

**THE IMPLICATIONS OF BREXIT FOR UK COMPETITION LAW:
PRACTICAL ISSUES AND PRIORITIES**

1. INTRODUCTION

- 1.1 The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.
- 1.2 The CLLS responds to a variety of consultations and topics of importance to its members through its 19 specialist committees. This response has been prepared by a working group comprised of the following members of the CLLS Competition Law Committee:
- (a) Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);
 - (b) Nicole Kar, Partner and National Practice Head, Linklaters LLP (Vice Chair of CLLS Competition Law Committee);
 - (c) Dr. Nigel Parr, Partner, Ashurst LLP (Chairman of Brexit Working Party of CLLS Competition Committee)
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 - (h) Alex Potter, Partner, Freshfields Bruckhaus Deringer LLP;
 - (i) Samantha Mobley; Partner, Baker McKenzie;and
 - (j) Simon Holmes, Partner, King & Wood Mallesons;
- 1.3 This paper has been prepared by the Brexit Working Party of CLLS Competition Law Committee. It aims to consider the implications of Brexit for competition law and policy in the UK and to identify priorities for action. The proposals in this paper are driven by four overarching objectives:
- (a) The importance of having an effective competition law regime in the UK;
 - (b) The need to protect the interests of UK consumers;
 - (c) The importance of minimising the burden on UK businesses and maximising legal certainty for businesses operating in both the UK and EU; and
 - (d) The desire to maximise the benefits for the UK as a whole and create a climate of legal certainty that will encourage investment and growth in the UK economy.
- 1.4 We have assumed, for the purposes of preparing this paper, that Brexit will involve leaving the EU and the EEA, (the single market and the jurisdiction of the European courts) and involve the CMA ceasing to be a member the European Competition Network. Whilst we note that the current expectation is that the UK will end up with a *sui generis* relationship with the EU, for the time being a "clean break" is the only knowable reference

point, as there are too many unknowns and variables in relation to the future relationship between the EU and the UK.

- 1.5 In this paper "Brexit" has been used in the sense of the point of time at which the UK actually ceases to be a member of the EU and not any earlier point or period in the leaving process.
- 1.6 We have considered the core areas of the competition regime, being merger control, the public enforcement of antitrust law, and private litigation. We have sought to identify four sets of priorities for each core area:
 - (a) issues which go to the terms on which the UK will leave the EU, and which should be taken into account in connection with the Article 50 Treaty for the Functioning of the European Union ("**TFEU**") negotiations, including transitional arrangements;
 - (b) issues which concern the post-Brexit interaction between the EU and UK regimes, which would need to be considered in the negotiations about the future relationship;
 - (c) issues which are for the UK to decide unilaterally, as regards matters of UK law and which do not play into the negotiations with the EU; and
 - (d) issues in relation to the Great Repeal Bill proposal. As the UK already has a fully effective standalone competition regime, we consider that it would be unnecessary – and indeed potentially unhelpful – to re-enact some parts of EU competition legislation into UK law.
- 1.7 We have also briefly considered the UK market investigations regime, which we consider to be far less affected by Brexit. We have not discussed State aid, which would appear to be a matter for the Government's industrial strategy policymakers. We have also not discussed public procurement law, although we recognise the merits of such a regime in ensuring fair and transparent procedures for the award of public contracts.
- 1.8 It is worth noting that, unlike many areas of law in which EU law (or EU derived law) is the only or major body of substantive law on a particular subject (e.g. product liability), in competition law the EU exercises a supranational jurisdiction in relation to trade by businesses between Member States and the conduct of Member States themselves. National laws, such as those of the UK, sit alongside the EU jurisdiction and, in various ways, the use of national laws is restricted by EU law, particularly so as to ensure that larger cases with impacts on trade between Member States are dealt with at EU level, a process which reduces the burden on businesses, which otherwise are faced with a multiplicity of proceedings. The substantive provisions of EU competition law are to be found in the TFEU at Title VII, Chapter 1, Article 101 et seq. These provisions have been included in all forms of the EU treaties to which the UK has been party, including the Treaty of Rome applicable in 1972 when the UK joined the "common market".
- 1.9 When the UK ceases to be a member of the EU, this supranational layer will no longer form a part of UK law and there will be no need to replicate it to ensure that the UK has a complete competition law code. It will, however, be necessary to clarify the approach to matters which occurred when the UK was part of the EU (when EU law was applicable) and to pending cases. In this respect, both the UK and the EU may agree or may enact transitional provisions with a view to providing clarity on jurisdiction and on the way parties that infringed EU competition law while it was part of the law applicable in the UK should be dealt with. Our suggestions are made with this in mind.

2. **MERGER CONTROL**

- 2.1 Merger control serves to prevent market power from being created through mergers and acquisitions. The current parallel EU/UK merger system is described as a "one stop shop" whereby larger transactions will fall for review under the EU regime, and smaller transactions would typically fall for review under the UK regime – but the UK regime will not apply where EU jurisdiction is triggered. Brexit will remove the "one stop shop" from merger control such that mergers and acquisitions of UK businesses will potentially face notification and clearance requirements at both EU and UK level (instead of *either* EU *or* UK investigations). The removal of the UK from the EU "one stop shop" would mean two sets of filings, two sets of information-gathering processes and, potentially, two different outcomes which have the potential to increase administrative and cost burdens on UK business and to reduce legal certainty. The EU Merger Regulation ("**EUMR**") will continue to apply to UK businesses where EU27/EEA turnover thresholds are met by UK businesses. In this connection, we would expect that the number of mergers reviewed by the CMA would increase materially (potentially by around 50%).
- 2.2 Whilst the UK's voluntary filing regime will mean that a number of mergers notified to the European Commission (such as simplified procedure cases) will not be reviewed by the CMA under the UK voluntary regime, where overlaps or other substantive issues arise (even where the transaction is not obviously a Phase 2 candidate) and an EUMR filing is being made, the commercial desire to ensure certainty of outcome and timing will nevertheless encourage the parties to make a UK filing.
- 2.3 Parallel investigations as between the European Commission under the EUMR and national merger reviews, eg, by the US DOT/FTC and MOFCOM in China currently exist and are not uncommon. However, we would expect that there would be more parallel UK/EUMR reviews as UK markets and businesses are much more closely integrated with EU markets/businesses than they are with the US or other third countries.

Priorities as regards the Article 50 terms on which the UK will exit the EU

- 2.4 We have given thought to the following key issues:
- (a) Transitional provisions will be required as regards the "cut off point" for when the EUMR ceases to apply to the UK as a Member State. Should pre-Brexit rules apply to all transactions where the obligation to notify was triggered pre-Brexit, or only to a subset of these transactions, such as where notification to the European Commission has already been made pre-Brexit? We consider that the best balance between avoiding undue continuation of EU rules post-Brexit and avoiding excessive burden on business would be to opt for submission pre-Brexit of a case allocation request to the European Commission to be the cut off point for application of transitional provisions.
 - (b) For pending merger reviews, it would appear logical to ensure the continued application of EU law, including procedural rules, rights of defence and subsequent rights of appeal etc, until the case is fully concluded.
 - (c) For EUMR cases which have been decided on the basis of remedies, how will enforcement provisions and appeal mechanisms work? We are of the view that the most sensible approach here would be to preserve the applicability of EU law, and the jurisdiction of the European Commission, for the duration of any obligations contained in such remedies, particularly where the application of the remedies/commitments extends to other Member States. This would be consistent with our suggested approach in relation to commitments accepted in connection with Article 101 and 102 cases.
- 2.5 We develop several of these considerations further below.

Relevant cut-off point

- 2.6 In the run up to Brexit, there will be numerous transactions in contemplation which will face considerable uncertainty if the jurisdictional position between the UK and EU is uncertain at the point of Brexit. In this context, objective criteria should be applied to afford legal certainty to merging parties on where jurisdiction for scrutiny will ultimately lie for transactions that have been entered into pre-Brexit and which trigger the EUMR, but whose merger review has not been concluded by the time of Brexit:
- (a) Our starting point is that transactions properly notified pre-Brexit under the EUMR should remain subject to EUMR review by the Commission, even if the conclusion of the Commission's review (which could be Phase 1 or Phase 2) falls after Brexit. EU law applies in full pre-Brexit, and EU law will continue to apply to transactions which qualified under the EUMR thresholds prior to Brexit (regardless of the fact that those criteria may not have been satisfied if calculated on an EU27, not EU28 basis). Given the considerable amount of work required of merging parties, and the administrative resources expended on preparing and reviewing a Form CO, it would be unduly burdensome and cause significant delays to require parties to re-notify the UK aspects of a transaction under a different regime.
 - (b) There is then the category of transactions which have been entered into pre-Brexit but have not yet been notified. There are a number of possible transaction or regulatory milestones that could be taken as the indicator of when the EUMR would cease to apply and when the Enterprise Act would replace it. These include deal signing/announcement; submission of a case allocation request, submission of a first draft Form CO to the European Commission and commencement of the pre-notification period or the date of formal filing.
 - (c) The obligation in the EUMR is that a transaction must be notified prior to its implementation, following conclusion of the relevant agreement or announcement of a public bid. In principle, the EUMR could continue to apply to any transaction that, prior to Brexit, had reached the point at which a notification would be accepted under the EUMR. This would have the benefit of simplicity, albeit EUMR notifications can be accepted as soon as there is a "good faith intention to proceed", and this approach could result in a relatively long tail of transactions continuing to be notified to the European Commission post-Brexit.
 - (d) Conversely, requiring the formal filing to have been made prior to Brexit as the only exception to full application of the Enterprise Act after Brexit would likely lead to significant duplication and impose unnecessary costs on some merging parties. The EUMR pre-notification period can be lengthy and burdensome, involving substantive submissions in relation to potentially affected markets and possible competition concerns. To subject merging parties to a new filing requirement, and potentially differing views from the CMA as to the information required, would seem unnecessarily duplicative and costly.
 - (e) On balance, we consider that a sensible approach would be for the European Commission to retain jurisdiction and responsibility for cases which qualify for notification and where the pre-notification process has already commenced. The cut-off point should therefore take into account the pre-notification period rather than rely on the date on which a formal filing is made. In light of the formal nature of the step, we consider that the best approach would be for the European Commission to have responsibility to review a transaction in circumstances where, *before* the Brexit date, a case team allocation request has been submitted to

¹ Whilst it is not a common occurrence, it would seem also sensible to adopt this rule for any EUMR notifications which are rejected by the Commission as incomplete, following an initial notification made prior to Brexit.

DGCOMP by the notifying parties and the European Commission has appointed a case team.²

Preservation of rights of appeal and enforcement

- 2.7 To ensure legal certainty and objectivity, for all transactions to which the EUMR continues to apply post-Brexit, related EU laws relating to rights of defence, enforcement and appeals should continue to apply.
- 2.8 This could be implemented by preserving the applicability of the various Treaty provisions and other EU legislation as regards transactions to which the transitional provisions apply. Key aspects of these rules would include:
- (a) Judicial review and appeal mechanisms in respect of the transaction, including:
 - (i) judicial review of any European Commission decisions by the notifying parties or third parties to the EU's General Court, including in relation to any penalty payments and fines imposed;
 - (ii) appeals from the General Court to the Court of Justice on points of law;
 - (b) Compliance with any commitments accepted by the European Commission, and the related powers of the European Commission to enforce compliance and impose sanctions for breach, particularly where the application of the commitments extends to other Member States, including the following typical provisions:
 - (i) appointment of monitoring and divestiture trustees to oversee compliance with commitments under supervision of the European Commission, including any hold-separate obligations and ring-fencing arrangements;
 - (ii) non-solicitation of key personnel of any divestment businesses;
 - (iii) restrictions on direct or indirect re-acquisitions over the divestment businesses for a period of ten years.
 - (c) As regards remedies which have effect within the UK, we would suggest that the power to enforce, release or vary as regards the UK only should be transferred to the UK and that where cases are still pending, remedies applying in the UK should be separately expressed to ease this process. The CMA should have fully transferred powers or alternatively act as the Commission's agent, although the latter approach would effectively preserve Commission and CJEU authority within the UK, as well as the parties' rights of appeal to the CJEU in relation to UK remedies.

Case referrals and re-allocation of jurisdiction

- 2.9 Similarly, the ability to refer EUMR qualifying cases back to the CMA under Articles 9 or 4(4) of the EUMR referral procedures should be preserved as part of any transitional arrangements, including pre-notification and post-notification re-allocation of jurisdiction. However, we consider that it would be inconsistent with the principles underlying Brexit if the referral mechanisms under Articles 22 and 4(5) to refer cases from the CMA to the European Commission were preserved post-Brexit.

² Using the European Commission's appointment of a case team as the cut-off point would guard against any hypothetical risk of parties submit in case allocation requests months in advance in order to guarantee certainty of jurisdiction, albeit we consider that the risk of such "gaming" is minimal.

Priorities as regards the terms of the future relationship with the EU

- 2.10 Whilst establishing effective and efficient transitional provisions is important, it is essential to ensure that effective inter-agency cooperation between the European Commission and the CMA will be established post-Brexit, particularly because of the proliferation of merger regimes reviewing large cross-border mergers operating globally. Therefore, dedicated cooperation agreements should be entered into between the EU and the UK that would accommodate at least the exchange of information between the authorities. There are a number of EU competition cooperation agreements in place which could serve as a model, including with the United States³, Switzerland⁴, South Korea⁵, and Japan⁶.
- 2.11 However, given the close integration of the EU and UK economies up to the point of Brexit, and the clear benefit in minimising the increased burden of regulation on businesses, there is in our view a compelling case to go further and seek a greater degree of cooperation than the norm. This could include:
- (a) the coordination of any remedies between the authorities, particularly remedy design and implementation;
 - (b) the coordination of any enforcement action between the authorities; and
 - (c) other matters relating to information-gathering and substantive assessment (i.e. comparative discussions of agencies' investigative approaches, planning, analytical methods, economic models to avoid divergent outcomes, and alignment of timing).
- 2.12 In our view, it would therefore be preferable to explore whether the UK would be able to remain a member of the European Competition Network in order to benefit from existing levels of cooperation between national competition authorities in the EU and the European Commission.

Priorities as regards domestic law and policy

- 2.13 As noted, the termination of the "one stop shop" system post-Brexit will mean that mergers may qualify for separate reviews by the European Commission and the CMA. To ensure a consistent and cooperative regulatory approach is adopted by the agencies and to minimise regulatory red tape resulting from double filings, the following longer-term priorities and options should also be considered:
- (a) whether notification requirements should be revised so that the CMA benefit, where appropriate and following consultation with the parties, from the evidence and analysis collated in preparing Form CO; and
 - (b) whether the CMA timetables should be streamlined with EU investigation timelines to maximise coordination of outcomes (from pre-notification to remedies). Currently the UK review timeline is amongst the slowest in the EU. There is a real risk that this will force the CMA into positions where it has to make decisions once the European Commission has already done so. This could lead to more challenges for the CMA (as were experienced in relation to the Eurotunnel/SeaFrance merger) in seeking to coordinate reviews with other authorities – which will become a

³ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of their Competition Laws (23 September 1991).

⁴ Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (17 May 2013).

⁵ Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities (23 May 2009).

⁶ Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (10 July 2003).

critical part of their remit as an independent global authority on large transactions. We would therefore suggest that the UK should align Phase 1 and 2 merger control timelines with those under the EUMR by amending domestic legislation.

- 2.14 The CMA will also face significant pressure in costs and resources as a result of a heavier caseload post-Brexit. Provisions contained in the Enterprise Act 2002 and other agency practices relating to the following matters may warrant changes to minimise review of non-contentious mergers and to deal with lower impact mergers more swiftly:
- (a) raising the turnover thresholds for reviewability;
 - (b) reducing merger control fees if the volume of transactions reviewed increases materially;
 - (c) replacing the duty to refer to Phase 2 with a discretion to do so, which would enable the CMA to develop more effective "prioritisation" criteria in deciding which mergers merit a detailed Phase 2 review;
 - (d) increasing de minimis thresholds to extend availability of the discretion not to refer and formalising the consideration of the de minimis exception at an early stage in the substantive review to maximise procedural efficiency. Moreover, early consideration by the CMA of the de minimis exemption should take place in all cases and the CMA should issue updated guidance on this;
 - (e) selecting Phase 1 mergers to be reviewed through the mergers intelligence committee. It would also add welcome clarity to merging parties if they were able to have brief and informal discussions with the CMA about whether the CMA would be inclined to investigate a particular case. Otherwise, the knee-jerk reaction may well be to notify to the CMA as a matter of course whenever a filing was required under the EUMR, thereby greatly increasing the workload of the CMA. Whilst we note that that parties can already provide a briefing paper to the CMA, this should be reflected in updated written CMA guidance;
 - (f) creating the possibility for early termination of Phase 2, in particular by allowing parties to propose and agree remedies at an earlier stage, while also aligning the review period with the EUMR; and
 - (g) creating the possibility for other sector regulators in the UK to undertake detailed analysis of mergers in their regulated sectors, or to second officials to the CMA for this purpose, with the decisional power remaining with the CMA. The CMA should remain the sole UK agency with powers of decision over mergers, but secondment of sectoral regulator officials to the CMA would act as a means of providing more resources to the CMA in light of its anticipated greater workload.

3. MARKET INVESTIGATIONS

- 3.1 Market investigations (and market studies) are governed by UK law only. The CMA's legal powers to undertake market investigations are contained in the Enterprise Act 2002.⁷ These powers neither refer to nor are influenced by EU law, although in some investigations, remedies are designed to comply with relevant EU laws (for example, the Supply of New Cars (2000) remedies considered the relevant EU block exemption regime). In that context, Brexit would have no practical impact on the CMA's powers to undertake market investigations as these operate concurrently with the European Commission's powers to pursue antitrust sector inquiries (EU sector inquiries) under Article 17 of Regulation 1/2003. However, the CMA should consider amending its guidance to remove

⁷ As amended by the Enterprise and Regulatory Reform Act 2013.

the reference to not opening a market investigation where the European Commission is investing the sector.

4. **PUBLIC ENFORCEMENT OF COMPETITION/ANTITRUST LAW**

4.1 Competition enforcement generates consumer benefits, both directly (ending anti-competitive behaviour) and indirectly (protecting the unrestricted operation of market forces to ensure lower prices, higher quality products and services and greater innovation). This benefit clearly needs to be preserved not only to benefit UK consumers, to promote economic growth and to ensure a level playing field which encourages investment, but also because competition policy is a requirement of most Free Trade Agreements (FTAs) today.

4.2 Post-Brexit, Articles 101 and 102 TFEU will continue to apply to UK businesses where they are involved in anti-competitive conduct which has an effect on trade between EU27 Member States (exactly as any other third country business can be investigated and fined currently). Post-Brexit, businesses will face the possibility of parallel investigations by the EC (under Articles 101 and 102 TFEU) and the CMA (under Chapter I and II of the Competition Act 1998). EU competition law will apply to conduct taking place within the UK but which has effects in the EU27 (for example where a Europe-wide cartel is orchestrated from London), but will no longer investigate the impact of such a cartel in the UK. The CMA (or sectoral regulators) will no longer be prevented by Regulation 1/2003 from taking action to enforce UK competition law in relation the UK aspects of a Europe-wide cartel being investigated by the European Commission. This double jeopardy risk in terms of costs and administrative process, as well as penalty, will be considerable. While EU fines should be calculated excluding UK turnover in cases where the European Commission has ceased to have jurisdiction (see below), where anti-competitive conduct affects the EU and the UK, there is a risk that, as well as double costs, total penalties will exceed those which the EU would apply including UK turnover in its calculations. As with merger control, we have considered whether any of the issues we have identified as requiring action post-Brexit are more complex than those that currently arise in connection with parallel anti-trust reviews by third countries (eg EU/USA). As with merger control, we consider that it is likely that there will be many more parallel EU/UK investigations, as UK markets and businesses are much more closely integrated with EU markets/businesses than they are with the US or other third countries. Moreover, the system of anti-trust law and enforcement in the UK has been closely aligned to and integrated with EU enforcement for several decades, with very close cooperation between the UK Courts and the European Commission and the UK Courts and the EU Court of Justice. Unravelling such an integrated system will inevitably raise complex issues.

4.3 Costs and uncertainties would be further multiplied to the extent that UK competition law began to diverge further from EU law, which has become very much an international standard, applying not only throughout the EU, but in jurisdictions as diverse as Japan, China and Brazil. There is therefore a real benefit to both UK and international businesses in UK law remaining in line with EU competition law for some time, to facilitate international business strategies (for example in relation to sales, marketing and licensing) and to reduce legal uncertainty and compliance costs.

Priorities as regards the Article 50 terms on which the UK will exit the EU

4.4 Transitional provisions will be required to identify the cut off point for when the European Commission ceases to have exclusive jurisdiction under Article 11 Reg 1/2003/EC, and parallel proceedings in Brussels and UK become possible under Articles 101 and 102 TFEU without the CMA being subject to any of the restrictions on its freedom of action under Regulation 1/2003/EC. We suggest that this needs to be bright-line and easy to understand and also that it has regard to the need to avoid unnecessary duplication of effort where the European Commission is already well advanced in dealing with a case or the stage of appeals to the CJEU has been reached. For this purpose the term "**CJEU**"

includes both levels of the court, the General Court and the Court of Justice hearing final appeals on points of law.

- 4.5 We put forward below two proposals, the first of which aims at as rapid a disentanglement as is practicable and efficient for the European Commission and the CMA. The second looks at the legal jurisdictional position in respect of conduct occurring while the UK is part of the EU. We also discuss procedural considerations where the European Commission and the CJEU retain jurisdiction, and the need to preserve the full rights of defence of UK parties subject to that jurisdiction.

Jurisdictional demarcation – primary proposal

- 4.6 We suggest that a suitable compromise to propose to the EU would be that the European Commission should retain jurisdiction in relation to conduct affecting trade between the UK and EU Member States where it has already formally commenced proceedings before the date of Brexit and the CMA should not be able to take any action in relation to that conduct against the businesses concerned, unless the European Commission terminates its proceedings without taking a decision or arriving at a settlement. By "commencement of proceedings" we mean service of a Statement of Objections. In all other cases, the European Commission should not assert its jurisdiction in relation to conduct affecting trade between the UK and any of the EU27 Member States, but take proceedings only in relation to conduct affecting trade between the continuing 27 States and should exclude turnover of the parties in the UK when setting penalties. Whilst we note that adopting a cut-off point at the service of a Statement of Objections might not eliminate the entire risk of duplication of review of antitrust cases by the CMA and European Commission, we think that this cut-off would strike the right balance.
- 4.7 If after Brexit the European Commission were to call in a case already under investigation by one or more national authorities, which it may do under Regulation 1/2003, it would follow that the call-in would not apply to any investigation by the CMA relating to that conduct. Where the European Commission has obtained information in investigatory processes prior to Brexit, it should, so far as consistent with the rights of the parties, provide that information to the CMA, but it should not have any rights in the UK in relation to cases where it cannot assert jurisdiction in accordance with the above scheme.
- 4.8 This will not in any way prevent the European Commission taking proceedings in relation to conduct affecting trade between continuing Member States, but it would only treat the UK as a Member State for that purpose if it had already commenced proceedings before Brexit. This would be consistent with efficient prosecution of cases to which considerable resources had already been committed, while minimising the extent to which the European Commission and CJEU would exercise jurisdiction after Brexit over competition cases affecting the UK market.

Jurisdictional demarcation - alternative proposal

- 4.9 The alternative would be to agree that the European Commission would retain its full concurrent jurisdiction over all conduct affecting trade between Member States including the UK which occurred before Brexit, but would lose its rights to impose penalties in respect of any period in which conduct continued after Brexit: that right and the right to make factual findings in relation to such post Brexit conduct would lie with the CMA. While this would reflect the status of the UK before Brexit and potentially minimise the cost and impact for affected businesses, it would result in a lengthy period before the CMA would be able to exercise its jurisdiction as regards most international cartels and other anti-competitive conduct without the consent of the European Commission in accordance with Regulation 1/2003, given that many investigations relate to past conduct.

Procedural considerations and protections

- 4.10 In relation to cases where the EU retained jurisdiction (whichever of the above bases were chosen), it would be important that businesses under investigation should have the same procedural rights as while the UK were a member of the EU, as regards representation, legal professional privilege and, ideally, composition of the CJEU (so that UK judges would remain members of the EU courts during the transitional period) when hearing such cases. For all purposes in relation to these continuing cases, the UK and its courts and competition authority as well as its citizens, businesses and professionals should be treated on the basis that the UK remains a Member of the EU. This is the only way to ensure that affected parties can enjoy their full acquired rights in relation to the exercise of jurisdiction by the European Commission and CJEU.
- 4.11 It is appreciated that third country businesses etc (e.g. from the USA) accused of EU competition law infringements, while they have rights of defence before the EU institutions, do not have the right to be represented by lawyers from their jurisdiction and do not benefit from legal professional privilege in relation to advice from such lawyers. However, UK businesses subject to such proceedings in relation to conduct prior to Brexit should be entitled to the full rights of EU citizens and businesses for however long after Brexit those proceedings continue. Thus in the Article 50 agreement, the EU should accept that the UK, the CMA and CAT, UK courts, professionals, businesses and citizens should be entitled to the same treatment as if the UK were a Member of the EU when the EU institutions are exercising their retained jurisdiction. This would include the conduct of EU proceedings and hearing references from UK courts if necessary.
- 4.12 Where decisions have already been taken and appeals are pending or the period for appeal is running at the date of Brexit, the same procedural considerations apply.

Enforcement within the UK

- 4.13 It would be consistent with either proposal on jurisdiction that we put forward above that, where a case has already been concluded by Article 9 commitments or the European Commission has imposed non-monetary obligations or taken into account undertakings as to future conduct in a final decision, these should continue to apply and to be enforceable in the UK Courts. It would be sensible to propose to the EU that enforcement (and also review of remedies in so far as they affect the UK market only) should be transferred to the CMA, or that the CMA should act as the European Commission's agent before the UK courts; note that the agency route would effectively preserve the jurisdiction of the Commission and the CJEU as well as the parties' rights of appeal to the CJEU after the UK has left the EU. It would also be necessary to allow the European Commission to retain UK investigative powers within the UK on cases where it retains jurisdiction, working with the CMA as presently. The European Commission should also be accorded standing before the UK courts in relation to the cases over which it retains jurisdiction after Brexit, wherever the precise line is drawn.

Other UK transitional arrangements

- 4.14 In addition to enforcement, some of the matters discussed below in relation to changes to UK law will need to be agreed with the EU as part of the Article 50 agreement, so as to support the smooth operation of the agreement on jurisdiction.

Priorities as regards the terms of the future relationship with the EU

Co-operation arrangements

- 4.15 It is clear from the preceding discussion that, wherever the demarcation line is drawn on jurisdiction, co-operation between the European Commission and the CMA will be important as regards the flow of information and remedies. This will also continue to be of importance for new cases relating to conduct post Brexit. There are precedents for the European Commission to agree bilateral accords with third country regulators. We

consider that the CMA and the European Commission should be encouraged to negotiate such an agreement separately from Article 50 or any new free trade agreement (FTA). Any extension of a UK/EU co-operation agreement to national authorities within the EU should be on an opt-in basis to avoid delays in implementation. We note in this connection the 1991 agreement between the Government of the USA and the European Commission regarding the application of their competition laws.⁸ The European Commission was replaced by the Council as the EU party in 1995 as a result of the ECJ's judgment of 9th August 1994. Competition policy is a matter within the sole competence of the EU under Article TFEU, with the result that unanimity of all the Member States should not be required to bring into effect an agreement of this nature with the EU.⁹ The EU/USA Agreements which provide for both traditional comity (respect for each other's interests including in wider economic policies) and positive comity (assistance in effective enforcement) as well as best practice methodology, would be a valuable precedent on which to build.

Leniency priorities

- 4.16 One of the most difficult matters for a business which discovers breaches of competition law affecting more than one jurisdiction within and/or outside the EU is the co-ordination of leniency applications. The position within the EU remains unsatisfactory, with a grant of leniency by the European Commission being potentially ineffective if a national authority, to whom no leniency application was made, subsequently commences proceedings under EU and/or national competition law in relation to the same conduct. The European Commission has been seeking to address this situation, but the UK would be excluded from any solution reached.
- 4.17 We suggest that the CMA and the European Commission should be encouraged to reach agreement that would enable a single leniency application to be used for both authorities when conduct involving the UK and EU markets is involved, with priority fixed by the time of submission of a leniency application to either authority. However, this may be affected by the arrangements made by the European Commission on this subject with continuing Member States and the arrangement should be consistent with that. Again, we think that the EU should have competence to agree this with the UK as a stand-alone arrangement without ratification by the Member States. To the extent that the EU may agree similar arrangements with the Member States, it would seem possible that a notification to a national authority within the EU would stand as an EU notification to which such an agreement could apply.

Priorities as regards domestic law and policy

Continued application of EU law

- 4.18 It would be desirable to clarify that in so far as EU competition law can continue to be applied within the UK, i.e. in relation to conduct which took place while the UK was part of the EU, EU law may be applied within the UK and parties shall have the rights granted thereby. This does not require actual replication of the relevant EU laws into English law, merely a direction that the UK authorities and courts should apply them where appropriate.

Limitation of jurisdiction of EU institutions

- 4.19 The jurisdiction of the European Commission and CJEU is reflected in the terms of the Competition Act 1998 (as amended) and in aspects of the Enterprise Act 2002 (as amended). These provisions will be needed insofar as the EU institutions retain

⁸ See OJ L95 of 27.4.1995 and OJ L131/38 of 15.6.1995, Council Decision 95/145/EC and France v Commission Case C -327/91 ECJ [1994] 1-03641.

⁹ See TFEU Article 3(1)(b) and Article 3(2).

jurisdiction during the transitional period (see paragraph 4.4 and following above) but the duration and scope of these provisions will need to be amended to reflect the position on jurisdiction recorded in the Article 50 agreement. In addition, any adoption of relevant EU law will require similar limitations, although we suggest that it will be sufficient to confirm the continued application of relevant EU legal provisions in cases where the European Commission retains jurisdiction, such as Regulation 1/2003/EC and the implementing regulation 773/2004/EC forming part of applicable law in the UK prior to Brexit and of decisions taken by EU institutions. Assisting provisions in UK law (CA 1998 Part II section 61 et seq) will need to be limited to cases where the EU continues to have jurisdiction.

- 4.20 The shape of UK law itself where it has drawn on EU law (e.g. parallel exemptions under the Chapter I Prohibition) will need to be addressed. We discuss some of these issues below.

Obligations to follow EU law

- 4.21 Section 60 CA 1998 requires interpretation of UK competition law as stated in CA 1998 to be interpreted as far as possible consistently with EU law and decisions of the EU Courts and requires UK courts and authorities to have regard also to any relevant decision or statement of the European Commission. No doubt the Great Repeal Bill will lay down some general principles with regard to the interpretation of UK law derived from EU law, but these may not apply to pre-existing UK primary legislation, such as CA 1998, even though it may be influenced by or reflect aspects of EU law.
- 4.22 We suggest that it would be desirable that interpretation of UK competition law should continue to have regard to EU law, given that the principles in the Chapter I and Chapter 2 prohibition are aligned in language with EU law and that EU law and decisions are used as guidance in many jurisdictions around the world that have adopted a similar approach to competition law. We assume that the Government will wish to allow for the possibility of greater divergence in interpretation over time. We therefore suggest that, when the language in the Great Repeal Bill is settled, the Government may wish to consider a revision to section 60 to apply to cases in which the UK is applying domestic competition law post Brexit, reducing it to a provision that allows the CMA, CAT and courts to take account of (but not be bound by) EU law and decisions.
- 4.23 On the other hand it will be necessary to preserve the application of Article 60 to the extent that the CMA or UK Courts are continuing to apply Article 101/102 in relation to pre-Brexit conduct (including claims for damages (whether follow-on from European Commission decisions or stand-alone) or other relief) and to UK law applied in parallel or alternative in relation to such conduct.

Parallel exemptions

- 4.24 The UK has taken a short cut in the exercise of its powers to exempt certain agreements from UK competition law prohibitions by the use of "parallel exemptions" which effectively apply European Commission block exemption regulations within the UK even to agreements that do not affect trade between Member States, (e.g. to an agreement that only affects trade within the United Kingdom) (section 10 CA 1998). Parallel exemptions cover the important areas of common commercial agreements – for example, vertical agreements (e.g. distribution and franchise agreements), technology transfer agreements (e.g. patent and know-how licences) and horizontal agreements (e.g. co-operation in research and development). These important parallel exemptions, like others granted individually by the UK authorities under section 11 CA 1998, are relied on by businesses for legal certainty when deciding on the terms of major commercial agreements. Many thousands of agreements have been drawn up over the years to reflect the terms of these exemptions.

- 4.25 Each block exemption regulation has a limited life. We suggest that the legitimate expectation of businesses when entering into their commercial arrangements should be respected, most efficiently by limiting the effect of section 10 CA 1998 to preserving each of the parallel exemptions in force at the date of Brexit for the life of the relevant EU block exemption regulation. When the last of these EU block exemption regulations expires, section 10 would be repealed.
- 4.26 In addition the CMA should be tasked with holding a timely consultation as each of these block exemption regulations come up to expiry (this could conveniently be in parallel with the European Commission's own consultation on replacement) with a view to providing a new exemption under s 11 CA 1998 in respect of each category of agreement, if considered appropriate.
- 4.27 This would ensure that exemption policy passed to the UK authorities, without the need to duplicate effort to create new exemptions under s 11 CA 1998 immediately or to re-enact the block exemption regulations themselves into UK law (they will continue to apply to agreements having effect within the continuing EU without UK enactment), while fully preserving the position of British business, which would reasonably have expected to benefit from these parallel exemptions in the terms of the relevant European Commission regulations for the duration of the application of those regulations.

Leniency

- 4.28 Depending on the jurisdictional settlement (see paragraphs 4.4 and following above), it may be necessary to give effect in the UK to leniency applications made to the EU. If the EU jurisdiction is limited to cases that have reached Statements of Objection, then there will be cases where there is an EU investigation and an EU leniency application that has been accepted, but there will now be the prospect of a UK investigation in parallel with that of the European Commission. In those cases, we consider that the UK authorities should be obliged to accept the leniency status accorded by the European Commission, without the need for a new application. This again would respect the legitimate expectations of the leniency applicants, who could not have known at the time of the application that a separate application to the UK authorities was essential, rather than optional.
- 4.29 Where a leniency application was also made in the UK, but the European Commission took up the investigation, we consider that it is still more appropriate to take the European Commission's decision about the order of applications made, rather than reverting to examination of the UK process and potentially deciding on a different order. This makes sense as not all applicants accorded leniency by the European Commission may have made a parallel application to the UK authorities and it again seems unfair to penalise those who may have only dealt with the European Commission. This will require at least the publication of rules by the CMA, but may also need to be agreed with the EU. Such an agreement may make it easier for the EU to agree to a quicker restriction of its jurisdiction under the Article 50 exit arrangements.

Priorities as regards the Great Repeal Bill

- 4.30 We do not consider it is necessary to re-enact Articles 101 and 102 TFEU into English law, so long as they continue to be recognised as having been applicable within the UK as if part of domestic law in the period from 1972 to the date of Brexit. As regards conduct post-Brexit, only UK competition law, which has principles based on EU competition law, will apply in the UK.
- 4.31 Council Regulation 1/2003/EC and the implementing regulation (Commission Reg 773/2004/EC) should fall within the body of law that does not require re-enactment into UK law: it is sufficient to provide that these regulations will apply in cases where the EU retains jurisdiction under the jurisdictional demarcation agreement.

5. PRIVATE LITIGATION OF COMPETITION LAW

5.1 Currently consumers and businesses can bring actions for damages, declarations and injunctions in the UK courts and the Competition Appeal Tribunal, in relation to infringements of UK or EU law, either on a standalone basis or following on from an infringement decision by one of the public enforcement bodies. In addition to the general right of action under the tort of breach of statutory duty for infringements of EU law, various statutory rights of action have been created under the CA 1998. These rights of action are important for UK consumers and businesses. Moreover, the risk of damages awards, in particular, contributes significantly to the wider deterrent effect of competition law, which in turn promotes compliance and protects the free play of market forces which drive competition for the benefit of consumers and the economy more generally.

5.2 The UK has for several years been at the forefront of promoting private enforcement of competition law, with acknowledged expertise in its judiciary, courts and legal profession, as well as strengths in other areas such as specialist competition economics. The leading position of UK institutions and businesses was acknowledged in the consultation earlier this year on the UK's implementation of Directive 2014/104/EU on actions for damages for competition law infringements (the "**Damages Directive**"):

*"The UK already has a well-developed mechanism for allowing claims for breaches of both European and domestic competition law. During the negotiation of the Damages Directive, the UK successfully ensured that it was based closely on the UK model. As such, many of the requirements of the Directive are already part of UK law and implementation will require relatively small changes to the substantive law. For example, the implementation of private actions for damages in competition law which came into force on 1 October 2015 (as part of the Consumer Rights Act) saw further enhancements to the rules for seeking damages for breaches of competition law."*¹⁰

5.3 The UK's well-established regime permits innovative funding mechanisms for litigation, enabling UK consumers and businesses to exercise their EU competition law rights effectively. The regime's favourable procedural rules, in particular, as to standing to sue and disclosure, have further enhanced the UK's position as a venue for EU competition actions involving UK claimants and defendants. The strength of the UK courts as a forum for collective damages actions for victims of competition law infringements has been steadily growing. This is a real success story enabling UK consumers and businesses, as well as claimants based in other Member States, to bring and defend EU competition actions in an efficient and effective jurisdiction.

5.4 In this context, our view is that it is very much in the interests of UK consumers and UK businesses that the current EU-wide regime for private enforcement should be preserved to the greatest extent possible. In particular, the UK should seek to maintain its role as the leading venue in Europe for actions involving EU competition law claims, enabling UK consumers and businesses to litigate competition actions arising in both the UK and the EU 27 in a familiar and effective jurisdiction, as well as contributing to the attraction of London as a leading centre for dispute resolution.

Priorities as regards the Article 50 terms on which the UK will exit the EU

5.5 For the UK to remain an attractive venue for competition litigation, it is essential that the UK should retain its position within the European regime of jurisdictional rules.

¹⁰ Consultation on implementing the EU Directive damages for breaches of competition law, Department for Business, Innovation & Skills, January 2016, paragraph 1.4.

- 5.6 In brief, the European regime comprises a series of legal instruments to determine the jurisdiction of courts in signatory countries to hear claims and to enable enforcement of judgments. The instruments relevant to competition litigation are as follows:
- (a) **Recast Brussels Regulation:** Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
 - (b) **2001 Brussels Regulation:** Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
 - (c) **Brussels Convention:** Convention on civil jurisdiction and the enforcement of judgments, signed at Brussels in 1968 by the members of the European Economic Community.
 - (d) **2007 Lugano Convention:** Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 30 October 2007.
 - (e) **1988 Lugano Convention:** Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988.
 - (f) **Rome II:** Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.
- 5.7 At present, the UK is bound by the instruments (and other EU Member States recognise the UK as so bound) by virtue of the UK's membership of the EU¹¹. Accordingly, the UK's continued participation post-Brexit will require agreement between the UK and the EU, and should therefore be addressed in the Article 50 TFEU negotiations. If no agreement is reached between the UK and the EU regarding post-Brexit relations, the UK would be unable unilaterally to replicate the European regime. In particular, whilst the UK could enact domestic legislation analogous to the Recast Brussels Regulation, this could only provide for UK compliance – it would be a matter of each individual EU Member State's domestic legislation as to whether, for example, it would stay proceedings commenced while an English court determined its jurisdiction, leading to the obvious risk that businesses will face parallel proceedings in the UK and the EU.
- 5.8 The European regime of jurisdictional rules benefits both claimants and defendants. Claimants are able to bring actions in a single court against multiple defendants from a number of EU Member States; defendants are protected against multiple proceedings in different countries. Both claimants and defendants can take advantage of the ease of enforcement of judgments in the jurisdictions of other signatories.
- 5.9 If the UK were outside the European regime of jurisdictional rules, it is difficult to see how it could retain its position as a venue for actions based wholly or partly on infringements of EU competition law. Claimants bringing an action in the UK would inevitably also need to bring a parallel action in an EU Member State, which is unlikely to be attractive; defendants would face the prospect of multiple proceedings. At best, the UK court would be likely to be confined to hearing only UK-specific aspects of a case, resulting in substantial diminution of activity in the UK courts and the status of the UK as a jurisdiction. In any event, parallel actions would clearly be inefficient for claimant and defendant alike.
- 5.10 Continuing adherence to the European regime of jurisdictional rules would have the implication that, in technical matters of jurisdiction and enforcement, the courts in the UK would remain subject to rulings on such matters by the CJEU. It is not realistic to expect other EU Member States to agree to the UK applying the regime in a manner inconsistent

¹¹ The instruments are largely given effect in the UK by the Civil Jurisdiction and Judgments Act 1982.

with such rulings. However, we consider that the advantages of UK participation in the regime should take precedence over concerns at continuing CJEU involvement in this technical area.

Priorities as regards the terms of the future relationship with the EU

- 5.11 On the basis that the UK remains within the European regime of jurisdictional rules, our future relationship with the EU with regard to private enforcement would be much simplified.
- 5.12 First, with respect to actions based on a European Commission infringement decision and/or an alleged infringement of EU competition law that occurred prior to Brexit, such actions could continue to be initiated and pursued in the same way as at present.
- 5.13 Secondly, with respect to actions based on a European Commission infringement decision after Brexit and/or an alleged infringement of EU competition law that occurred in whole or in part after Brexit, it would not in principle require any additional agreement with the EU for the UK to permit such actions. As at present, UK businesses and consumers who have suffered loss post-Brexit from an infringement, such as a cartel, could as a matter of UK law retain the ability to sue for damages in the UK. Application of the European regime of jurisdictional rules would ensure that the UK courts would be on a level playing field with courts in other EU Member States in attracting claimants. Judgments of the UK courts would continue to be enforceable against businesses in the EU.

Priorities as regards domestic law and policy

- 5.14 Given the UK's historic role in the vanguard of promoting private enforcement, and the clear advantages to it of retaining that position, we do not envisage that Brexit requires or should lead to any change in the UK's policy in this area.
- 5.15 There will, however, be a need to preserve certain elements of the current regime to ensure that UK courts are able to continue to be a leading jurisdiction for competition litigation. In this context, we are encouraged by the Government's decision to proceed with implementation of the Damages Directive and we would wish to see it continue in full operation post-Brexit. In particular:
 - (a) **European Commission decisions under Article 101 and 102 TFEU:** these are currently binding on UK courts under section 58A CA 1998. This clearly remains appropriate for pre-Brexit decisions. For post-Brexit decisions (which presumably will not deal with conduct in the UK, although in many cases will involve UK businesses), we can foresee objections to an extra-UK administrative decision being given legal force in a UK court. In addition, it would be likely to result in continuation of the current practice of UK courts staying cases where there is an ongoing European Commission investigation in order to avoid inconsistency with any ultimate European Commission decision. However, we view this preservation of a special status for European Commission decisions as a necessary pre-condition to preserve the UK as a venue for EU competition law actions.
 - (b) **EU Member State decisions under Article 101 and 102 TFEU:** similar considerations arise for these decisions, which will be given legal force in the UK through implementation of the Damages Directive. These may perhaps be viewed as less authoritative than European Commission decisions, but the UK would be at a disadvantage (and Member States may be more likely to object to the UK participating in the European regime of jurisdictional rules) if national competition authority decisions were excluded. In practice, given that Member State decisions will deal with competitive effects in that Member State only, it is unlikely that many cases where such decisions were relevant would reach the UK courts in any event.

(c) **Leniency and immunity:** we view it as important to preserve in UK law the provisions of the Damages Directive relating to the civil liability of immunity recipients in cartel cases and disclosure of material related to European Commission and other investigations (settlement submissions, cartel leniency statements, investigation materials and competition authority's file).

5.16 Post-Brexit the UK would, of course, be free to move away from the Damages Directive policies, although there does not appear to be any compelling reason to do so at present. Should the Damages Directive be amended at some point post-Brexit, the UK would need to determine the extent to which UK law should reflect such amendments.

Priorities as regards the Great Repeal Bill

5.17 As a matter of statutory underpinning for competition claims, rights grounded in the tort of breach of statutory duty will fall away once Articles 101 and 102 are no longer part of UK law as a result of the repeal of ECA 1972, although statutory rights derived from CA 1998 would remain. We would recommend that the Great Repeal Bill should expressly preserve statutory rights of action in relation to EU infringements post-Brexit (specifically, sections 47A and 47B CA 1998).

6. HARD BREXIT SCENARIO - THE CLIFF-EDGE

6.1 In the event of a "hard Brexit" without any agreement or transitional provisions, there would be the potential for considerable confusion, both in relation to pending cases and as to co-operation on future cases.

6.2 As regards pending mergers, the European Commission would probably be restricted in its final decision to considering the effect of the merger in the "continuing EU", and the UK's separate jurisdiction would revive immediately. The timetable currently outlined to Parliament suggests that it would be known some months in advance of the leaving date if a hard "cliff-edge" Brexit was a high risk. In these circumstances it might still be possible for the CMA and the European Commission to agree a sensible reference back process to apply for some months in advance of Brexit, so that the UK element of any case in which the CMA considers that UK remedies are likely, is referred back and the parties are not faced with uncertainty on their timetables. In all other pending cases, the UK should assist parties by making it clear that it will not start a separate UK investigation. If no agreement at all is possible, we would suggest that the UK should take a self-denying ordinance and only assert jurisdiction in a case that is already so advanced that remedies relating to the UK are under discussion or if it is a case where the UK has, or would have, sought a reference back.

6.3 With regard to current anti-trust investigations, the position is different. The Commission will be investigating historic facts and would appear under UK and EU law to retain jurisdiction over conduct which occurred in the UK when the UK was an EU Member State. The CMA will have concurrent jurisdiction as regards both EU and UK law. We recommend that the UK should accept the continued jurisdiction of the European Commission in pending cases and continue to afford the European Commission assistance in relation to investigation and enforcement. Any transitional provisions in UK law should be framed accordingly. The UK cannot stop these proceedings and it would be unreasonable to impose double jeopardy in well advanced cases. As regards new cases relating to pre-Brexit conduct, we would recommend exploring whether any separate agreement with the EU is possible to enable transfer of enforcement as regards conduct in the UK and on co-operation (see 4.15 above). There will be nothing to prevent the CMA applying national or EU competition law after Brexit, even if the European Commission is investigating historic breaches of Article 101/102, but the CMA would need to consider whether its enforcement was a good use of administrative resources. If the UK starts an investigation under UK and EU law post Brexit, then it cannot prevent the European Commission from

starting parallel proceedings on the EU aspects, but co-operation would be sensible to avoid duplication.

- 6.4 There will then be an increasing number of cases that will cover periods in whole or in part after Brexit. In those circumstances the CMA cannot apply EU competition law to that conduct at all, only national law. Equally the European Commission cannot apply EU Competition Law to conduct in the UK, unless it has effects within the EU (on the basis of the relevant extraterritoriality principles) and affects trade between continuing EU States.
- 6.5 The observations above indicate that after a hard Brexit there will still be great value in a co-operation agreement on competition law enforcement between the EU and the UK. The concept of traditional comity, as found in the EU/USA Co-operation Agreement would be invaluable if the UK introduces an industrial policy with non-competition controls over mergers. (See 4.15 above). It would also increase the prospects of the UK being able to obtain information in order to apply EU law alongside national law in historic cases if so desired.
- 6.6 The UK will remain part of the International Competition Network, but will find it useful also to develop multi-lateral and bilateral arrangements with the EU Member States and with third countries. The negotiation of Free Trade Agreements may provide an opportunity to include provisions in these agreements (e.g. the EU competition co-operation arrangements on competition with many countries are wholly or partly in Free Trade Agreements or other forms of wider co-operation agreement). Alternatively, separate arrangements may be negotiated, as with the USA. The process of replacing co-operation arrangements originally made within or through the EU will take some time post Brexit but will be worthwhile pursuing in any event.
- 6.7 There is also a question of penalties imposed by the European Commission by reference to UK turnover. We consider the EU would be entitled to collect and retain these penalty payments in any case where it had not agreed to limit its jurisdiction to the continuing EU. On a hard Brexit there would be no agreement, but if a jurisdictional agreement were in prospect, these penalties might need to be taken into account in assessing the UK's ongoing financial contribution to the EU.

**City of London Law Society
Competition Law Committee
Brexit Working Party**

3 March 2017