



**Response of the Competition Law Committee of the City of London Law Society (CLLS)
to the House of Lords EU Committee's call for Evidence in its Inquiry into the Impact
of Brexit on UK Competition Policy**

1. INTRODUCTION AND SUMMARY

Introduction

The CLLS Competition Law Committee welcomes the opportunity to submit evidence to the House of Lords EU Committee in its Inquiry into the Impact of Brexit on UK Competition Policy.

The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

The Competition Law Committee consists of the following members:

- Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);
- Nicole Kar, Partner, Linklaters LLP (Deputy Chairman, CLLS Competition Law Committee)
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1. SUMMARY

General

Competition policy in the UK currently aims to make markets work well for consumers, businesses and the economy by protecting consumers and businesses from anti-competitive conduct, agreements, and mergers, and intervening in markets which exhibit features that have adverse effects on competition. This policy framework is sound and does not need to be changed after Brexit.

However, it should be supplemented by subordinate policies post Brexit which seek to ensure that duplication of effort between the UK competition authorities (i.e. the Competition and Markets Authority ((CMA)) and the sector regulators) and the European Commission (the Commission) are minimised wherever possible.

Antitrust

With regard to antitrust law (i.e. the prohibitions on anti-competitive agreements and abuse of dominance), we consider that continued consistency of UK law with EU law, maintenance of the present procedural approach to infringements under the Competition Act 1998 (CA 1998) and negotiation of a cooperation agreement between the UK and EU authorities on the enforcement of EU and UK domestic antitrust law will be in the best interests of UK consumers. We do not favour major changes to the current approach in the UK, in particular we believe that the adoption of adversarial civil processes or moves to a criminal law regime would be counterproductive and would protect UK consumers less well than maintenance of the present approach.

We believe there will be value in co-operation arrangements with the EU and probably with other third country regulators to assist enforcement. We also believe that transitional arrangements will be essential in the field of antitrust enforcement.

Brexit may adversely impact the UK's status as a jurisdiction of choice for antitrust private damages actions as a result of, first, its reduction in the ease of bringing damages actions in UK courts based on infringements of the EU antitrust prohibitions and, secondly and more importantly, the removal of the UK from the European regime of jurisdictional and enforcement rules.

Mergers

The UK's withdrawal from the EU will end the existing division of jurisdiction between the Commission and the CMA in relation to merger control (the so-called "one-stop-shop" system). As a consequence, mergers, acquisitions and joint ventures involving businesses active in the UK will potentially be subject to parallel reviews by the CMA and the Commission, where both UK and EU review thresholds are triggered. The end of the "one-stop-shop" system will also increase the regulatory and administrative burdens for merging companies. While a multiplicity of merger filings is not unusual for international transactions, the CMA and the Commission are both known to be among the more demanding of authorities internationally. In this context, it will be essential that transitional arrangements are agreed between the UK and the EU and made public sufficiently far in advance of Brexit (i.e. at least a year) to deal with the significant uncertainty and duplication of cost for businesses that could otherwise arise.

This change in jurisdiction will increase the CMA's workload significantly, and more resources will therefore be required. In our view, the most efficient way forward should be a strengthening of the CMA as centre of excellence for merger control, rather than redirecting merger review to sector-specific regulators in the UK.

Looking forward, some significant differences in procedure – notably in relation to the timing and approval of remedies offered by merging parties in order to secure a clearance – have the potential to pose serious difficulties in some circumstances. Close cooperation between the CMA and the Commission will be important to maintaining fairness and consistency.

Finally, Brexit presents opportunities for the UK to introduce a broader set of national interest criteria for the assessment of mergers (should this be viewed as desirable) without the need to seek approval from the Commission. The current scope for the UK to undertake public interest review is relatively broad – including public security, media plurality and prudential supervision for transactions subject to competition review by the Commission, and limited only by UK statute to transactions subject to competition review by the CMA. Any expansion of the existing regime to include broader industrial policy considerations, such as the protection of UK critical infrastructure, is likely to lead to less predictability of outcomes and may reduce the attractiveness of the UK to foreign capital that would otherwise be welcome. We believe that the key consideration is transparency as to the policy and criteria to be applied for any such broader national interest review.

State Aid

The options in relation to state aid depend on what assumptions are made about the future trading relationship between the EU and the UK. Whilst it is possible to conceive of other approaches, it seems likely, based on recent precedents, that some form of state aid control based on the EU model, and operated through an independent body, will be a requirement of any future trade agreement.

Even leaving aside the possible terms of any trade agreement, there would, in our view, be advantages to the UK in retaining some form of anti-subsidy control and avoiding inefficient “subsidy races”. State aid control, done properly, seeks to facilitate the best and most effective use of public money, by ensuring that interventions are appropriately targeted, proportionate, and kept to the minimum necessary.

If there is to be an independent body then the most obvious candidate for the role of state aid authority would be the CMA (or some agency associated with the CMA); there is a strong logic for grouping expertise on state aid control with other aspects of competition policy and enforcement given the significant overlaps in underlying policy and the resources required. However, it should not be assumed that this would be straightforward: there would be both resource and skills gaps that would need to be addressed, at a time when the CMA is in any event likely to see a significant increase in demand on its resources. The CMA would also require firm political and parliamentary support for its role in order to be able to deliver this mandate effectively. In this regard, it is important that the CMA should be, and be seen to be, independent from government. The CMA should have appropriate and transparent decision making processes to retain the confidence of businesses and consumers.

2. THE QUESTIONS

General

1. **What should competition policy in the UK set out to achieve? What guiding principles should shape the UK's approach to competition policy after Brexit?**

- 1.1 Competition policy in the UK currently aims to make markets work well for consumers, businesses and the economy by protecting consumers and businesses from anti-competitive conduct, agreements, and mergers, and intervening in markets which exhibit features that have adverse effects on competition. This policy framework is sound and does not need to be changed after Brexit. However, it should be supplemented by subordinate policies which seek to ensure that duplication of effort as between the UK competition authorities (i.e. the CMA and the sector regulators) and the Commission is minimised, unnecessary legal uncertainty is avoided (particularly so that businesses operating across the UK and the EU 27 can comply with competition law in a consistent manner) and the synergies and benefits of cooperating with the Commission and where appropriate the EU Courts, are maximized.

Antitrust

2. **Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?**

Consistency - General

- 2.1 The UK, in common with many other jurisdictions (see further below), has chosen to model its competition law closely on EU law: the provisions of Chapters 1 and 2 of the CA 1998 effectively provide for a domestic version of Articles 101-102 of the Treaty on the Functioning of the European Union (TFEU) applying to trade within the UK, as opposed to trade between Member States of the EU. The UK chose to take this step after considerable deliberation on whether to repeal its very different form-based approach under the Restrictive Trade Practices Acts 1956, 1968 and 1976 and the Fair Trading Act 1973 (as well as the Resale Prices Acts 1964 and 1976). In 1998, the UK had already been in the EU for some 25 years and was not in any way obliged to make this change.
- 2.2 Section 60 of the CA 1998 legislates to the effect that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under the antitrust provisions of the Act in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions under EU law in relation to competition within the EU.
- 2.3 The UK is free to make changes that apply post-Brexit, unless the current negotiations lead to agreement to the contrary. The question is therefore not, whether the UK can make changes, but whether it should?

- 2.4 We are of the view that in order to maintain predictability and legal certainty so far as possible, and thereby reduce costs on business, the UK should seek to maintain, at least initially, consistency with the EU in the interpretation of its antitrust law. We believe that this offers greater opportunities for the UK than encouraging divergence or actively legislating to change UK Competition law to a greater or lesser extent. We believe, however, that the current language of Section 60 may be regarded politically as too prescriptive and as potentially requiring the decisions of the EU Courts taken after Brexit to constrain the UK courts in the area of UK competition law. In that event, the section could be changed as regards post Brexit EU decisions simply to provide that the UK courts should use the decisions of the EU Courts and the decisions and guidance issued by the Commission relating to Articles 101 and 102 as aids to the interpretation of UK competition law, but not be bound by them. In practical terms we would therefore recommend that the UK courts and regulators should be required to “have regard to” EU Court judgments and Commission decisions. We believe that specific language of this nature (which recognises the closeness and consistency between UK and EU antitrust law up to this point) would provide more certainty and hence be preferable to making no mention at all of EU law (thereby treating it in the same way as any other foreign law).

Consistency – EU Commission Block Exemption Regulations authorised by Article 105(3) TFEU and relevant Council Regulations.

- 2.5 One specific area will need to be clarified. At present UK businesses rely on "parallel exemptions" based on EU "block exemption" Regulations to operate lawfully such commonly beneficial agreements as distribution agreements, franchise agreements and intellectual property licenses. The EU has well developed law and guidance on what is acceptable in such agreements, depending on the nature of the agreement and the relative market power of the parties. We believe that the simplest approach will be to preserve these parallel exemptions and guidance in their present form while the current EU Regulations remain in place. As the European Union (Withdrawal) Bill is currently drafted, it seems probable that the intention is that these will be incorporated into UK law when the UK leaves the EU, although there is a small risk that the definitions used in the Bill may not pick them up, which could easily be removed by a minor drafting amendment. If Article 105(3) Regulations are covered by the Bill in final form, then references to them in UK legislation will continue to apply. However, the Commission's related guidance will become decoupled from the Regulations as applied in the UK, in the absence of BEIS or CMA guidance on the topic.
- 2.6 As these Regulations and related Guidance are of limited life, there will be obvious opportunities to legislate for UK exemptions as they expire, taking account of any changes to EU rules. These exemptions often have international elements and the value of a common approach to business is significant and will assist in preserving the UK as an attractive place to do business. As there is a process for removing the protection of such exemptions in individual cases, the risk of any potential disadvantage to UK consumers from this approach would not be material and would limit the degree of UK resource that needed to be

devoted to agreements benefitting from the Block Exemption Regulations, which can be expected to be almost always beneficial to consumers.

Reasoning on Consistency

- 2.7 Our reason for taking the position that a high degree of consistency is desirable post-Brexit is that the EU system of antitrust law (and competition law generally) has been recognised world-wide as an effective and attractive model. The UK has supported the adoption of competition laws modelled on EU law in many jurisdictions including many Commonwealth countries and former Protectorates, as well as third countries. With UK support, EU-style antitrust law has been adopted in Brazil, in the People's Republic of China, in Russia, in Hong-Kong and in Japan (abandoning the former law based on the US approach). Other major jurisdictions have adopted laws which use the same principles with somewhat different procedures: e.g. India and Australia, where EU cases are now frequently cited as an aid to interpretation. UK law firms operating in many third country jurisdictions advise their clients on both EU and local law and the commonality of principles is a considerable assistance to understanding and effective enforcement in a way that is of benefit to consumers in both the UK and other jurisdictions.
- 2.8 The other major antitrust regime is that of the United States. Although, because of its considerable antiquity (the Sherman Act dates back to 1890 and deals with anti-competitive agreements and monopolisation/abuse of a dominant position is dealt with separately in the Robinson-Patman Act of 1936) it expresses itself in different language and has a more rigid categorisation of offences than the underlying principles inspired by EU and current UK law.
- 2.9 One key difference in US antitrust law is that the most serious offences are prosecuted as crimes against both companies and individuals, leading to substantial fines and significant prison sentences. The effective operation of this system depends upon the US system of plea-bargaining in criminal cases, a process which is not common in the UK criminal process, which has traditionally regarded plea-bargains as potentially leading to miscarriages of justice.
- 2.10 Another feature of the US system is that all private civil claims carry triple damages, assessed by a jury. The UK, like most EU Member States, follows the principle that damages should be compensatory. It differs from Civil Law countries in allowing an award of additional "exemplary" damages on a case by case basis, but is opposed to automatic uplifts, such as that applicable under US law.

Opportunities – are they worth taking up?

- 2.11 The UK has previously considered (as it was to a large extent free to do even as an EU member) moving to a more adversarial style of dealing with corporate breaches of UK antitrust law, in which the regulatory authority (currently the CMA) would have to prove its case before the Competition Appeal Tribunal (CAT). This was rejected after consultation prior to the Enterprise and

Regulatory Reform Act 2013 which established the CMA. An adversarial process is used in Ireland and the Irish regulator has found it difficult to obtain decisions in its favour. The CLLS remains of the view this process would not be as effective in achieving enforcement as the current process.

3. Will Brexit impact the UK's status as a jurisdiction of choice for antitrust private damages actions?

- 3.1 As the question indicates, the UK has over a period of several years acquired a leading status amongst EU Member States for private damages actions based on EU antitrust prohibitions (and, where applicable, the equivalent UK prohibitions). This has brought benefits to UK businesses (and consumers) in providing ready access to experienced courts and lawyers in the UK, enabling them to bring actions in their "home" jurisdiction. It has also been a valuable source of work to UK-based lawyers and specialists such as economics experts.
- 3.2 Brexit may adversely impact the UK's status in two ways:
- (a) First, it could create significant obstacles to bringing damages actions in UK courts based on infringements of the EU antitrust prohibitions (which currently include the vast majority of antitrust private damages claims).
 - (b) Secondly, removal of the UK from the European regime of jurisdictional and enforcement rules would lead to uncertainty for claimants and defendants.
- 3.3 The obstacles to bringing damages actions based on infringements of the EU antitrust prohibitions will principally arise due to the EU competition prohibitions (in Articles 101 and 102 of the TFEU) ceasing to be applicable in the UK, so that they no longer form part of domestic law under which legal actions may be brought. Of at least equivalent practical significance will be the status of infringement decisions by the Commission. Currently, the majority of competition law claims are so-called "follow-on" damages claims, under which a Commission decision finding an infringement (typically a cartel) is currently treated as binding on the court, whether the High Court or the CAT, pursuant to sections 47A and 58A of the CA 1998. However, a significant number of cases are "stand-alone", even in areas where the EU has issued related decisions: e.g. many of the cases against VISA in relation to allegedly excessive interchange fees. (The EU case is against Mastercard, but contains persuasive reasoning.) Other cases also raise claims for a period not covered by the EU decision or based on domestic rather than EU law (e.g. some of the Mastercard cases).
- 3.4 The Repeal Bill provides that any rights derived immediately before Brexit from EU Treaty articles, including Articles 101 and 102, will continue to be recognised and available under UK domestic law. Whilst this allows claims entirely relating to the pre-Brexit period to continue to be brought in the UK, they alone would provide no basis for claims under the EU Treaty articles arising after Brexit (including claims spanning both pre-and post-Brexit periods). Combined with the

fact that (once the EU's jurisdiction over pre-Brexit offences is exhausted, which may take some years) the Commission infringement decisions can be expected to make no findings with respect to an infringement's impact in the UK as a non-Member State, the UK is likely to lose some of its attraction as a venue for EU competition cases, unless Parliament legislates to preserve the continued recognition of Commission decisions (and the EU competition prohibitions) for the purposes of bringing claims in UK courts, or, at least clarifies that there is no public policy objection to the application of EU antitrust law by a UK Court or Tribunal: this would be a clarification consistent with the current effect of Article 6 of the Rome II Regulation (text in Annexe), which the UK intends to preserve as part of UK law (See HMG Position Paper: *Providing a cross-border civil judicial cooperation framework*, published August 2017).

3.5 The UK can thus ensure that EU Competition law remains enforceable post-Brexit in the UK courts as the law of the State or States where the principal effects on the market are or are likely to be felt, such laws including the binding effect of CJEU judgments.

3.6 However, there would remain an **obstacle to bringing damages actions** if there is uncertainty as to the enforceability of UK judgments elsewhere in Europe and if actions brought in a UK court no longer preclude actions in relation to the same facts in the courts of an EU Member State. These concerns are, of course, of much broader application than competition law alone, but are particularly relevant with respect to competition claims that could, in principle, be brought in a number of Member States' courts. Commission decisions finding a cartel in a number of EU Member States are, at present, routinely litigated exclusively before a UK court, but may no longer be so post-Brexit.

3.7 This can only be resolved with the cooperation of the EU: e.g. by the UK being permitted to become a party to the Lugano Convention as an independent State or a new treaty between the UK and the EU in terms of the Recast Brussels Regulation, (Regulation (EU) 1215/2012) which is superior to the Lugano Convention in providing protection against parallel proceedings.

4. Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?

4.1 At present cooperation between the Commission and national competition authorities takes place within the context of EU law and cooperation structures. These mean that, at present, proceedings to enforce EU antitrust law are carried out either by the Commission or relevant national authorities (in the UK the CMA) and the decision on this lies with the Commission.

4.2 Post-Brexit, however, the EU ceases to control parallel investigations and the jurisdiction of the Commission and the EU Courts ceases to include the UK. It seems likely, in that context, that there will be an increasing number of parallel investigations of the same conduct (as is already relatively common between the EU and a range of other jurisdictions, most frequently the USA). This will be

necessary to ensure that conduct damaging to consumers is stopped in the UK as well as in the continuing EU and will pose challenges best met through cooperation.

- 4.3 As explained in answer to subsequent questions, the EU has a history of cooperation with third country competition regulators, including on exchange of information, and there is no reason to think that they and the UK would be averse to cooperation in the future. Given the UK's physical location and the high volumes of trade between the UK and parts of the EU (which would be expected to continue to some extent after Brexit), it is highly likely that the UK and the European Commission or national authorities within the EU will wish to cooperate in their investigations.
- 4.4 Although the Commission may lose its rights under UK law (e.g. as regards information gathering, enforcement of fines, undertaking etc.) post-Brexit, except where the Commission retains jurisdiction for historical infringements, agreement to work together and to share information is likely to be in the mutual interests of consumers in the UK and the EU. Recognition and enforcement of administrative decisions would require agreement similar to that for judgments and has not so far appeared to feature in thinking on the post-Brexit situation.
- 4.5 In addition, we take the view that the CMA may wish (resources permitting), to undertake parallel investigations in cases where the Commission no longer has jurisdiction in relation to the UK market (and to take parallel decisions subsequent to those investigations) as these will impact UK consumers' rights to claim damages and generally support UK enforcement of competition law. Such actions should be taken in close cooperation with the Commission.

5. Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?

- 5.1 Yes. Cooperation between national competition agencies and the Commission plays an important part in the efficient application of competition law in the European Union including the UK. Further cooperation is therefore essential to ensure a system which is effective in deterring, detecting and preventing unlawful behaviour. Ideally, a cooperation agreement between the UK and the EU will facilitate cooperation both on the level of policy and also between enforcement agencies. Alignment at a policy level will reduce the compliance burden on business and ensure similar outcomes. Cooperation at an institutional level will improve efficient enforcement.
- 5.2 Current competition cooperation agreements between the EU and third countries contain provisions relating to:
- (a) Coordination and cooperation of enforcement activities;
 - (b) Conflict avoidance (negative comity);
 - (c) Exchange of non-confidential information; and

- (d) Request for enforcement action to be taken if a country's interests are being infringed in another state.

5.3 The European Union or the Commission has competition specific agreements with the US, Canada, Japan, South Korea and Switzerland. However, the Commission also has bilateral arrangements with a number of other countries in various forms, including but not limited to memoranda of understanding, arrangements in relation to parallel investigations and practical guidance for cooperation in merger control. It should also be noted that, according to a 2016 OECD report, several countries cooperate with one another without the existence of such agreements/treaties, and experience shows that cooperation generally occurs where there are strong trade/economic ties.

6. How will Brexit affect the CMA's ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK's influence in developing global competition policy?

6.1 Although the CMA currently has no competition cooperation agreements with non-EU countries, there is in practice no impediment to international cooperation. Brexit is unlikely to change this position. In particular, we see no reason why the CMA should not continue to participate actively in international networks such as the International Competition Network ('ICN') following Brexit. There is also the possibility to make co-operation arrangements with national authorities within and without the EU: see, for example, the recently signed agreement between Denmark, Finland, Iceland, Norway and Sweden, which provides for co-operation at national level. Iceland and Norway, though EEA Members, do not participate in the EU's Member State co-operation network.

6.2 The UK has, historically, made a significant contribution to the development of thinking around antitrust policy both within the EU and internationally. The impact on the UK's influence on developing global competition policy post Brexit is unclear. In particular, if the UK competition law agenda varies significantly from both EU and US thinking, then the impact of the UK position on other regimes may be muted.

7. Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK's withdrawal from the EU? If so, what transitional issues would such arrangements need to address?

7.1 In our view, transitional arrangements are essential to deal with antitrust cases and may be required for a substantially longer period than in the case of mergers, discussed below. This is because the EU may have jurisdiction for many years over pre-Brexit agreements and conduct affecting trade between Member States, where the UK was an affected Member State.

7.2 The EU has asserted that, in addition to dealing with pending EU Court cases at the date of Brexit and references from UK Courts relating to pre-Brexit matters; "The Union institutions, bodies, offices and agencies are competent under the

same conditions as before the withdrawal date to start and conduct, after the withdrawal date, administrative procedures concerning compliance with Union law by the United Kingdom, and/or United Kingdom natural/legal persons, relating to facts that occurred before the withdrawal date." See Position Paper TF50 (2017) 5 – Commission to UK of 12 July 2017 on Ongoing Union Judicial and Administrative Procedures.

- 7.3 In relation to infringements the EU limitation period for imposing fines is 5 years from the cessation of the conduct in question. Action taken by the Commission or a Member State for the purpose of investigating an infringement interrupts the limitation period. The limitation period is suspended for the duration of any appeals before the EU Courts. Frequently serious antitrust conduct only starts to be investigated towards the end of that 5 year period and in the case where a cartel has existed for some years (periods in excess of 10 are not uncommon) can look back for the whole of the period of the infringement. In complex cases the investigative and decision making process may take many years and in cases where the EU courts annul a decision and the Commission reconsiders and takes a further decision, the process from beginning to end may take in excess of 10 years in itself, with civil damages claims potentially following after that. Although many cases, of course, settle much more quickly, it is not impossible to envisage on the basis of the EU position paper, an antitrust case in which investigation starts in 2023 (4 years after the withdrawal date) relating to trade between Member States in the UK lasting many years and ending in 2018 being in the (potentially exclusive) jurisdiction of the EU institutions and still being litigated there in, say 2032! Throughout that time the EU would envisage current co-operation and enforcement rights remaining in place. The Commission would also according to its paper have power to take over a case being investigated by the CMA at the time of Brexit in relation to breach of EU and UK antitrust law and commence their own investigation related to EU law, while requiring a stay of the UK processes as they could currently.
- 7.4 On the other hand the UK Position Paper on Ongoing Union Judicial and Administrative Procedures, while opening the door for an agreement on pending CJEU cases in the interests of the parties already involved, anticipates that the CJEU's writ will cease to run in the UK immediately. It states that administrative proceedings, including competition law processes, will be dealt with according to their type and indicates more flexibility in areas of close cooperation. We would anticipate that antitrust would be treated as an area of high co-operation. The paper essentially invites negotiation, but does not reveal where the UK would wish to end up.
- 7.5 In the absence of agreement between the UK and the EU on transition, there would be a very lengthy period in which the EU could assert its jurisdiction on the basis set out in its position paper, while the UK might resist this and adopt parallel proceedings to the detriment of the parties involved in the conduct in question. Ultimately, while the CJEU might declare whether as a matter of EU law, the UK has a continuing duty to co-operate in accordance with current EU law in relation to the exercise of EU processes in relation to pre-Brexit matters, if the UK does not accept that declaration it would be a matter, potentially

justiciable at the International Court in the Hague in proceedings brought by one or more continuing EU States party to the Vienna Convention on the law of Treaties against the United Kingdom (or possibly an ad hoc UK EU referral to an agreed dispute resolution body) to decide whether the UK was still obliged as a matter of public international law to give effect to that duty post-Brexit.

- 7.6 Against that background the importance of a transitional agreement on the extent of EU jurisdiction post Brexit and the extent to which the UK authorities might be left to enforce EU law in the UK alongside UK law post Brexit in parallel with the EU will be very important, so as to avoid businesses being adversely affected by double jeopardy. In particular, businesses need to be clear whether the “one-stop-shop” system will fall away, and become a "two-stop-shop" and, if so, whether the UK will confine itself to enforcing national law (i.e. only deal with cases that involve a breach of domestic competition law (affect trade within the UK) or will also deal with the EU law aspects of those cases. It needs to be clear that they will not be fined by both the UK and the EU for breaches of EU law using a measure that is or includes UK turnover, whether or not there are parallel investigations.
- 7.7 No doubt businesses would prefer the current "one-stop" process where they will generally be investigated either by the Commission only applying EU law, or will be investigated only by one or more national competition authorities in respect of national law and (if relevant) EU law. If they have "two-stop" jurisdiction they would want to be clear that which of the EU and the UK was applying EU law in so far as pre-Brexit trade between the UK and EU was at issue and levying a fine on a basis that included UK turnover.
- 7.8 Transitional arrangements should cover at least the following issues:
- (a) The relevant cut-off point for establishing jurisdiction
 - (b) The preservation of rights of appeal and enforcement
 - (c) Case referrals and reallocation of jurisdiction

Cut off point for Establishing Jurisdiction

- 7.9 Transitional provisions will be required to identify the cut off point for when the 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 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. We considered this question in depth in our paper published on 15th March 2017

(http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=108) and repeat the proposals we made in that paper for ease of reference.

- 7.10 We put forward below two proposals, the first of which aims at as rapid a disentanglement as is practicable and efficient for the 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 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

- 7.11 We suggest that a suitable compromise to propose to the EU would be that the 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 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 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 Commission, we think that this cut-off would strike the right balance.
- 7.12 If after Brexit the 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 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.
- 7.13 This will not, in any way, prevent the 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 Commission and CJEU would exercise jurisdiction after Brexit over competition cases affecting the UK market.
- 7.14 On the basis that EU law can continue to be applied within the UK in relation to pre-Brexit facts, the CMA would be able to apply both EU law and base fines on

UK turnover, so this would not affect the overall application of EU law, merely the methodology of application.

Jurisdictional demarcation - alternative proposal

- 7.15 The alternative would be to agree that the 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, as indicated above 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 Commission.
- 7.16 It can now be seen that the EU favour the second proposal and that the UK is resistant to it, but may be willing to agree to very close co-operation in the field of antitrust. We believe that a compromise involving close co-operation should be sought with a view to avoiding unnecessarily duplicative litigation and giving business a clear indication of what to expect..

The preservation of rights of appeal and enforcement

- 7.17 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 Commission and CJEU.
- 7.18 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.

- 7.19 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.
- 7.20 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 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 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 Commission to retain UK investigative powers within the UK on cases where it retains jurisdiction, working with the CMA as presently. The 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.

Case referrals and re-allocation of jurisdiction

- 7.21 Under proposal one, jurisdiction questions should be relatively easily settled according to the agreement between the UK and the EU and in the alternative process current EU law would continue to apply to all pre-Brexit conduct and determine case referrals, with EU law having primacy in that regard.

Mergers

8. What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?

- 8.1 We note at the outset that under the current, pre-Brexit, merger control regime the UK has significant scope to review national interest issues relating to mergers and acquisitions. By way of introduction, we summarise this position below and indicate where EU law places some constraints on the UK’s ability to act unilaterally.
- 8.2 Under the Enterprise Act 2002 (EA), the UK government, acting via a Secretary of State, can intervene in a transaction on national interest grounds in two instances: (i) when a transaction, that is reviewable under either UK or EU merger law, may raise public interest considerations (a “public interest” case); and (ii) when a transaction does not meet the requirements for review under UK merger law, but raises special public interest considerations (a “special public interest case”).¹ The EA sets out three broad grounds for public interest

¹ In addition, section 13 of the Industry Act 1975 grants the Secretary of State the power to block an acquisition of control by a non-UK entity of an “important manufacturing undertaking” when it appears that a change of control

intervention: national security (including public security), the need for plurality of views in the media, and the maintenance of stability of the UK financial system. The EA allows the Secretary of State to specify further grounds for intervention, if the need arises. An intervention by the Secretary of State in public interest or special public interest cases can result in a case being cleared which would otherwise be prohibited on grounds of competition law; or a case being prohibited which would otherwise be cleared on grounds of competition law.

- 8.3 For transactions that require clearance under the EU Merger Regulation (EUMR) – generally, the transactions involving larger companies – any intervention by the UK under the EA (or other UK legislation) must be in accordance with the provisions of EU law. Article 21(4) EUMR allows a Member State to intervene in a transaction having an EU dimension to protect its “legitimate interests”, including the specified public interest grounds of public security, media plurality and prudential rules. Member States can also apply to the Commission for permission to intervene in a transaction to protect “other legitimate interests”. This can result in the Member State prohibiting or requiring commitments (remedies) in a case cleared under the EUMR. However, if a case has been prohibited under the EUMR, a Member State cannot override that prohibition to allow the transaction to proceed.
- 8.4 Accordingly, the additional opportunities afforded by Brexit for the UK to review national interest criteria arise in relation to the (relatively small number of) cases that fall to be considered under the EUMR and where the national interest consideration does not fall within the pre-defined categories set out in Article 21(4) EUMR and is something that would not be accepted as an additional “legitimate interest”. Equally, there is currently the possibility of cases which might be prohibited under the EUMR, but which the UK might wish to clear on national interest grounds. Brexit would also permit the UK to intervene without regard to more general restrictions against discrimination against EU nationals and companies which are contained in the free movement rules of the Treaty on the Functioning of the European Union, and which have generally been considered by the Commission (Commission) in the context of requests under Article 21(4) EUMR. It is not clear to us whether or not this last type of flexibility would be viewed by Government as desirable.
- 8.5 These additional opportunities presuppose that the UK and the EU do not reach a transitional or longer-term agreement that lays out different rules in this area.
- 8.6 In this context, potential advantages and disadvantages of this greater flexibility would include:
 - (a) Advantages: greater leeway to protect UK national interests outside of public security, without reference to the Commission or broader free movement principles of EU law. In particular, the ability to act

would be contrary to the interests of the UK or a substantial part of it. However, we are unaware of this provision ever being used.

unilaterally would increase the Government's capacity to be nimble in its response to unexpected national interest concerns, without the need to go through additional bureaucracy and potentially have its judgment questioned by a non-UK body.

- (b) Disadvantages: any approach that involves increasing the scope of the UK Government's discretion to intervene in – and potentially delay, impose conditions on or prohibit – transactions on broader national or public interest grounds is likely to lead to less predictability and may therefore reduce the attractiveness of the UK to foreign capital that the Government may otherwise wish to welcome. It is to be noted that the Government has thus far taken a relatively tightly constrained approach to public interest intervention and has only sought to intervene in a small number of areas.

8.7 To the extent that the Government wishes to apply a review of industrial strategy considerations, such as protection of UK critical infrastructure or technology for transactions, this could be achieved by the addition of an additional public interest criteria to the existing CMA process under the EA or by creating a separate national interest review (which could incorporate the existing grounds of special/public interest intervention) to sit alongside the competition review under the EA, in the same way that, for example, the CFIUS process operates in the US.^[1] The first approach runs the risk of causing additional unwelcome confusion and uncertainty in what is currently predominantly (save for a small number of cases involving public security, media plurality and prudential supervision) a competition-based assessment under the EA carried out by the CMA as a body which is independent from Government with expertise (at least in its current form) only in competition-based assessment and not in making discretionary judgements on wider policy considerations. The second approach adds an entirely new and additional review system which will add cost and complexity to the overall process of receiving regulatory clearance for transactions in the UK.

8.8 Regardless of the structure adopted, however, it would be highly desirable for any new national interest review to be accompanied by clear guidance on the circumstances in which Government is likely to wish to intervene and the considerations that would be critical to such a determination. In addition, those making the determination must be expertly qualified to do so or have the necessary expert input available to them. Finally, the approach should be to minimise the additional burden on business.

^[1] CFIUS refers to the Committee on Foreign Investment in the United States. It is an inter-agency committee of the United States government that reviews the national security implications of foreign investments in US companies or operations. If a transaction could pose a risk to US national security, the US President may suspend or prohibit the transaction, or impose conditions on it.

9. Does the Competition & Markets Authority (CMA) have the capacity to manage an anticipated increase in UK merger notifications post-Brexit? Could regulators with concurrent competition powers, e.g. Ofgem and Ofcom, play a greater role?

9.1 We expect that Brexit will indeed put a significant strain on the CMA's merger control capacity. The CMA estimates that Brexit could lead to an increase in the CMA's caseload of 40-50% (i.e., 30-50 additional Phase 1 cases and approximately six additional Phase 2 cases a year). These are likely to include several substantial and complex international transactions which are highly resource intensive for the competition authorities reviewing them.

9.2 This increase is so significant that we would not expect adjustments to the CMA's enforcement priorities and procedures alone to suffice to allow the CMA to deal with the increase in merger notifications without a deterioration from its current standard of work.

9.3 We would expect significantly more resources to be required, and these resources would need to be in place prior to Brexit to ensure no loss of quality of service just when the caseload gets heavier and more complex. Absent additional resources it seems likely that the CMA would need to scale back the discretionary aspects of the CMA's work (which would include its work enforcing the Competition Act as well as its wider education and advocacy roles).

9.4 The CMA is currently the centre of excellence for merger control in the UK. Procedural requirements such as, for example, statutory timetables and the separation of the Phase 1 and Phase 2 review teams, make it necessary to concentrate significant expertise within one group of people. This concentration of expertise helps to avoid divergence and allows for the highest degree of predictability of outcomes.

9.5 Against this backdrop, we consider that it would be best to continue concentrating merger control competencies within the CMA as the centre of excellence. It would be impractical and costly to seek to replicate the current merger control system within a number of additional regulators which are not currently geared up to conduct merger reviews and which do not have that expertise. Specifically, we suspect that any expansion of merger control competencies within concurrent competition authorities would actually not save money, but increase costs (compared to an increase in capacity within the CMA alone). For example, concurrent regulators would have to build up merger control capabilities from scratch and hire additional personnel to replicate the CMA's two-stage review process. Moreover, it is unlikely that sector regulators will experience sufficient throughput of cases in their sectors to develop expertise needed for stand-alone merger control reviews.

9.6 In summary, any attempt to "redirect" competencies for merger control in certain sectors to concurrent regulators would, from our point of view, simply shift the issue, but not solve it. Instead, the more efficient and cost effective way forward should be an increase of the CMA's own merger control resources. We can, however, foresee that secondment of staff (if available) from sector regulators to

provide industry knowledge within a CMA case team in appropriate cases could be a useful way of partially addressing resourcing issues. Nevertheless, this would not on its own suffice.

10. How burdensome would dual CMA/European Commission merger notifications be for companies?

- 10.1 Currently, the Commission and the Member States coordinate their merger control competencies under what is referred to as the “one-stop-shop” system set out in the EUMR. Under this system, either the Commission or the CMA has jurisdiction to review and approve transactions as regards their effects on competition in the UK, but not both.
- 10.2 The EU’s “one-stop-shop” for merger reviews will no longer apply to the UK after Brexit. In this context, transactions involving businesses active in the EU and UK will potentially be subject to parallel reviews by the Commission and the CMA if relevant turnover/market share thresholds are met. Companies will therefore be faced with an increased regulatory and administrative burden. This in itself will not be a major issue (international deals now frequently require notification in 10+ jurisdictions), although the addition of the CMA to review effects in the UK alongside the Commission’s review of EU effects will be a material addition to that burden in more complex cases given the rigor and intensity of data demands that characterise the CMA’s process.
- 10.3 Under the current system, businesses have to gather information both for the UK and the rest of the EU in any event, so changes in the overall information gathering burden are not likely to be substantial. However, pre-notification engagement with the Commission can start many months before the formal date of filing and involve provision of significant amounts of information in response to detailed requests for information. Any need to repeat such pre-notification engagement with the CMA on account of jurisdiction shifting due to Brexit would result in delay, duplication and further costs which businesses would have to bear.
- 10.4 The key changes will therefore be related to timing and procedure:
- (a) **Timeline.** The UK statutory timeline is longer than the Commission’s (both at Phase 1 and Phase 2). Even though the Commission has a lengthy pre-notification phase in more complex cases, this is now an increasing feature of the CMA process as well. The UK merger regime does not of course require mandatory filings of transactions to be made, and merging parties have the option not to file. However, in cases where there is the potential for material effects in the UK, merging parties will often choose to file and await clearance from the CMA rather than run the risk of CMA intervention at a later stage, potentially after closing. This is particularly likely to be the case when there will be high visibility of the deal as a result of the Commission’s review of the transaction under the EUMR.

- (b) Transaction costs will rise. Most mergers which are investigated by the CMA are subject to a fee whereas no fee is payable for transactions reviewed under the EUMR. Filing fees vary according to the value of the UK turnover of the business being acquired and are high at the top level (i.e., £160,000 when the value of the UK turnover of the enterprise being acquired exceeds £120 million). In addition, coordinating merger reviews with multiple authorities increases costs and complexity.
- (c) Remedies. For those transactions that give rise to competition concerns, a critical part of ensuring a successful outcome can be the ability to offer commitments or undertakings to remedy the concerns. Where the competition concerns identified – and the potential remedies – affect the UK and other parts of the EU, there will be a need post-Brexit to coordinate remedy strategy and procedure so that a consistent outcome can be achieved. Coordination between Commission and CMA processes will be key to avoiding conflicting remedies requirements from the authorities.

10.5 Both the UK and EU merger control processes encourage early discussion of remedies where they may be necessary. However, the timings for submission of remedy proposals and for the relevant authority to gather third party feedback on the effectiveness of the remedies are very different. The CMA only formally considers and market tests remedies at Phase 1 after reaching its formal decision on the case, at the end of its 40 working day process, and has a further 40 working days after agreeing to consider remedies in which to consult and reach a final determination on acceptance of remedies. By contrast, the EUMR requires formal submission of remedies no later than 20 working days from filing, and the Commission will consult with third parties before accepting a remedy and reaching its final Phase 1 decision on acceptance of the remedy no later than 35 working days from filing. These differing procedures have the potential to place great strain on the ability of merging parties to ensure consistent results between both authorities, unless one agrees to play a subsidiary role to the other (which is not expected to be likely). This underlines the need for procedural co-operation between the two authorities in appropriate cases.

11. How likely is it that parallel merger reviews by the European Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?

11.1 The Commission’s and the CMA’s approaches to substantive assessment in merger control are very similar. Both are sophisticated competition authorities and the standards applied for substantive review are for all practical purposes the same. While the Commission can intervene in mergers that would lead to a “significant impediment to effective competition,” and the CMA looks for a “substantial lessening of competition,” their theories of harm and underlying economic theory are essentially the same.

11.2 Accordingly, while having two separate authorities reviewing a case with UK and EU effects clearly does give rise to a risk that did not exist before, with one

caveat we do not see a major risk of divergent outcomes in those transactions that have cross-border effects, provided that there is procedural co-operation.

11.3 The caveat is that the statutory threshold for referral of a case to Phase 2 is generally considered to be slightly lower under the EA than under the EUMR, and therefore there is a small risk that some cases might require a Phase 2 investigation in the UK but not in the EU.

11.4 Clearly, there would also be more scope for divergence if there are increased possibilities for intervention on national interest grounds in the UK, if the public interest and special public interest regimes are expanded.

12. Do either the CMA or the European Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews?

12.1 Yes, both do. The Commission has engaged actively in cooperation with competition authorities of many countries outside the EU. Cooperation with some of them is based on bilateral agreements dedicated entirely to competition (“dedicated agreements”). In other cases, competition provisions are included as part of wider general agreements such as free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements, etc.

12.2 A list including all the EU bilateral relations on competition issues is available on the Commission’s website (see: <http://ec.europa.eu/competition/international/bilateral/>). These include agreements with Brazil, Canada, China, Japan and the US.

12.3 The CMA also currently cooperates with other non-EU national competition authorities on merger reviews and it may do regardless of whether there is a formal cooperation agreement in place. The CMA has good relationships with authorities around the globe and, during a merger review, the CMA will likely cooperate with another authority on an informal basis should it be in the interests of the CMA and/or the other authority. Cooperating on an informal basis means that, essentially, the authorities may discuss anything that is not confidential. If more formal cooperation is required in the context of a merger (e.g. to share confidential information) then the most likely mechanism for this is on the basis of waivers from the parties for such cooperation.

13. Will it be necessary for the UK and EU to agree a transitional arrangement for merger control after the UK’s departure from the EU? If so, what transitional issues would such an arrangement need to address?

13.1 In our view, transitional arrangements are essential to deal with merger control. Their aim should be to reduce any need for duplication to the extent possible and as early as possible. It is critical that these arrangements are made public sufficiently far in advance so that companies can build them into their transactional planning.

13.2 As explained above, with Brexit, the “one-stop-shop” system will fall away, inevitably leading to transitional issues for cases that are either pending (i.e.,

under review by the Commission or the CMA) or that are being prepared at the time of Brexit.

13.3 Transitional arrangements should cover at least the following issues:

(A) The relevant cut-off point for establishing jurisdiction

13.4 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. Transactions can be affected by this uncertainty early on, due to the long lead times involved. Assuming, for example, a case notified under the EUMR with a pre-notification time period of one to three months (which is not unusual, and indeed on the short side for complex cases), a Phase 1 review of up to 35 working days and a Phase 2 review of up to 125 working days, transactions for which pre-notification discussions with the Commission are started about 11 months prior to Brexit could be affected. In highly complex cases, significantly longer pre-notification discussions might be required.

13.5 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 should 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; or that the transaction may not actually complete until after Brexit). Given the considerable amount of work required of merging parties, and the administrative resources expended on preparing the filing (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 EA would replace it. These include: deal signing/announcement; submission of a case allocation request; submission of a first draft Form CO to the Commission; commencement of the pre-notification period; and 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 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 EA 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 substantial submissions in relation to potentially affected markets and possible competition concerns. It is not unusual for the EUMR pre-notification period to last three months or longer – in Dow/Dupont, for example, the period between announcement of the transaction on 11 December 2015 and its notification on 22 June 2016 exceeded six months.² 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. See earlier comments at paragraph **Error! Reference source not found.**
- (e) On balance, we consider that a sensible approach would be for the 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 Commission to have responsibility to review a transaction in circumstances where, before the Brexit date, a case team allocation request has been submitted to DG COMP by the notifying parties and the Commission has appointed a case team.

(B) The preservation of rights of appeal and enforcement

- 13.6 To ensure legal certainty, for all transactions to which the EUMR continues to apply post-Brexit, related EU laws concerning rights of defence, enforcement and appeals should continue to apply.
- 13.7 This could be implemented by preserving the applicability of the various Treaty provisions and other EU legislation as regards transactions which were previously subject to an EUMR decision and those to which the transitional provisions apply. Key aspects of these rules would include:

² Case COMP/M.7932 – *Dow/Dupont*, notified to the EC on 22 June 2016, cleared conditionally on 27 March 2017.

- (a) Judicial review and appeal mechanisms in respect of the transaction, including:
 - (I) judicial review of any 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; and
 - (II) appeals from the General Court to the Court of Justice on points of law.

- (b) Compliance with any commitments accepted by the Commission, and the related powers of the Commission to enforce compliance and impose sanctions for breach, where the application of the commitments extends to Member States other than the UK, including the following typical provisions:
 - (I) an obligation to sell (parts of) a business (the so-called "divestment business");
 - (II) the appointment of monitoring and divestiture trustees to oversee compliance with commitments under supervision of the Commission, including any hold-separate obligations and ring-fencing arrangements;
 - (III) the non-solicitation of key personnel of any divestment businesses; and
 - (IV) 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 powers to enforce, release or vary where this only impacts the UK 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.

(C) Case referrals and re-allocation of jurisdiction

13.8 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 Commission were preserved post-Brexit.

State Aid

14. Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?

14.1 It seems likely that some form of state aid control will be a requirement of any future trade agreement between the UK and EU, given that the remaining EU Member States are unlikely to find it attractive to open up their domestic markets to potentially subsidised overseas competition (and the same will presumably be the case for the UK). Businesses are also less likely to take up opportunities to trade in markets where they can face competition from subsidised domestic businesses.

14.2 Such an approach would also be consistent with:

- (a) Paragraph 20 of the European Council's guidelines for Brexit negotiations, which states that such any agreement "*must ensure a level playing field in terms of competition and state aid*";
- (b) Existing precedents for trade agreements with the EU. Most of the recent trade agreements with other European jurisdictions have included commitments in relation to State aid. Even CETA, the EU's new trade agreement with Canada, requires notification of each side when subsidies are granted, and makes provision for a consultation procedure if necessary.
- (c) The fact that the UK will, in relation to the supply of goods, in any event continue to be subject to the anti-subsidy provisions of the WTO rules which to some extent overlap with EU state aid rules (services, which are covered by the WTO rules, would need to be addressed specifically in any trade agreement – see [16.3(a) below];
- (d) The UK Government's historic support for the underlying principles behind the state aid regime in terms of ensuring a level playing field for competition, discouraging subsidy races and avoiding measure that simply provide ongoing support for uneconomic businesses or sections of industry without associated restructuring.

14.3 There could also be practical advantages to the UK in continuing to participate in an EU-wide anti-subsidy regime. In particular, it would ensure that if the UK committed to comply with state aid rules, it could obtain corresponding protection from the grant of subsidies to EU entities that are specifically targeted on the UK market, or designed to attract investments to the EU that would otherwise have been made in the UK. More generally, application of the state aid rules can assist in focusing attention on some important issues that need to be considered in any public project. In particular, state aid assessments require analysis of (i) whether there is a market failure that requires public sector intervention; (ii) whether the proposed intervention offers the best value for

money and (iii) what the broader impact of the proposal will be on competition and competitiveness and whether there is a more proportionate means of achieving the same objective.

14.4 Existing trade deals between the EU and third countries provide interesting precedents but their direct relevance varies given the wide variation in the nature of the agreements as well as the dates of their negotiation. The most useful are likely to be the more recent agreements that have been reached with other European countries which at least provide a guide as to the likely negotiating position of the EU. These would include:³

- (a) The Association Agreement with Ukraine, under which Ukraine has agreed to implement a system of state aid rules, which are to be interpreted by reference to EU precedents and guidance, with an independent authority applying them. There are obligations on each party to report annually on the state aid that has been granted.
- (b) The Stabilisation and Accession Agreements with Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia, and the Association Agreement with Moldova which contain similar provisions to the Ukrainian agreements.
- (c) The Accession Partnership Document relating to Turkey's potential accession to the EU under which Turkey has agreed to adopt domestic state aid rules in line with the EU *acquis* and set up an independent authority to apply those rules.

14.5 In addition Articles 61-64 and Annexe XV of the EEA Treaty provide a complete parallel code for State aid in which the EEA Countries bind themselves in essentially the same terms as the TFEU.⁴ The provisions are managed by the EFTA Surveillance Authority so far as the EFTA Countries are concerned. The EEA precedent also provides an intergovernmental dispute resolution mechanism with the possibility of either side applying unilateral measures as a sanction.

³ Other precedents include the Free Trade Agreements with the Faroe Islands, Iceland and Norway which also make provision in relation to State aid but which, in the case of Iceland and Norway, need to be seen in the context of participation in the EEA arrangements. Switzerland has a series of bilateral agreements with the EU of which the 1972 FTA and the 1999 Agreement on Air Transport make provision in relation to State aid but which we do not consider to be likely to reflect modern practice. There is also a 1997 Partnership and Co-operation agreement with Russia under which Russia has agreed to implement a system of state aid rules to be enforced in consultation with a Cooperation Committee established under the agreement, although we understand that details of this have not yet been defined. The parties are required to provide information on any aid granted if requested to do so by the other party.

⁴ Fisheries are excluded from this mechanism, but there is a mutual commitment to abolish state aid under Article 4 of Protocol 9 to the Treaty. There is also no express exemption for culture and heritage conservation (as is found in the TFEU), but it is thought that the same substantive effect can be achieved in the EEA under another head.

- 14.6 The position of the UK is arguably different from the existing (non-EEA) precedents in that it is currently fully aligned with, and has considerable experience in applying, the EU state aid regime. It is therefore arguably easier for the UK to achieve a high degree of harmonisation with the EU than might be the case in some other single country jurisdictions. It will likely also be harder for the EU to explain to its own constituencies why they should potentially face competition from UK businesses potentially subsidised to a greater extent than permitted in the EU/EEA. In the context of an EU/UK trade deal therefore, the EEA Treaty may provide the best precedent.
- 14.7 An issue to consider in this context, however, will be the extent to which the UK would, under this approach, have equal freedom of action in relation to aid in areas that are administered by the EU centrally (for example under the Common Agricultural Policy and Scientific Research Programmes as well as some projects supported by the EIB). Such activities, when carried out by the EU, are not subject to the State aid rules because they concern EU rather than Member State funds and activities (although they will be subject to WTO anti-subsidy rules). If the EEA model is followed then a mechanism may need to be found to ensure that the UK is not disadvantaged in its freedom of action in these areas.

15. Will the UK require a domestic state aid authority after Brexit?

- 15.1 Leaving aside the possibility that this might, given the emphasis placed in the recent precedents on the establishment of an independent body, be a requirement of any trade deal with the EU (see above), the need for a domestic state aid authority would depend on the nature of the regime that is ultimately implemented.
- 15.2 Agreements on subsidies that operated purely as part of an international trade agreement, without conferring any rights on individuals and without imposing binding obligations on the UK Government as a matter of UK law, would not need a domestic state aid authority to enforce them. Some form of monitoring and enforcement mechanism may well need to be agreed at an international level but it would be a matter of negotiation as to what was required and whether, for example, this function could be performed within Government.
- 15.3 Assuming that the regime is going to be implemented in some form at a domestic level, then the need for a domestic state aid authority will depend on the extent to which provision is made for exemption from any prohibitions on state aid, and for third party complaints about breach of the relevant rules. There is also a separate question about the operation of the transitional regime which we address in response to question 19 below.
- 15.4 A regime that operated purely on the basis of specific rules as to what was and was not permitted – whether in the form of legislation or guidance to Government – could probably be applied directly by the organisations that are subject to those rules in the same way as any other legislative requirements, with enforcement being through the courts (whether by way of statutory enforcement

or judicial review), but might be more conveniently managed by a specific authority, such as the CMA.

- 15.5 It is likely that in any event there would still need to be some central pool of expertise to advise individual authorities (including local authorities and other entities responsible for public funding) on the application and scope of the rules (for example, on whether a proposed support measure fell within the concept of “aid” or “subsidy”); to ensure consistent application of the relevant rules across the UK; and potentially to act as a point of liaison with the EU. However, these are functions that are already performed within Government (primarily within BEIS) and would not in themselves require the creation of a standalone state aid authority.
- 15.6 However, if a domestic state aid regime was modelled on the EU/EEA structure which, unlike the WTO, allows for exemptions from the state aid prohibition in a wide range of circumstances, then in our view some form of domestic state aid authority would be required to adjudicate on these provisions. State aid can have positive and negative effects, and deciding how the trade-off is made and decisions on whether exemption from the state aid prohibition should be granted inevitably involve complex discretionary decisions – for example, as to how to strike a balance between the desire to support potentially legitimate aid objectives without discouraging private sector investment and innovation. It would be very difficult for these types of decision to be taken by a judicial body.
- 15.7 Vesting an adjudication and enforcement role with an independent body would introduce additional formality as it would mean that public sector entities wishing to give subsidies would need to go through some form of approval process with that authority rather than simply taking their own decisions and waiting for a challenge. However, taken in the round this should not be seen as overall representing an additional burden given that:
- (a) This process would only apply in cases where there was doubt as to the permissibility of a proposal or where an exemption was being sought: an approval process therefore introduces additional optional flexibility as compared to a black-and-white rule approach;
 - (b) In the case of major projects that rely on third party funding it is often important to be able to get upfront certainty as to the state aid position in the form of a formal ruling. More generally, the existence of a permanent standing body could make it possible for investors and government to seek authoritative advice at the planning stages of a project in a way that would not be possible with an ad hoc body or a court-based process;
 - (c) A dedicated enforcement agency can make it easier for businesses (particularly smaller businesses) and consumers to seek redress for infringements as compared to the need to bring actions in court;
- 15.8 The most obvious existing candidate for the role of state aid authority would be the CMA. There would in our view be a strong logic for grouping expertise on

state aid control together with other aspects of competition policy and enforcement given the significant overlaps in the underlying policy and approach to analysis (and this is the approach taken by the Commission). We also see it as important that the relevant authority would have access to high-quality economic advice, of the type that is available within the CMA. The alternative – assuming that the body is required to operate with a degree of independence - would be to set up a new stand-alone entity (which could perhaps be affiliated but not entirely integrated with the CMA, so that it could share resources and know-how). This would likely entail additional cost, but the advantage would be that it would create a clearer separation between the consumer-interest led functions of the CMA and the public-sector facing functions of the new state aid entity.

- 15.9 However, it should be recognised that whilst the CMA has significant expertise on the underlying competition policy considerations it has no current expertise on the detail and practical operation of the state aid regime. It would therefore require significant support in terms of additional skills and resources (particularly bearing in mind that the repatriation of merger control and antitrust cases from the EU post-Brexit is already expected to lead to a significant increase in its workload).
- 15.10 Whether responsibility was entrusted with the CMA or another standalone authority a further issue to consider would be the extent to which its opinions would be of binding or purely advisory effect (and if so on whom):
- (a) Enforcing a state aid regime by its nature involves ruling on proposed actions by public bodies. It would be critical to the effectiveness of the regime that the CMA or other designated authority was given the authority and Government support to fulfil this function. In particular, this will require it to be genuinely independent of Government and equipped with transparent decision making powers, such that it retains the confidence of businesses and consumers;
 - (b) There would be a particular issue in relation to the possibility of aid being granted in the form of primary legislation. It seems both unrealistic and constitutionally inappropriate for the CMA, another body or even a court to be given the ability to block the passage of primary legislation. We would suggest that this scenario could be resolved through the use of some form of declaratory process (as is currently used in the Human Rights Act 1998);
 - (c) For other forms of aid (not granted through primary legislation) we do not see a constitutional objection to making the opinions of the designated authority binding. The key consideration here will be around the extent to which third parties are empowered to enforce compliance with the state aid rules – an advisory regime would clearly make it harder for the subsequent decisions of public authorities to be challenged (although it would not necessarily completely rule out the scope for challenge on, e.g., judicial review principles). It would however be important that the opinions of the designated authority were made public

so as to ensure that there was transparency in relation to any subsequent decision to depart from the views of the body.

15.11 To the extent that a domestic state aid body is established as part of the terms of a trade agreement with the EU then the remit of the body and the validity (on an ongoing basis) of EU state aid precedents would need to be established as otherwise there would be a risk of divergence in approaches and interpretations between the UK domestic regime and the EU regime that would, in this scenario, be inconsistent with the overall objective of the regime.

16. What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK's ability to support industries, or individual companies, through favourable tax arrangements?

16.1 If no trade agreement were reached with the EU, the UK would remain subject to the WTO rules on subsidies.

16.2 There is considerable overlap between the WTO concept of “subsidy” in Article 1 of the Agreement on Subsidies and Countervailing measures (the “SCM Agreement”) and the concept of “state aid” under Article 107(1) TFEU. In particular it is clear that the concept of “subsidy” in the WTO regime extends to subsidies in the form of foregoing of tax revenues.

16.3 The key differences between the two regimes are as follows:

- (a) The provisions on subsidies in the SCM do not apply to services;
- (b) Unlike under the EU regime there is no mechanism for approval for justified subsidies on public interest grounds under WTO rules.
- (c) There is no ex-ante approval mechanism for subsidies under WTO rules, so recipients of subsidies bear the risk that the subsidy is subsequently deemed to have been illegal. This would affect legal certainty, which would be a particular issue for projects requiring significant third party investment over an extended period.
- (d) There are significant differences in the enforcement rules: the WTO uses state-to-state enforcement or imposition of countervailing duties by the affected state and there is no scope for third party action under WTO rules. By contrast, businesses and individuals are able to bring complaints about state aid to the Commission and can also bring claims in the UK courts in relation to breaches of the prohibition on state aid.
- (e) Subsidies that do not require recipients to meet certain export targets, or to use domestic goods instead of imported goods can only be challenged by a WTO member if an adverse effects on interests can be shown. Under the EU rules adverse effects on competition and trade are subject to much lower thresholds and are often assumed to flow from the grant of a selective advantage.

16.4 The combined effect of the above factors is that although the concept of subsidy is arguably broader, enforcement of the SCM Agreement is much more limited, particularly for grants of individual, ad-hoc aid (albeit that the future attitude of the EU, and its willingness to seek to enforce WTO rules in the absence of specific trade agreement with the UK, is uncertain). In addition, the consequences of a finding of illegality for subsidy recipients are typically much more limited under the WTO rules as, unlike adverse enforcement decisions of the Commission, WTO rulings do not typically require retrospective recovery of subsidies that have already been granted.⁵

16.5 It also follows from point (16.3(d)) above that reliance on WTO rules would fundamentally change the role of Government in relation to the regime: the UK Government would need to take on a role as the interlocutor for UK businesses, and UK businesses that believe there to be a breach of the WTO rules would need to persuade the UK Government to take action on their behalf. It follows that the UK will need to identify in some form a body or part of Government that will take responsibility for trade defence (i.e. to investigate complaints from UK companies that other WTO members have granted illegal subsidies, to initiate actions through the WTO or by imposing countervailing measures, and to defend similar actions by other WTO members). This is a necessary consequence of Brexit as the UK can no longer rely on the EU to carry out trade defence functions vis-à-vis third countries.

17. How will the Government's industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission's state aid policy limited interventions that the UK Government may have otherwise pursued?

17.1 In relation to the negotiation of trade agreements with the EU (and potentially other third states) it seems likely, for the reasons given above, that some form of state aid provision will be required in order to address concerns about opening up markets to "national champions" or other forms of subsidised competition.

17.2 Beyond this it is not obvious that state aid or subsidy control either has, or would, directly impact on the Government's choice of industrial strategy.⁶ In particular, the UK has in the past spent significantly less on state aid than most other EU Member States. For example, the UK's spend of 0.35% of GDP for 2014 is almost a quarter of that of Germany (1.36%) and less than half of that of

⁵ One case in which retroactive recoupment was ordered by a WTO dispute resolution body is *Australia- Automotive Leather II* (Article 21.5-US) para 6.31, but this is considered anomalous by most commentators.

⁶ A 2012 study of investment incentives given in the US and the EU found that, as a result of the EU State aid regime, EU jurisdictions gave lower amounts of aid, in terms of both intensity and cost per job, than did their US counterparts to attract comparable investments, but that this had no discernible adverse effect on foreign direct investment in the EU. See "EU Control of State Aid to Mobile Investment in Comparative Perspective", Kenneth P. Thomas, *Journal Of European Integration* Vol. 34 , Issue 6,2012.

France (0.73%).⁷ Accordingly, it is clear that even within the confines of the EU state aid regime there is unused "headroom" within which the UK could expand its industrial strategy efforts.

17.3 However, by its nature state aid or subsidy controls would impact on the manner in which that policy is delivered. So, for example a system modelled on the EU rules would:

- (a) Allow funding to be provided for R&D but would require that funding to be limited to the level required to deliver the project in question;
- (b) Permit the sale of state assets to private sector entities but would require that sale to be at full market price;
- (c) Allow the purchase of goods or services from the private sector provided that the price paid does not exceed the market value;
- (d) Allow one-off support to be given to business in difficulty provided that this is kept to the minimum necessary, there are measures put in place to mitigate the distortions of competition, and that there is a demonstrable ability to reach long term sustainability;
- (e) Allow the grant of incentives that are necessary to attract investment in UK regions that are considered to be "less developed" provided they do not lure investment away from another region that has the same or lower level of economic development

17.4 However, a state aid policy closely tied in to the EU's would require tighter restrictions on the scope of permitted aid in certain industries: e.g. the steel sector where EU policy is that certain types of aid (notably regional aid and rescue and restructuring aid) are not permitted.

17.5 More generally, the EU state aid regime allows subsidies that are necessary and proportionate for the achievement of a legitimate objective and which do not unduly distort competition. State aid policy is used to support the overall strategy of the EU by indicating the priority sectors for support and sectors where support is not considered to be justified (and subsidy controls could potentially be used in a similar way by the UK to support its industrial strategy). In this sense, state aid clearance reviews carried out by the Commission seek to facilitate the best and most effective use of public money: an objective that would remain valid - and would continue to constrain government intervention in practice - even in the absence of subsidy regulation.

⁷ See the Commission's State aid scoreboard, available at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html

18. What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?

18.1 It would be important that any state aid or subsidy regime was applicable across the whole of the UK in order to ensure consistency and to avoid different parts of the UK being incentivised to engage in “subsidy races” to attract investment. Indeed, this would be desirable even in the absence of a generally-applicable domestic subsidy regime and there are some precedents – notably in the Canada and Australia – for domestic legislation and agreements that act specifically to regulate subsidy races of this type.⁸

18.2 Whilst enforcement could in principle be split so that each of the devolved administrations had an independent agency, it is not clear that there would be any significant advantages to this, particularly bearing in mind that businesses in the UK do not necessarily operate within a single devolved region. Nor would it be consistent with the approach that is currently taken to competition policy. A more appropriate balance might be to build into the process a specific role for the devolved administrations to comment on proposed aid measures that would have a particular impact within their jurisdictions.

19. Will it be necessary for the UK and EU to agree a transitional arrangement for state aid matters after the UK’s withdrawal from the EU? If so, what transitional issues would such an arrangement need to address?

19.1 Yes. Additional transitional provisions will also be required as a matter of domestic UK law.

19.2 At present, the EU (Withdrawal) Bill proposes to preserve directly effective EU rights contained in treaties. The explanatory notes indicate that the Government envisages that the state aid provisions that are to be preserved include the prohibition on the implementation of unapproved state aid in Article 107(1) TFEU and the standstill obligation (which prevents implementation of aid prior to approval) in Article 108(3) TFEU.

19.3 However, it would not include the provisions in relation to the possibility of approval in Article 107(3) TFEU as these are not directly effective and only the Commission can grant such an approval. According to the most likely interpretation of clause 3 of the Bill, it would continue to be possible to rely on Block Exemptions (see also our comments at paragraph 5 above). For less routine aid measures, the prohibition on state aid would become much more onerous and would prevent the implementation of aid measures that would otherwise have been considered unproblematic. At a minimum therefore some form of additional provision will need to be made using the powers proposed in

⁸ See for example, Canada’s “Code of Conduct on Incentives” in the 1994 Agreement on Internal Trade between Canada’s federal government and its provinces and territories and Australia’s 2003 Interstate Investment Cooperation Agreement.

clause 8 to designate an authority to take over the role of the EU in operating some form of exemption regime.

- 19.4 There will also be transitional arrangements required, in addition to those contained in the EU (Withdrawal) Bill, in order to address the non-domestic aspects of the regime (albeit that some of these issues are of more general application and are not specific to the state aid regime). In particular:
- (a) The status of state aid measures (implemented and unimplemented) that have already been notified to or are being investigated, but not yet decided on by the Commission at the time of Brexit;
 - (b) Whether state aid cases involving the UK pending before the EU Courts at the time of Brexit, whether references to the Court of Justice from the UK courts or direct actions in the General Court (or on appeal to the Court of Justice), can continue to judgment and appeal, and the consequences of a subsequent remittal of a case for redecision by the Commission;
 - (c) the extent to which the Commission (or anyone else) will have power post-Brexit to order the UK to recover unlawful aid granted before Brexit or that has become unlawful as a result of breach conditions attached to state aid approvals (which can be long term commitments stretching many years into the future);
- 19.5 It will be important that there is clarity as early as possible as to the future arrangements for state aid/subsidy control in the UK. This is a particular issue for major infrastructure and other investments which can have lead times of several years and where private sector investors working alongside public investors will want certainty as to the regime that will be applied to the public sector investment before committing to the project. To the extent that this is a new UK regime it will be important that information and advice is made available significantly in advance of any regime becoming operational in order to ensure that investments are not delayed.
- 19.6 In the event that a new UK state aid regime is introduced then – in order to avoid a need for mass renotifications - it is likely that arrangements will also need to be made for existing state aid decisions approving ongoing state aid measures, and existing aids, to “carry over” to the new regime.

City of London Competition Law Committee

15 September 2017

Annexe

Text of Section 60 Competition Act 1998

60 Principles to be applied in determining questions.

- a) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
- b) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
- c) the principles applied, and decision reached, by the court in determining that question; and
- d) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
- e) The court must, in addition, have regard to any relevant decision or statement of the Commission.
- f) Subsections (2) and (3) also apply to—
- g) the [Competition and Markets Authority]; and
- h) any person acting on behalf of the [Competition and Markets Authority], in connection with any matter arising under this Part.
- i) In subsections (2) and (3), “court” means any court or tribunal.
- j) In subsections (2)(b) and (3), “decision” includes a decision as to—
- k) the interpretation of any provision of Community law;
- l) the civil liability of an undertaking for harm caused by its infringement of Community law.

Note "Community" is the pre-Treaty of Lisbon term used to describe the EU.

Text of Article 6 of the Rome II Regulation (Regulation (EC) 864/2007

Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply. [i.e. the general rule that the law is the law of the place where the damage occurs, regardless of where the events giving rise to the damage occurred.]
3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.
4. The law applicable under this Article may not be derogated from by an agreement (between the parties) pursuant to Article 14.