

COMMERCIAL BAR ASSOCIATION

BREXIT REPORT

COMPETITION LAW SUB-GROUP

COMBAR Brexit papers

Members of COMBAR are leading specialists in many of the areas of commercial legal practice that will or may be impacted by Brexit. A series of detailed papers explaining the potential effect of Brexit on these areas of practice have been produced by teams of COMBAR members, in some cases working with non-COMBAR specialists including solicitors, academics and retired judges in the following areas:

- 1. Conflicts of Laws, Jurisdiction, Choice of Court Agreements, Choice of Law, Service of Legal Process and Judicial Assistance in Taking of Evidence.*
- 2. Banking.*
- 3. Financial Services.*
- 4. International Arbitration.*
- 5. Competition.*

These papers were recently submitted to the Ministry of Justice following a meeting with the Lord Chancellor in December attended by a number of members of the COMBAR Brexit Committee. They are now being made available on the COMBAR website. Anyone is welcome to read them and to disseminate them on the understanding that, in doing so, the fact that they were produced by COMBAR will be acknowledged.

A second tranche of papers on other areas of legal practice affected by Brexit will be provided in the near future.

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

1. This paper has been prepared by the Commercial Bar Association's sub-group considering the effect of Brexit on competition law in the United Kingdom. We do not address all aspects of competition law, but have focused instead on the effect of Brexit in the following five specific areas:

- (1) The Competition Act 1998;
- (2) Private competition law actions before UK courts and tribunals;
- (3) Merger control;
- (4) State Aid; and
- (5) Relations between national and international competition law regulators.

2. Below we provide a brief summary of our key conclusions and recommendations in relation to each of the above areas. We use the expression "hard Brexit" to refer to a scenario in which the UK leaves the EU and does not remain in the EEA (or join EFTA) or enter into some equivalent arrangement to the EEA/EFTA.

- (1) As regards the Competition Act 1998 ("the Act")
 - (i) There are arguments both for and against the retention of s.60 of the Act (which, in summary, obliges the English courts and tribunals to ensure that the key provisions of the Act are interpreted consistently with EU law). We consider that, at least following a hard Brexit, it would be appropriate to replace s.60 with a lesser duty in equivalent terms to that imposed on domestic courts by section 2 of the Human Rights Act 1998, namely, in applying the Chapter I and Chapter II prohibitions to "take into account" EU decisions under Articles 101 and 102 TFEU. Transitional provisions should, however, clarify that s.60 would continue to apply to conduct that occurred before the UK formally leaves the EU.
 - (ii) If, after a hard Brexit, the Government were minded to repeal section 10 of the Act (given its intimate connection with EU Regulations),

there would be a compelling case for the CMA to recommend that the Secretary of State adopt a series of block exemptions for distribution agreements, technology transfer agreements, R&D agreements etc. as a matter of domestic law. There are strong arguments for supposing that these domestic exemptions should mirror (or at least closely follow) the equivalent EU block exemption.

- (iii) Once the detailed arrangements for Brexit and any associated Treaty between the UK and the EU are known, consideration will need to be given for whether it is appropriate to repeal any of the existing exclusions to Chapters I and II of the Act (including, in particular, those relating to mergers and agriculture).
 - (iv) The UK should retain the powers contained in Part II of the Competition Act 1998 (sections 62 to 65N) to help with investigations by the European Commission and/or the competition authorities of Member States of the EU.
- (2) As regards private competition law actions:
- (i) If the UK leaves the EU but remains within the EEA (and, potentially, joins EFTA or an equivalent), private actions for damages will, in practice, continue much as they do presently (save for certain essentially technical changes).
 - (ii) In the event of a hard Brexit, however, EU competition law will be confined in its application to its territorial ambit, i.e. to the territory of the remaining EU Member States and would not extend to the UK. Nevertheless, claims based on infringements of Articles 101 and 102 TFEU might still be brought in the UK as claims based on the law of a remaining EU Member State and are likely to be permitted or not permitted by the UK Courts on the same basis as other claims based upon foreign competition laws. There is no reason for Parliament to legislate to preclude (or expressly permit) such claims. EU competition law should be treated in the same way as any (similar) foreign competition law.

- (iii) We do not recommend the repeal of s58A of the Competition Act 1998. Similarly, we do not recommend the of repeal the recent measures implementing the Damages Directive. We recommend, instead, that these provisions be considered as part of a more general and considered review of UK competition policy to be undertaken after Brexit.
 - (iv) If, contrary to our primary recommendations above, the decision were made imminently to repeal s58A (and/or the provisions implementing the Damages Directive) then transitional provisions would be advisable to address the position where a Commission Decision was handed down after the repeal of s58A but relating in whole or in part to an infringement that occurred before the UK left the EU (and hence to a time when the UK was bound by EU law).
 - (v) Whether we opt for a soft or hard Brexit, it would be desirable to seek to ensure an arrangement based on one of the possible jurisdiction regimes (Brussels, Lugano) and, in particular arrangements for the reciprocal enforcement of judgments relating to competition law as between the UK and EU Member States.
- (3) As regards merger control:
- (i) If the UK leaves the EU but remains in the EEA, it will remain part of the EU “one stop shop” for merger control and so Brexit will have no material impact on merger control in the UK.
 - (ii) In the event of a hard Brexit, however, the UK would leave the “one stop shop” system with the result that the CMA’s merger control workload would expand dramatically and change substantially in character. It would shift from focussing on small, UK-centric mergers to reviewing large, global mergers alongside many other authorities. This would require more resources and greater cooperation with other authorities around the globe.

- (iii) The additional resources required by the CMA could, however, be funded at least in part from the merger filing fees that the CMA would collect from those additional mergers falling within its jurisdiction.
 - (iv) It may be desirable to align the CMA's merger review timetable with that of the European Commission to facilitate cooperation on pan-European and global mergers.
 - (v) There will also be a need for at least some transitional measures to provide for mergers that are notified to the European Commission prior to Brexit.
 - (vi) Although Brexit may also provide an occasion for considering wider reforms of the UK merger control rules, it may be preferable to conduct such a review some time after Brexit to allow for time to adjust to leaving the EU "one stop shop" first.
- (4) As regards State Aid:
- (i) It is likely that some form of State aid control will be a condition of any comprehensive free trade agreement between the UK and EU: and it would certainly be a condition of continued membership of the single market (eg EEA).
 - (ii) In any event, as a member of the WTO, the UK will be bound by anti-subsidisation rules in relation to goods: and enhanced anti-subsidy rules are a feature of many free trade agreements.
 - (iii) In addition to securing compliance with international rules (continued State aid or anti-subsidy) the UK will also have to consider some form of State aid control to prevent "subsidy races" by devolved governments (currently prevented by EU State aid rules).
 - (iv) A purely domestic State aid regime could be set up but there are a number of difficulties that would have to be addressed; but it may be possible (even if the UK does not stay in the EEA as such) to "borrow" EEA institutions such as the EFTA Court and EFTA Surveillance

Authority for State aid purposes. Because those institutions act much more quickly than their EU equivalents, the main disadvantage of the current EU State aid regime (delay) would be substantially ameliorated.

- (5) As regards relations between national and international competition law regulators:
- (i) Brexit into the EEA/EFTA will lead to a diminished direct influence on EU competition policy by the UK but the current information-sharing and cooperation with EU/EEA and EFTA competition regulators should largely remain. As a member of EEA and EFTA, the UK would have a new and closer relationship with EFTA countries than before and the EFTA Surveillance Authority would cooperate with the Commission on those cases which covered both the UK and the EU, so that UK regulators' workload would not be dramatically increased.
 - (ii) Hard Brexit would mean that, unless other arrangements are made, the CMA and the other concurrent regulators will be excluded from the framework of cooperation within the ECN, which currently enables the transmission of information about current investigations between all the NCAs and the influence of member states (including the UK) on Commission's decision-making through the Advisory Committee. Additionally, it would considerably add to the work load of the CMA.
 - (iii) We would recommend that, in the event of a hard Brexit, steps are taken to ensure that a post-Brexit cooperation agreement on competition is concluded between the EU and the UK (either separately or as part of a wider bespoke agreement) similar to, or even more extensive than, the cooperation agreement between the EU and Switzerland. The UK might, in a best case scenario, be granted observer status in the ECN.
 - (iv) Regardless of its future relationship with the EU/EEA/EFTA, the UK will nevertheless be able to foster the potential of international convergence in the substance and process of competition policies

through its membership of the ICN, the OECD Competition Committee and UNCTAD.

II. THE EFFECT OF BREXIT ON THE COMPETITION ACT 1998

3. This paper has three parts. The first part summarises the main provisions of the Competition Act 1998. The second part discusses the possible effects of ‘Brexit’ on those provisions. The third part examines the need for reform and possible options for reform of the Competition Act 1998. References to Act are to the Competition Act 1998 (as amended), unless otherwise stated.

The existing position

4. The Competition Act 1998 radically reformed the domestic competition law of the UK. The Act received the Royal Assent on 9 November 1998 and its main provisions entered into force on 1 March 2000. This text is concerned with the most important provisions in the Act, which are contained in Part I.
5. The Competition Act contains two prohibitions, which are the ‘Chapter I prohibition’ and the ‘Chapter II prohibition’.

The Chapter I prohibition

6. The Chapter I prohibition is closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”). It is contained in section 2(1) of the Competition Act 1998, which provides:

“Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.”

7. The obvious difference between the Chapter I prohibition and Article 101(1) TFEU is that there is no requirement that trade between Member States may be affected, only that trade within the United Kingdom should be affected. Moreover, the Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK: section 2(3).

8. Section 2(2) of the Act contains a non-exhaustive list of agreements that infringe the Chapter I prohibition, which is identical to the list set out in Article 101(1) TFEU.
9. Any agreement or decision that is prohibited by the Chapter I prohibition is void pursuant to section 2(4), which is identical to Article 101(2) TFEU.
10. Section 3 (1) provides that the Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of:
 - (a) Schedule 1: mergers and concentrations;
 - (b) Schedule 2: competition scrutiny under other enactments; and
 - (c) Schedule 3: planning obligations and other general exclusions.
11. Section 9(1) provides that an agreement, though restrictive of competition, is exempt from the Chapter I prohibition where it meets the conditions contained in that subsection (referred to as ‘exempt agreements’). The wording of section 9(1) is almost identical to Article 101(3) TFEU. As with the position in EU law, the parties to an agreement are responsible for demonstrating that all the conditions of section 9 are satisfied so that an anti-competitive agreement necessitates an exemption: section 9(2).
12. Section 6 provides that, if the CMA considers a particular category of agreements are likely to satisfy the conditions set out in section 9(1) (i.e. constitute ‘exempt agreements’), it may recommend that the Secretary of State make a block exemption order. The only such block exemption in force concerns public transport ticketing schemes: the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2016, SI 2016/126.
13. Section 10 of the Act provides for a so-called ‘parallel exemption’, whereby any agreement that benefits from a block exemption Regulation under EU law, or would do if it were to affect trade between Member States, will also be exempt from the Chapter I prohibition under UK law. Agreements within the terms of a parallel exemption are valid without specific authorisation. Parallel exemptions provide desirable legal certainty for firms and have greatly reduced the need to promulgate domestic block exemptions.

The Chapter II prohibition

14. The ‘Chapter II prohibition’ is contained in section 18(1) of the Act and is modelled on Article 102 TFEU. Section 18(1) provides that:

“Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within in the United Kingdom.”

15. Section 18(2) contains a non-exhaustive list of abuses that reflects exactly the terms of Article 102 TFEU. A dominant position means a dominant position within the UK: section 18(3).
16. Section 19 provides for certain conduct to be excluded from the Chapter II prohibition, which are contained in Schedules 1 and 3 to the Act. There are fewer exclusions applicable to the Chapter II prohibition than to the Chapter I prohibition.

Consistent interpretation of domestic and EU competition law

17. Section 60 of the Competition Act is a very important provision. It seeks to maintain consistency between the Treaties and EU case-law, on the one hand, and decisions and judgments issued under domestic law, on the other. Section 60(1) explains the purpose of the section, whereas sections 60(2)-(3) impose the duties.
18. Section 60(1) of the Act 1998 provides:

“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 UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the EU’.

19. Sections 60(2) and (3) provide that:

“(2) 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-

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) 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 EU law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission”.

20. The objective of consistency is not absolute. It is clear that section 60 envisages consistency only, ‘so far as is possible’, having regard to ‘relevant differences’ and only ‘in relation to competition’. Subject to these qualifications, a consistent interpretation between UK and EU competition law is required. Indeed, in *BetterCare Group Limited v Director General of Fair Trading* [2002] CAT 7, the CAT held (at para 32) that:

“... we conceive it our duty under section 60(1) to approach the “undertaking” issue in the manner in which we think the European Court would approach it, as regards the principles and reasoning likely to be followed by that Court. In addition, under section 60(2) we must seek to arrive at a result which is not inconsistent with [EU] law.”

21. Sir Peter Roth has noted that the provisions of section 60 have had “a broad reach” (“Nourished by the Tide: The European Influence on English Law”, speech of 17 November 2014). On occasion this broad reach has been controversial. One such controversy has been whether, and if so, to what extent, the duty of consistency imposed by section 60(2) extends to procedural questions arising in relation to the enforcement of the competition rules. In a case about third party rights during an investigation under the Competition Act 1998, the former Office of Fair Trading (now the CMA) took the view that section 60 is concerned with consistency as regards questions which arise “in relation to competition”, not in relation to detailed questions of procedure: *Pernod-Ricard v Office of Fair Trading* [2004] CAT 10, para 110.

22. On appeal in the *Pernod* case, the CAT held (at para 229) that section 60 was concerned not only with the substantive rules but also the procedural principles to be applied in the application and enforcement of the competition rules. Further, the CAT observed that section 60 imports “high level principles, such as proportionality, legal certainty and administrative fairness” into domestic law (see para 231). The CAT continued (at para 232) that an aspect of administrative fairness principle that the complainant has a “right to be heard” had stood for forty (now fifty) years, since the EU system was created in 1962. The CAT concluded (at para 234):

“In all these circumstances, we are of the view that, by virtue of section 60 of the Act, we should resolve the questions before us in the same way as they would be resolved under [EU] law in an equivalent situation. Indeed, it seems to us that section 60(2) of the Act gives us little or no choice in the matter. Nor can we see any good reason for not following [EU] law in situations such as that arising in the present case as regards complaints by competitors. The system as it has evolved under [EU] law appears to have worked satisfactorily, and has been an important element in ensuring fairness, transparency and rigour in decision making. We would have thought it undesirable if, at this stage of the development of [EU] law, the United Kingdom should go the other way on an issue such as this.

23. It should be noted, however, that the CAT considered that the same conclusion would be reached as a matter of domestic administrative law: see para 235.

Investigations and enforcement

24. The CMA and, within their respective spheres of activity, the sectoral regulators (listed in section 54), may conduct an investigation if there are ‘reasonable grounds for suspecting’ that any of Articles 101, 102, the Chapter I prohibition and/or Chapter II prohibition have been infringed.
25. The Competition Act 1998 (as amended by the Enterprise Act 2002, the Competition Act 1998 and Other Enactments (Amendment) Regulations and the Enterprise Regulatory Reform Act 2013) gives an extensive range of powers to the CMA and sectoral regulators, including:
- (a) to require documents and information (section 26);
 - (b) to ask questions (section 26A);
 - (c) to enter business premises without a warrant (section 27);
 - (d) to enter business premises with a warrant (sections 28);
 - (e) to enter domestic premises with a warrant (sections 28A);
 - (f) to adopt decisions (section 31), give directions (sections 32 and 33) and impose financial penalties (section 36).
26. The procedures for obtaining warrants authorising entry and search in the UK in relation to investigations by the European Commission and competition authorities of other

Member States are broadly similar to those which apply to CMA investigations, with variations reflecting the different nature of the investigation at issue: see sections 62 to 65N of the Competition Act 1998.

27. Finally in this regard, an important difference between UK and EU law is section 30 of the Act, which provides that a person is not required to produce or disclose a privileged communication with professional legal advisers, which, unlike EU law, include in-house lawyers.

The effect of Brexit

28. As noted above, the Competition Act 1998 introduced prohibitions into domestic law that are modelled upon Articles 101 and 102. It follows that, even after Brexit, many cases investigated under EU and under domestic law are likely to lead to the same outcome: for example, a price-fixing cartel that infringes Article 101(1) and affects both trade between Member States and trade within the UK, will also be caught by the Chapter I prohibition, unless, for example, it occurred in a sector that is currently excluded by section 3 of the Act.
29. The Chapter I and II prohibitions are not derived from any obligation imposed by EU law. It follows that, regardless of UK's withdrawal from the EU, they will continue to be a part of domestic law. To put the same point another way, in the absence of an Act of Parliament, Brexit (of whatever form) will have not have an immediate or necessary effect upon the interpretation or application of the Chapter I and II prohibitions.
30. The UK's withdrawal from the EU may have the following immediate consequences for the Competition Act 1998:
 - (1) Para 5 of Schedule 3 to the Competition Act 1998 provides that neither the Chapter I nor the Chapter II prohibition applies to an agreement or to conduct that is required to comply with a legal requirement. An immediate consequence of Brexit will be that a legal requirement will no longer be one imposed by the TEU or TFEU (or in the case of a 'hard Brexit' the EEA Agreement) since those laws will no longer have legal effect in the UK without further enactment.

- (2) After Brexit, the provisions of Article 3 of Council Regulation (EC) No 1/2003 will cease to apply in the UK. It follows that, where the competition authorities and courts of the UK apply national competition law to agreements or practices, they will no longer be obliged to apply Articles 101 or 102 where those provisions are applicable. It also follows that it would be possible for Parliament to enact stricter sanctions for anti-competitive agreements than those envisaged for transgressions of Article 101.
 - (3) The CMA will no longer have the power to withdraw the benefit of EU block exemption Regulations under Article 29(2) of Regulation 1/2003. This being so, para 8(b) of Schedule 9 to the Act will be otiose.
31. If the UK were to leave the EU, but remain a party to the EEA Agreement (commonly referred to as a ‘soft Brexit’), then the UK would remain bound by Articles 53 and 54 of the EEA Agreement. These, and other, provisions have been summarised in the section discussing the likely effect of Brexit on private competition law actions before the courts in the UK

Options and recommendations

32. We consider four specific issues that arise out of a potential hard Brexit for the future of the Competition Act 1998:
- (1) Should the UK modify or repeal the duty of consistent interpretation with EU law contained in section 60 of the Competition Act 1998?
 - (2) Should the UK modify or repeal the system of parallel exemptions contained in section 10 of the Competition Act 1998?
 - (3) Should the UK modify or repeal any of the EU-related exclusions from the Chapter I and II prohibitions?
 - (4) Should the UK remove the ability of the CMA to assist or act on behalf of the European Commission and competition authorities of Member States?
- (1) Should the UK modify or repeal section 60 of the Competition Act 1998?**

33. As noted above, regardless of UK's withdrawal from the EU, the provisions of the Competition Act 1998 will continue to be part of domestic law. That said, a hard Brexit throws into sharp relief the question of whether or not the competition authorities and courts of the UK should continue to be obliged to interpret UK competition law consistently with general principles of EU law and the jurisprudence of the Court of Justice of the European Union.
34. The basic argument in favour of repealing section 60 would be that it would be incongruous, after choosing to leave the EU, for the competition authorities and courts of the UK to be obliged to follow principles of EU law and the jurisprudence of the Court of Justice. If section 60 were repealed and not replaced with a different interpretative obligation, the courts in the UK would no longer be obliged to take the EU jurisprudence as they found it, and could refine domestic law as they would like it to be. This might be particularly important in cases where the EU jurisprudence is in a not altogether satisfactory state.
35. It might also be argued that, after Brexit, requiring domestic competition authorities and courts to concentrate on EU jurisprudence may prevent them from benefiting from the views expressed in cases from other jurisdictions when wrestling with widespread problems of competition law and policy. For example, the South African Competition Tribunal has developed its decisions by reference to the wisdom to be derived from all jurisdictions.
36. There are, however, a number of arguments in favour of retaining section 60:
 - (1) After Brexit, it is possible that EU and UK competition law may apply to the same agreement or practice. It is necessary therefore to deal with the problem of overlap so as to ensure consistency in interpretation and clarity of process. That is precisely why section 60 was enacted in the first place.
 - (2) The provisions of section 60 are well-understood. It has worked so well in practice that it has been relatively straightforward to maintain consistency between EU jurisprudence and decisions adopted under domestic law. In many cases, parties proceed on the basis that if the matters complained of infringed Article 101 then they would also infringe the Chapter I prohibition

Act and, vice versa: *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), para 298.

- (3) It is in no-one's interest to have nearly identical EU and UK prohibitions interpreted and applied to the same conduct in diverging or contradictory ways. There will always be exceptional cases where there is genuine disagreement as to the appropriate outcome of a particular case, but section 60 helps to maximise the likelihood of consistency.
- (4) It is in everyone's interest – including competition authorities, courts, businesses, and consumers in the UK – to know that Part 1 of the Competition Act 1998 will (so far as is possible) be interpreted consistently with the large body of case-law of the EU Courts as well as have regard to the decisional practice of the European Commission.
- (5) The provisions of section 60 already allow the competition authorities of the UK an appropriate degree of latitude (for example, by having regard to relevant differences between EU and UK law) to develop UK-specific policies on, for example, the imposition of financial penalties: see *GF Tomlinson v Office of Fair Trading* [2011] CAT 7, para 102.
- (6) There is no need to jettison section 60 when the UK has already been able to enact provisions of the Competition Act 1998 that deliberately differ from EU law. For example, sections 46 and 47 of the Competition Act 1998 provide for appeals on the merits to be taken to the Competition Appeal Tribunal against 'appealable decisions', which include both decisions that Chapters I and/or II prohibitions have been infringed and decisions that they have not been infringed. In *VIP Communications v Office of Communications* [2007] CAT 3, referring to section 60, the CAT stated that "*it may not always be possible or appropriate to achieve absolute uniformity, particularly if the relevant statutory provisions are different.*" There was no need to circumscribe the wide-ranging powers of the Tribunal to the EU Courts' more limited jurisdiction to hear actions for annulment.
- (7) Jersey is not a Member State of the EU, but has nonetheless modelled Articles 8 and 16 of the Competition (Jersey) Law Act 2005 upon Articles

101 and 102 TFEU *and* required those domestic prohibitions to be interpreted and applied consistently with EU law: see Article 60 of Competition (Jersey) Law Act 2005, which is not dissimilar to section 60 of the Competition Act 1998. This shows that it is possible to be outside the EU but seek to maintain consistency with EU competition law; the two are not mutually exclusive.

37. If, contrary to the arguments set out above, it were deemed appropriate to repeal section 60 and replace it with a lesser interpretative obligation, then the duty imposed on domestic courts by section 2 of the Human Rights Act 1998 has much to commend it. Section 2(1) requires that:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,*

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

38. Section 2(1) does not enjoin a domestic court or tribunal to place any particular weight on Strasbourg cases, still less does it require a court or tribunal to apply those cases strictly as precedent (cf. *Ambrose v Harris* [2011] UKSC 43, paras 18-19).
39. If section 60 were replaced with a similar obligation to the one contained in section 2(1) of the Human Rights Act, then it should apply to competition authorities as well as courts. UK authorities and courts would not be strictly required to follow the rulings of the General Court or Court of Justice, as they would be bound by the rulings of superior courts in the domestic curial hierarchy. Instead, they would merely be required to “*take into account*” the rulings of those foreign courts (and the decisions of the European Commission). That is to say, the UK authorities and courts

would be expected to have regard to case-law and decisional practice in the EU, and treat that law and practice as relevant when determining corresponding questions of UK competition law. The merit of this approach would be to guarantee that UK law and practice would keep pace with EU competition law as it evolves over time (see, to that effect, *In R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, para 20).

40. An obvious objection to the proposal in the previous paragraph is that the CMA, the CAT and/or courts in the UK might wish to fashion a distinctively British solution to certain competition law problems. For example, the UK case of *BetterCare Group Limited v Director General of Fair Trading* [2002] CAT 7 and the EU case of Case C-205/03 P *FENIN v Commission* EU:C:2006:453, was concerned with a similar issue about the procurement of services; however, the CAT and the Court of Justice reached different conclusions on when (if at all) such an activity should be subject to the competition rules. If, after Brexit, section 60 were to be abolished and not replaced at all, then a distinctive domestic competition law jurisprudence and decisional practice would probably emerge (although, even in this situation, it is not unreasonable to suppose that the authorities and courts would have regard to the EU jurisprudence and decisional practice).
41. We have reviewed in the preceding paragraphs the arguments each way. The issue is finely balanced. After Brexit, the inescapable objection to retaining section 60 in its current form is that it would be wrong for the courts in the UK to be obliged to follow EU law (which will be a foreign law) in interpreting its own domestic law, especially when the UK will no longer have any input into developing EU law. This being so, the pragmatic way forward in a post-Brexit world is for Parliament to repeal section 60 and replace it with a lesser interpretative obligation modelled on section 2(1) of the Human Rights Act 1998.

(2) Should the UK modify or repeal section 10 of the Competition Act 1998?

42. After Brexit, the question arises whether agreements that are block exempted under EU law (or would be block exempted if they were to have an effect on trade between Member States) should continue to be exempted from the Chapter I prohibition under domestic law.
43. The argument in favour of repealing section 10 of the Competition Act 1998 is that, after Brexit, it would be unacceptable for EU law, as a foreign law, to determine whether an anti-competitive agreement ought to be exempted from UK law. Since the Competition Act 1998 and Other Enactments (Amendment) Regulations SI 1261/2004 ended the system of notification, individual exemption for agreements and the OFT's 'monopoly' over decision-making under section 9(1) of the Competition Act 1998 with effect from 1 May 2004; and introduced the principle of 'self-assessment' of agreements under the Chapter I prohibition, it could be argued that there is no need for block or parallel exemptions.
44. As with section 60, however, there is a strong case for retaining parallel exemptions (even if they were to be renamed domestic block exemptions):
 - (1) Section 10 provides both simplicity and certainty for parties to agreements that benefit in EU law from block exemptions. If an agreement complies with the conditions of the EU block exemption, it is deemed to be exempted from domestic law. It is no doubt for this reason that draft standard terms and conditions for distribution agreements and bilateral licences of patents and know-how frequently track closely the wording of EU block exemptions.
 - (2) Experience shows that the system of EU block exemptions has worked well in practice. For example, when deciding to renew the block exemption Regulation for vertical agreements until 2022, the European Commission specifically took into account "*the overall positive experience*" with the application of the previous block exemption: see recital (2) to Regulation 330/2010, OJ [2010] L 102/1.

- (3) If there were concerns that a particular EU block exemption ran counter to UK interests or public policy, the CMA already has the power (under section 10(5) of the Act) to cancel or limit a parallel exemption in relation to agreements that satisfy the terms of an EU block exemption.
 - (4) There would be no need for Parliament to repeal section 10 if it would simply mean that the CMA would recommend that the Secretary of State adopt a series of domestic block exemptions that mirror the terms of the existing EU block exemption Regulations.
 - (5) If section 10 were to be repealed and the Secretary of State were to adopt domestic block exemptions that materially differ from EU block exemptions for the same type of agreements, there would be an obvious risk of conflict between UK and EU law. After Brexit, the UK would no longer be bound to respect the EU block exemption and refrain from applying its own stricter standards.
45. If, after Brexit, the Government were minded to repeal section 10 of the Competition Act 1998 (given its intimate connection with EU Regulations), there would be a compelling case for the CMA to recommend that the Secretary of State adopt a series of block exemptions for distribution agreements, technology transfer agreements, R&D agreements etc. as a matter of domestic law. For the reasons set out above, ideally, these domestic exemptions would mirror (or at least closely follow) the equivalent EU block exemption.

(3) Should the UK modify or repeal the exclusions to the Chapter I and II prohibitions?

46. As noted above, Schedules 1, 2 and 3 to the Competition Act 1998 provide for a range of agreements and conduct to be excluded from the Chapter I and II prohibitions.
47. Schedule 1 to the Act provides that the Chapter I and II prohibitions do not apply to mergers and concentrations in respect of which the European Commission has exclusive jurisdiction under the EU Merger Regulation. Whether or not this exclusion ought to be retained is likely to depend upon what arrangement, if any, the Government reaches in respect of the future scope and application of EU merger control.
48. The exclusions relating to (1) EEA markets (Schedule 3, para 3) and (2) agricultural products (Schedule 3, para 9) are both derived from provisions of EU law. The rationale for these exclusions essentially disappears after the UK's membership of the EU has ceased. They are therefore obvious candidates for repeal after March 2019.

(4) Should the UK remove the ability of the CMA to assist or act on behalf of the European Commission and competition authorities of Member States?

49. After Brexit, Articles 101 and 102 TFEU will be foreign competition laws in the UK. This being so, section 25 of the Competition Act 1998 will likely have to be amended to remove the power of the CMA to investigate suspected infringements of Articles 101 and 102 TFEU (on the basis that Articles 101 and 102 will no longer be directly applicable in the UK).
50. In addition, it will be necessary to consider whether the UK should retain the powers contained in Part II of the Competition Act 1998 (sections 62 to 65N) to help with investigations by the European Commission and/or the competition authorities of Member States of the EU. After Brexit, the UK would no longer be obliged by EU law (i.e. Articles 20, 21 and 22(2) of Regulation 1/2003) to provide such assistance or conduct an investigation on its behalf. Given this, it might be argued that Part II of the Competition Act 1998 should be repealed.

51. The better view is that the provisions in Part II of the Competition Act 1998 are valuable, and will continue to be so. They should therefore be retained. Cooperation between the competition authorities in the UK and the EU is already a fact of daily life, and so is coordination of enforcement. Indeed, it is likely to be counter-productive for the UK, after Brexit, to abolish the powers given to the CMA to assist with Commission investigations since: (1) the information obtained during such an investigation could well be relevant to a UK case; and (2) it would make it more likely that the Commission would refuse to assist the UK whenever it wanted to probe conduct outside the UK that adversely affects trade and competition in the UK
52. The point made in the previous paragraph also applies to the national competition authorities of the Member States, although the force of the point may vary according to how closely the UK cooperates with a particular country.

Transitional arrangements

53. If the decision were made to repeal any provisions of the Competition Act 1998 then consideration would need to be given as to whether to make any transitional arrangements. Such arrangements would allow a period of time for undertakings to adapt and adjust to any new means of interpreting the Chapter I and II prohibitions and/or to prepare for any repeal of parallel exemptions. In particular, it would be appropriate for the duties in section 60 of the Act to continue to apply in relation to conduct that occurred before the UK formally left the EU.

III. PRIVATE COMPETITION LAW ACTIONS

54. Below, we summarise the existing position as to the application of competition law before UK courts and tribunals.¹ We then describe the potential effect of Brexit (in both its ‘soft’ and ‘hard’ varieties) in this area. Finally, we consider options and recommendations, including consideration of any potential specific legislation required and transitional provisions.

The existing position

55. At present, by reason of the direct effect of Article 101 and 102 TFEU, the EU competition law prohibitions are applied directly in English courts as part of English law². When the conduct in issue occurred in part (or in whole) in the UK then EU competition law is typically relied on by litigants, and applied by the Courts, in parallel with our key domestic competition provisions, namely, Chapter I and II of the Competition Act 1998. As noted above, those domestic provisions are closely modelled on EU law, save that they only apply to conduct with an effect on competition and trade within the UK, as opposed to the EU. In practice, as things stand now, where EU competition law applies, the application of the corresponding domestic provisions are frequently otiose.

56. In addition, there are a number of further rules and procedures deriving from EU law that potentially affect a number of aspects of competition law claims before the English Courts. These include the following:

- (1) The rules relating to the effect and role of Commission decisions (and CJEU judgments relating to those decisions) before the English courts;
- (2) The rules and procedural provisions in Regulation 1/2003 and the Commission’s notice on cooperation with national courts;

¹ We have focused below on the effect on the courts and tribunals of England and Wales.

² Since the entry into force of Regulation 1/2003, the entirety of Article 101 TFEU (including the exemption in Article 101(3) TFEU) has direct effect and is applied by national courts: see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (“Regulation 1/2003”).

- (3) Rules on jurisdiction and recognition of judgments in the Recast Brussels Regulation 1215/2015 (“the Recast Brussels Regulation”) and on choice of law in the Rome II Regulation 864/2007 (“Rome II”);
- (4) The substantive and procedural rules contained in the soon to be implemented Damages Directive³.

The effect of Commission decisions

57. The binding status of Commission Decision’s emanates from Article 288 TFEU, which provides that decisions are binding in their entirety on those to whom they are addressed. The current position regarding the status and effect of Commission Decisions in national court proceedings derives from the general EU law principle of ‘sincere cooperation’ between national courts and Commission institutions, set out in Article 4(3) TEU as elucidated by the *Delimitis*⁴ and *Masterfoods*⁵ jurisprudence. It has been codified in Article 16 of Regulation 1/2003⁶ in the following terms:

“Article 16 Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under article [101] or article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under article 234 of the Treaty.

2. When competition authorities of the member states rule on agreements, decisions or practices under article 81 or article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.”

58. These principles have been incorporated into national law in the form of section 58A of the Competition Act 1998, which provides that “infringement decisions” (which include a decision of the European Commission “that the prohibition in Article 101(1)

³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

⁴ Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR I-935

⁵ Case C-344/98 *MasterFoods v HB Ice Cream* [2000] ECR I-11369, §§55-60.

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

or the prohibition in Article 102 has been infringed”), once final, are binding before the High Court (as well as in actions for damages and in collective proceedings before Competition Appeal Tribunal). Commission Decisions become final when the time for appealing against that decision to the European Court expires without an appeal having been brought or when an appeal to the European Court has concluded.

59. Similarly, pursuant to section 60(1) of the Competition Act 1998, national courts are required to ensure that issues of competition law are dealt with in consistent manner with the corresponding treatment under EU competition law. The Court must ensure that there is no inconsistency with the principles laid down by the Treaty and any relevant rulings of the CJEU (including appeal judgments on infringement decisions) (s.60(2)) and must have regard to any relevant decision or statement of the European Commission (s.60(3)). Section 60(1) is considered elsewhere in this document.
60. In accordance with this, the jurisprudence of the CJEU and English courts has established, in summary, that:
- (1) Claims in the English Courts involving the same issue as proceedings before the Commission may be progressed in terms of disclosure and evidence but must be stayed prior to any substantive trial until any relevant Commission decision becomes final (which typically means after the conclusion of any appeals from such decisions to the CJEU).⁷
 - (2) The operative parts of the Commission Decision (and those of the recitals to the Decision necessary to support the operative part) are binding upon the persons to whom they are addressed (unless overturned on appeal to the CJEU). It follows that an English Court cannot make a finding that is contrary to a finding of the Commission in a Decision that is in the operative part of a decision (or forms a necessary part of the reasoning leading to that operative part) at least in relation to proceedings involving an addressee of the decision in question (or a person that would have had standing to appeal the Commission decision).⁸

⁷ *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2009] EWHC 1326 (Ch).

⁸ Case T-91 *Air Canada v Commission* at [35] – [43].

- (3) In relation to findings in a Commission that are not in the operative part or not necessary reasoning for the operative part (or in relation to proceedings that do not involve either an addressee of the decision or a party that could have appealed the decision) the recitals in Commission Decisions are evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by the English court as persuasive.⁹

61. These principles are of some significance for claims brought in the English courts for alleged violation of Article 101 or Article 102 TFEU that are based upon a prior finding of liability established in a decision of the Commission i.e. what are called ‘follow on claims’.

The Damages Directive

62. The recent Damages Directive¹⁰ is due to be implemented by the UK by the end of the year. This contains a number of novel features:

- (1) It makes specific provision (in articles 5-8) in relation to the disclosure of certain categories of documents provided or received in the course of Commission investigations. In particular:
 - (i) It forbids disclosure in any circumstances of documents produced for the purposes of a leniency or immunity application or settlement submissions¹¹;
 - (ii) It forbids disclosure of other documents created for the purposes of a Commission investigation until the investigation has concluded¹².
- (2) In addition to the binding status of Commission decisions explained above, it sets out the status of decisions issued by national competition authorities as follows:

⁹ *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38

¹⁰ See note 1 above.

¹¹ Article 6(6).

¹² Article 6(5).

- (i) Final infringement decisions issued by the English competition authorities or the CAT will count as irrefutable proof of an infringement before the English courts in any follow on damages actions¹³ (although this is already part of English law); and
 - (ii) final decisions of the competition authorities of other Member States may be presented before the English Courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.
- (3) It provides for a minimum 5 year limitation period for damages actions based on Commission decisions (Article 10(3)), which shall not start to run before the infringement has ceased and the claimant knew certain key elements of his cause of action (Article 10(2). It also provides for the suspension of the limitation period during any investigation, appeal or ADR process (Article 18).
- (4) It provides for joint and several liability, but limits this in the case of SMEs and recipients of immunity from the European Commission.
- (5) It implements certain rules and presumptions relating to the proof, quantification and passing on of the overcharge in relation to claims by direct and indirect claimants (Articles 12-15).
- (6) It makes provision for the effect of settlement agreements on subsequent or continuing actions (Article 19).

The effect of a soft-Brexit

63. If the UK were to leave the EU but remain in the EEA Agreement and join EFTA¹⁴ then the UK would remain bound by the competition provisions of the EEA Agreement.

¹³ Article 9(1).

¹⁴ Complications would arise if we were to seek to remain in the EEA but were not able to join EFTA. Such complications are outside of the scope of this paper.

In this regard, Articles 53 and 54 of the EEA are materially identical to Articles 101 and 102 TFEU.

64. Secondary EU legislation in the competition field is, pursuant to Article 7 EEA, legally binding once integrated into the EEA Agreement. The acts relevant to competition are listed in Protocol Z1 and Annex XIV to the EEA Agreement, which incorporates the “Community *acquis*” in the competition field, subject to certain adaptations.
65. Instead of the Commission and CJEU, English companies would become subject to the investigation process and decisions of the EFTA Surveillance Authority (“ESA”) and to the supervisory jurisdiction of the EFTA Court. The division of competence between the Commission and ESA is also laid down in Articles 56 and 57 EEA (and the relevant Protocols). This division turns of whether certain turnover thresholds have been reached by the undertakings concerned in the territory of the EEA/EFTA States.
66. The rights and obligations of national competition authorities and courts when applying Articles 53 and 54 EEA are set out in Chapter II of Protocol 4 to the Surveillance and Court Agreement, in the Authority's Notice on co-operation within the EFTA Network of Competition Authorities, and in the Authority's Notice on co-operation with the Courts of the EFTA States in the application of Articles 53 and 54 EEA. Those provisions largely mirror the process under Regulation 1/2003.
67. Since 20 May 2005, following the entry into force of the modernisation reforms, the competition authorities of the EFTA States are empowered to apply Articles 53 and 54 of the EEA Agreement. National courts also apply those prohibitions. As in the EU, when national courts or competition authorities rule on conduct falling under Articles 53 or 54, they are not entitled to reach a decision that runs counter to a decision adopted by the ESA in the same case.
68. Other than the implications of the presence of the ESA and EFTA Court, the key differences in the application of competition law in the national courts following a soft Brexit would be:
 - (1) The Rome II Regulation on choice of law for non contractual obligations (including competition law infringements) would cease to apply.

- (2) The Recast Brussels Regulation on jurisdiction would cease to apply (but there might well be the possibility of joining the Lugano Convention if we were to join EFTA).
- (3) There would be no preliminary reference procedure to the CJEU (as opposed to the EFTA Court) and any rulings from the CJEU interpreting the application of Article 101/102 TFEU would not be automatically binding on the English Courts¹⁵.
- (4) The English Courts would not be required to “have regard” to any statements of decisions from the European Commission but they would owe a duty of “loyal cooperation” to the ESA and are precluded from issuing rulings that might counter an infringement decision from the ESA¹⁶.

It is doubtful whether these differences would have much practical impact on day-to-day conduct of private competition law actions before English courts and tribunals.

The effect of a hard Brexit

69. The effect of a hard Brexit will be rather more profound.

EU law will cease to apply to conduct implemented in the UK

70. EU and domestic competition law is territorial in nature i.e. they apply only insofar as competition is restricted (and trade actually or potentially affected) within either the EU or the UK respectively.¹⁷ Following a hard Brexit, Articles 101 and 102 TFEU will no longer apply in the territory of the UK law and will no longer be a part of our law (and would not be replaced by Articles 53 or 54 EEA). Similarly Regulation 1/2003 would no longer be directly applicable save where its provisions had been explicitly

¹⁵ An English court would be entitled (but there is no obligation even for the Supreme Court) to make a preliminary reference to the EFTA Court, although the latter’s rulings are merely advisory and not binding on the referring court. Similarly, although the EFTA Court has regard to the rulings of the CJEU, it is not bound by them and has departed from them in several cases.

¹⁶ Article 16(1) of Section IV of Chapter II of Protocol 4 SCA provides that a national court which rules on a matter under Articles 53 or 54 EEA which is already subject to an ESA decision cannot take a decision running counter to that decision.

¹⁷ *Iiyama Benelux BV & Ors v Schott AG & Ors* [2016] EWHC 1207 (Ch); *Iiyama (UK) Ltd & Ors v Samsung Electronics Co Ltd & Ors* [2016] EWHC 1980 (Ch)

incorporated into domestic legislation. The duty of sincere co-operation will no longer apply.

71. Articles 101 and 102 would continue to apply only if and insofar as the infringing conduct is implemented in (or, arguably, has immediate, foreseeable and substantial effects in) the remaining EU Member States (and has an actual or potential effect on trade within those States). If and insofar as the conduct amounting to an infringement of competition law only restricts competition within the UK (and not the remaining E.U. Member States) then the Chapter I and Chapter II prohibitions of the Competition Act 1998 alone would apply to such conduct. The territorial ambit of competition law will therefore respect our border.
72. However, the activities of those infringing competition law may well operate across our national border. In particular, it can be anticipated that some companies based in the UK will continue to infringe EU competition law by their activities on the Continent. Equally, some victims will suffer loss and damage from anti-competitive conduct that spans the UK *and* some or all of the remaining EU Member States.

Can claims be brought for violations of EU competition law in the English courts?

73. One implication of this is that potential claimants may, therefore, wish, even after a hard Brexit, to bring claims for a cartel or other infringement implemented (wholly or in part) on the European continent before the UK courts. It may be anticipated that such claims might be brought alongside similar claims based on UK domestic competition law (insofar as the infringing conduct was implemented in the territory of the UK). The attraction for claimants would be that they could potentially bring all claims arising out of a single infringing activity in a single jurisdiction (and in a jurisdiction with a high reputation for the fair and effective conduct of litigation).
74. By virtue of section 58A, even after Brexit, the UK courts (and Competition Appeal Tribunal) will, unless other provisions is specifically made, continue to be bound by final Commission infringement decisions for the purpose of follow on damages actions. Since s58A is part of statute (and not merely an EU regulation) it follows that, regardless of UK's withdrawal from the EU, the English High Court and Competition Appeal Tribunal will continue to be bound by that statutory provision even after the UK leaves the EU.

Procedural and substantive issues regarding the claim

75. It is understood that the Government intends to respect the obligation to implement the Damages Directive into UK law by the end of 2016 and intends to do so through a variety of primary and secondary legislation and “soft law”. After Brexit, those parts that are to be implemented by Statute (such as binding nature of decisions, limitation and joint and several liability) will remain part of UK law (unless removed in the ‘Great Repeal Bill’). It is anticipated that there will be some matters (such as quantification issues that are to be implemented through changes to the CPR and judicial guidance) that will not be retained.

Choice of law issues

76. A key issue that arises in relation to such potential claims is whether the English courts would recognise such a claim as justiciable relating, as it would, to an infringement implemented (at least in part) outside the territory of the UK and hence not covered (or not entirely covered) by UK competition law.
77. At the present time, our choice of law rules for competition law claims are governed by the Rome II Regulation. Article 6(3) of the Rome II Regulation provides for specific rules for the applicable law to competition law claims and expressly contemplates the application of competition law other than the law of the forum (i.e. it envisages the application in the UK of foreign competition laws). In particular, it provides:

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.”*

78. If, after Brexit, such a claim for an infringement implemented in Continental Europe were brought before the UK courts (or Competition Appeal Tribunal) it would, under Article 6(3), be either
- (1) Under 6(3)(a), be a claim governed by the law of the relevant EU Member State(s) where the relevant market(s) was affected (whether France, Germany e.t.c). The law of the Member State(s) in question would themselves incorporate Article 101 or 102 by reason of the principle of direct effect. Accordingly, if the Rome II Regulation is retained it is clear that it will, in principle, be possible to bring such claims based on Articles 101 and 102 (via the law of the relevant Member States) where the circumstances in Article 6(3) are satisfied.
 - (2) If the UK was also a market affected then, under 6(3)(b), the Claimant could also choose to apply UK competition law to the claim.
79. If, however, the rules in Rome II are not retained by Parliament then UK choice of law rules for non-contractual claims will revert to the rules contained in the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”). Under the 1995 Act, an alleged tort consisting of an infringement of competition law will, in summary and so far as likely to be relevant, be governed by the law where the significant elements of the tort occurred: s11(2)(c) of the 1995 Act. In the case of a competition infringement this is likely to be where the immediate damage was suffered (which will typically be where the goods or services in question were purchased by the claimant at an inflated price, which will, in turn, often be the place where the claimant is incorporated¹⁸).
80. However, the 1995 Act abolished the ‘double actionability rule’ which means that the mere fact that EU competition law is territorial in nature is itself no necessary bar to its enforcement in proceedings brought here. Nor is the fact that the tort for breach of Article 101 or 102 (via the law of the remaining Member State concerned) be quasi-statutory in nature. As Dicey & Morris state in the Fourteenth Edition (2006) of the Conflict of Laws (the edition preceding the introduction of the Rome II Convention) at 35-033: “*There is no reason in principle why an English court should not give effect to*

¹⁸ See *Iiyama (UK) Ltd & Ors v Samsung Electronics Co Ltd & Ors* [2016] EWHC 1980 (Ch)

[foreign] statutory liabilities as exist in the applicable law of the tort provided such liabilities are properly characterised as sounding in tort and no questions of extra-territoriality, public policy or non-enforceability of penal or public law arise”.

81. Accordingly, subject only to the possible exceptions mentioned by Dicey, it appears that the English courts will regard the application of Articles 101 and 102 (via the law of other Member States) as justiciable claims in much the same way and to the same extent that they will regard claims based on other foreign competition laws (similar to our own competition law) as justiciable.

Jurisdictional issues

82. In any particular case, however, a claimant also will need to establish English jurisdiction for a claim based on Article 101 and 102 (via the foreign competition law of another Member State).
83. The question has been considered elsewhere of whether, after Brexit, the UK will continue to apply the Recast Brussels Regulation, or join the Lugano Convention or fall back on the old Brussels Convention.
84. Whatever the position, all sets of rules potentially permit joinder of EU defendants to an anchor defendant domiciled in a contracting state. In particular, this is permitted where the claims against an (English) anchor and the other proposed defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
85. In this regard, the English courts have taken a generous approach to pleadings against English anchor defendants – permitting claims alleging secret infringements of competition law to proceed even in the absence of any direct evidence that the company in question was involved in the infringement¹⁹. It will, however, still be essential for a claimant to find an English defendant that may have been involved in the infringement of EU law on the Continent. A defendant that merely sold cartelised goods in the UK might not suffice, unless that defendant was also arguably a participant in the cartel insofar as it was implemented or directly affected the EU (ex UK). Furthermore, a

¹⁹ *KME Yorkshire Ltd v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190 at [38]. See also *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11 at [363(7)]

company with its registered office in England might also be able to sue EU defendants in England for all of its loss arising from a cartel (apparently regardless of where it initially purchased the cartelised goods or services) under Article 5(3) of the Brussels Convention (now 7(2) of the Recast Regulation).²⁰

86. Where there is jurisdiction against a defendant by virtue of the above provisions, the English courts have no discretion to decline jurisdiction under the doctrine of *forum non conveniens*.²¹
87. The position under the common law, which governs claims against foreign defendants that are not domiciled in the EU or EEA, is rather different. Such claims are not governed by the Brussels Convention (or the Lugano or Recast Brussels Regulation). Instead, a claimant against non-EU defendants will have to satisfy the requirements of the CPR and common law and show the following:
- (1) There is a real issue between the Claimants and an anchor defendant under Article 101 or 102 which it is reasonable for the Court to try and that the non EEA defendant is a necessary or proper party to that claim: CPR 6.37(1)(a), 6.37(2), and PD 6B paragraph 3.1(3).
 - (2) That the claim against the non EEA Defendant has a reasonable prospect of success: CPR 6.37(1)(b).
 - (3) That England is the proper place for the Claimants to bring the claim: CPR 6.37(3).
88. The applicable principles in applying the first condition were summarised by Lord Collins in *Nilon Limited v Royal Westminster Investments SA and others* [2015] UKPC 2 at [15]. It is important to note that, unlike with the Brussels Convention and Recast Brussels Regulation, the English court does have a ‘discretion’ to decline jurisdiction on ‘forum non conveniens’ or similar grounds: see, for example *Erste Group Bank AG London Branch v J 'VMZ Red October' & Ors* [2015] EWCA Civ 379. The courts may

²⁰ Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* at [51] – [56]

²¹ See *Owusu v Jackson* [2005] ECR I-1383.

be more willing to exercise this discretion in relation to claims under Article 101 and 102 that will, after Brexit, be claims under foreign law.

89. If, after Brexit, the common law alone were to apply then this would also have significant implications for the recognition of judgments. Pursuant to Articles 36 and 39 of the Recast Brussels Regulation, a judgment given in a Member State is recognised and enforceable in all other Member States without the need either for any special procedure or for any declaration of enforceability. In its absence, enforcement of a non-EU judgment in an EU Member State will be a matter for local law.

Options and recommendations

90. We consider four specific issues that arise out of a potential hard Brexit:
- (1) Should the UK introduce specific provision to either prevent, or alternatively to ensure, the ability of the English courts to entertain claims for violation of Articles 101 and 102?
 - (2) Should the UK take immediate steps to repeal s58A of the Competition Act 1998?
 - (3) Should the UK introduce specific measures relating to the Damages Directive?
 - (4) Should the UK introduce measures in the field of competition law to mirror the terms of the Brussels Regulation Recast or Rome II?
- (1) **Should the UK introduce specific provision to either prevent, or alternatively to permit, the ability of the English courts to entertain claims for violation of Articles 101 and 102?**
91. As noted above, after Brexit, claims based on Articles 101 and 102 may potentially be brought as part of claims based on the law of a remaining Member State.
92. here does not seem to be any compelling reason to make specific provision either to prevent or to permit such claims. This is because:
- (1) After Brexit, EU competition law will be confined in its application to its territorial ambit, i.e. to the territory of the remaining EU Member States and

should not extend to the UK. Accordingly, insofar as EU competition law is applied by the Courts of the UK after Brexit (to events occurring in the period after Brexit) it should not interfere with our territorial sovereignty.

(2) As noted above, such claims are likely to be permitted or not permitted by the UK Courts on the same basis as other claims based upon foreign competition laws. There seems no reason for Parliament to legislate either to prevent or preclude claims based on EU competition laws as opposed to, for example, claims based on Korean competition law.

(3) Insofar as the application of any particular aspect of EU competition law is seen to be objectionable on the grounds of public policy here (and is not precluded by our Courts) the Secretary of State already has sufficient powers under the Protection of Trading Interests Act 1980 to address the position.

(2) Should the UK take immediate steps to repeal s58A of the Competition Act 1998?

93. The case for repeal of s58A would be that it would be inappropriate, after choosing to leave the EU, for the English courts to continue to be bound by any measures of the European Commission.

94. There are, however, a number of persuasive arguments to the contrary, namely:

(1) After Brexit, the territorial ambit of EU Commission decisions will no longer extend to conduct implemented in the UK. Accordingly, although the English courts will continue to be bound by Commission decisions, the Commission decisions themselves should only apply to conduct implemented outside the UK or having an immediate, substantial and foreseeable effect outside the UK.

(2) If s58A were repealed the effect would not be to liberate the addressees of Commission decisions from the binding effect of those decisions (or their consequences in follow on damages actions).²² Rather, the effect would be to

²² It might be that defendants would not be liberated even if claims were brought in the English courts if it transpires that the binding effect of Commission decisions is (via Regulation 1/2003 and the Damages Directive) to be properly regarded as part of the applicable substantive (as opposed to procedural) foreign law.

encourage claims based upon those Commission decisions to be brought in Member States of the EU (where they would clearly continue to be binding) rather than in the UK. It is unlikely to be to the advantage of UK businesses, whether they be claimants or defendants in such actions, to be forced to litigate such claims by way of an unfamiliar process (and likely in a foreign language) before the courts of EU Member States rather than in this jurisdiction.

- (3) If a follow-on action based on violation of Article 101 were to be brought in a Member State then the Commission decision would be binding. It would be curious, therefore, if in an action based on the law of that Member State (incorporating Article 101) but brought in England that the Commission decision would not be binding. Even if s58A were repealed then it is possible that the English courts would in any event regard themselves as bound by Commission decisions insofar as they were implementing the competition law (including EU competition law) of the remaining Member States. This is because the binding nature of Commission decisions might be regarded as part of substantive law, as opposed to procedural law, of the remaining Member State. This might depend upon which choice of law provisions are in force in the UK at the time.
- (4) If there were concerns that a particular Commission decision ran counter to British interests or British public policy (e.g. because it was perceived as a transparently political decision targeting a UK company) then there already provisions in the form of the Protection of Trading Interests Act 1980 for the Government of the day to take steps to disapply it.

95. Overall, therefore, we do not see a strong case for repealing s58A at the present time. We would recommend that the continued role of s58A be considered as part of a more general and considered review of UK competition policy to be undertaken after Brexit.

(3) Should the UK introduce specific measures relating to the Damages Directive?

96. In general, the Damages Directive is liable to have a lesser effect on UK competition law litigation than in many other Member States (where rules on disclosure, in

particular, are less developed). That is largely because the procedural reforms introduced by the Damages Directive were in significant part modelled on the English process. The Directive is only likely to have a significant effect in a relatively limited number of circumstances in relation to cases brought in England and, accordingly, its absence is unlikely to act as a deterrent to claims in the UK. If anything, the removal of certain innovations might actually encourage litigants to make use of the English courts.

97. Two points are, however, worthy of mention. First, absent the Damages Directive there will be no prohibition on disclosure of leniency documents (i.e. documents produced for the purposes of seeking immunity or leniency from fines from the European Commission) or settlement documents. Moreover, if we are outside the EU altogether then it is at least questionable whether the English courts would regard there as being any absolute impediment to the disclosure of such documents in a private action for damages.
98. The potential for such disclosure could act as an incentive for claimants to bring their actions in the UK. On the other hand, such disclosure, if it became routine, could reduce the willingness of leniency and immunity applicants to come forward to the Commission, thereby undermining the efficacy of the Commission's leniency and immunity programme. This is something that might need to be considered in the context of any negotiations with the European Commission regarding future cooperation in the field of competition law.
99. It may be unnecessary to repeal any implementing measures, especially where the provisions of the Damages Directive have limited impact or their removal could deter claims being brought in the UK. However, if there were to be a repeal of such implementing measures, it would be curious if the Damages Directive were not to apply to claims brought in the UK courts under EU law (including those relating to conduct implemented in the UK where that conduct took place at a time when EU law applied).

(4) Should the UK introduce measures in the field of competition law to mirror the terms of the Brussels Regulation Recast or Rome II?

100. Whether the precise provisions adopted are those in Brussels Recast, Brussels Convention or Lugano Convention, little is likely to change in the technical ability to bring competition law claims in the UK. However, it is our view:

- (1) A return to the common law provisions to claims in respect of EU Defendants would create uncertainty for claimants by reason of the existence of the ‘forum conveniens’ discretion.
- (2) The absence of any provision for reciprocal enforcement of judgments could create uncertainty in the ability of claimants to enforce any judgments against defendants domiciled in EU Member States.

Accordingly, from the perspective of future competition law claims, it would be desirable to seek to ensure an arrangement based on one of the possible regimes (Brussels, Lugano) and arrangements for the reciprocal enforcement of judgments as between the UK and EU Member States.

101. As regards choice of law, while the Rome II Regulation is largely untested, the specially tailored competition law choice of law rules appear to offer greater clarity and specificity than the more general regime for all torts that applies under the 1995 Act. It would therefore be desirable from a competition claim standpoint, to retain it.

Transitional provisions

102. If, contrary to our primary recommendations above, the decision were made to repeal s58A or the provisions implementing the Damages Directive then consideration would need to be given to address the position where a Commission Decision was handed down after the repeal of s58A but relating in whole or in part to an infringement that occurred before the UK left the EU (and hence to a time when the UK was bound by EU law).
103. It is believed to be uncontroversial that considerations of legal certainty (and reciprocity with the EU) require that, in relation to events that occurred prior to the departure of the UK from the EU our courts and tribunals should continue to apply EU in full. In accordance with this, it would be appropriate to make transitional provision to the following effect:
 - (1) To ensure that s58A would continue to apply in relation to Commission Decisions insofar as they relate to conduct that occurred before the UK

formally left the EU (irrespective of the date of the Commission Decision in question).

- (2) To ensure that the provisions implementing the Damages Directive would continue to apply in relation to claims relating to conduct that occurred before the UK formally left the EU (irrespective of the date of the Commission Decision in question).
- (3) To ensure that the provisions of Brussels Recast and Rome II would continue to apply in relation to claims relating to conduct that occurred before the UK formally left the EU (irrespective of the date of the Commission Decision in question).

IV. MERGER CONTROL

104. In this paper, we summarise the existing regime for merger control in the UK and EU, and then consider the implications of leaving the EU for the UK regime. We explain first that if the UK remains in the EEA (or something like it), then Brexit will have no impact on merger control in the UK. If, however, the UK leaves the EEA as well, there will be implications for the scope of the UK's merger control jurisdiction (with consequent implications for the regulatory burden on parties, workload of the CMA, and scope of UK's economic sovereignty), for the need for greater coordination between the CMA and the European Commission and other regulators on remedies for potentially problematic mergers, and for potential reform of the UK regime more generally. There will also be a need for transitional measures.
105. In short, if the UK opts for a "hard Brexit", leaving not only the EU but also the EEA, the CMA's workload would expand dramatically and may even double, as well as changing substantially in character, from focussing almost exclusively on small or UK-centric mergers to reviewing a substantial volume of large, global mergers. That has implications for the resources that the CMA's merger control function will require, and for its need to cooperate with the European Commission and other global regulators when fashioning remedies for problematic mergers. Given that, it may also be necessary or at least desirable to consider aligning the CMA's procedural timetable to fit more closely with that of the European Commission. Although we also discuss the possibility of reforming the UK's jurisdictional rules to adjust for the implications of Brexit, our view is that this is something that should be kept under review in the first few years of Brexit, because it would be preferable, if possible, to retain the current combination of wide, flexible jurisdictional thresholds and voluntary notification.

The existing relationship between UK and EU merger control

106. Merger control in the modern global economy can best be thought of as a series of overlapping "veto rights" that States have over mergers that affect competition in their jurisdictions. It is common for mergers of multinational businesses to require merger control clearances from several, or even many, different competition authorities around the globe. For example, Kraft's takeover of Cadbury was considered by competition

regulators in at least the EU, US, Turkey, South Africa, Brazil, Australia and Jersey.²³ Each of those jurisdictions has the power, on its own, to block the merger, or to impose conditions that must be satisfied (e.g. that the merging parties divest particular assets) before the merger can be completed.

107. In order to reduce the regulatory burden on European mergers, the EU operates a “one stop shop” for large mergers that have the potential to affect competition in several EU Member States. For mergers that meet the conditions for EU jurisdiction (explained in more detail below), the merging parties need only notify and obtain clearance from the European Commission, and not any of the competition authorities of the EEA Member States. Of course, if the merging parties operate in other jurisdictions as well, then clearances may also be required in those jurisdictions. All the same, the “one stop shop” operates to reduce the number of clearances required for European mergers substantially. To take the example of *Kraft/Cadbury* again, the European Commission’s decision to clear that merger investigated competition issues in the UK, Ireland, France, Portugal, Poland, Romania in some detail, and also considered briefly issues in Bulgaria, Germany, Greece, Hungary, Latvia, Lithuania, The Netherlands, Slovakia, Slovenia, Sweden, Cyprus, the Czech Republic and Spain. It is not known how many of those States would have required notification in the absence of the one stop shop, but it is likely that the number would be substantial.
108. The scope of the “one stop shop” is defined by Article 1 of Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EUMR”). Article 1 provides two sets of turnover thresholds to qualify for EU jurisdiction. If the merging parties satisfy either set of thresholds, the merger qualifies and must be notified to and cleared by the Commission prior to completion.
109. The first set of thresholds, set out in Article 1(2), provides that a merger qualifies if:
 - (1) the combined aggregate worldwide turnover of the parties is more than €5bn;
 - (2) AND the aggregate EEA turnover of at least two of the parties is more than €250m;

²³ The parties did not publish a full list of jurisdictions in which they required competition clearances

- (3) UNLESS each of the parties achieves more than two thirds of its EEA turnover within one and the same Member State.
110. The alternative set of thresholds, set out in Article 1(3), provides that a merger qualifies if:
- (1) the combined aggregate worldwide turnover of the parties is more than €2.5bn;
 - (2) AND the combined aggregate turnover of the parties is more than €100m in each of at least three EEA Member States;
 - (3) AND at least two of the parties achieve more than €25m each in those same three Member States;
 - (4) AND the aggregate EEA-wide turnover of the parties is more than €100m;
 - (5) UNLESS each of the parties achieves more than two thirds of its EEA turnover within one and the same Member State.
111. Where the merging parties satisfy the conditions for notification to the European Commission, Member States are prohibited from applying their own national competition laws: Article 21(3) EUMR. Where the merging parties do not satisfy the conditions, however, Member States are free to apply their own national competition laws.
112. The jurisdictional thresholds for the CMA's power to review mergers that do not qualify for EU notification are set out in Part 3 of the Enterprise Act 2002. In particular, s 23 provides that the CMA has jurisdiction where the merging parties have UK turnover in excess of £70m, OR they have a combined share of supply at least 25% in the UK or a substantial part of the UK.
113. The UK merger control regime is somewhat unusual in that it operates a voluntary notification system. Even where the CMA has jurisdiction, the parties do not have any obligation to bring it to the attention of the CMA, or to wait for CMA clearance prior to completing the merger. That is in contrast with the position in most jurisdictions, where non-notification results in substantial civil penalties even if the merger is not in

any way anticompetitive. In some jurisdictions (e.g. Jersey), a failure to notify can even render the transaction void within that jurisdiction. However, where the CMA has jurisdiction, the CMA can investigate and prohibit a merger, and, if it has already been completed, it can order the parties to unwind the merger or to comply with conditions to address any competition concerns it has identified (e.g. divest particular assets). The CMA has four months from the date on which it becomes public knowledge that the merger has completed to take action (s 24 Enterprise Act).

114. In addition to that basic division of jurisdiction between the EU “one stop shop” and the Member States such as the UK, the EUMR also provides for a system of referrals from the European Commission to the Member State authorities and vice-versa. Thus, where a merger satisfies the EU thresholds and therefore must be notified to and examined by the Commission to the exclusion of the Member States, but the merger has particularly significant effects in the UK, Article 9 EUMR empowers the Commission – on its own motion or at the request of the CMA or the parties – to refer the UK aspects of the merger to the CMA for the CMA’s consideration and approval. Similarly, Article 22 EUMR empowers the Commission to examine a merger that does *not* meet the EU thresholds if the UK (or any other Member State) requests that the Commission should do so.
115. Another feature of cooperation in merger control within the EU is the EU Merger Working Group, which consists of all of the competition authorities in the EEA as well as the European Commission. The Working Group has agreed a set of Best Practices on Cooperation between EU National Competition Authorities in Merger Review, which provide for the sharing of information between the authorities (with the consent of the merging parties).

Implications of Brexit for the scope of the UK’s merger control jurisdiction

116. If the UK leaves the EU but remains in the EEA, the one stop shop system described above will continue to operate in essentially the same way. That is because Article 57 of the EEA Agreement provides that the European Commission has sole competence to examine mergers that satisfy the EUMR turnover thresholds. Article 57 also provides for review by the EFTA Surveillance Authority of mergers that do not satisfy the EU thresholds but do satisfy the corresponding thresholds based on turnover in just the EEA

Member States (currently Norway, Iceland and Liechtenstein), but there has never yet been a merger that fell within that category. In practice, it is therefore likely that large mergers affecting the UK and several EU Member States would continue to be examined by the European Commission, although it is possible that the addition of the UK to the EEA might make it more likely that at least some mergers would fall to be examined by the EFTA Surveillance Authority. The UK would also continue to benefit from the possibility of having mergers referred back from the European Commission where the merger thresholds are satisfied but the UK market is particularly affected by the merger: Article 6 of Protocol 24 to the EEA Agreement.

117. If the UK leaves the EU and the EEA, the consequences for merger control would be more pronounced. Barring any bespoke arrangement to the contrary, the UK would no longer participate in the “one stop shop”. Although mergers that affect the UK would continue to be notifiable to the European Commission where they also satisfy the EU thresholds for notification, such mergers would also fall within the jurisdiction of the CMA, and could be blocked by the CMA if the CMA took the view that they were anticompetitive. That would impose a modest additional regulatory burden (including the addition of the CMA's filing fee) on merging businesses (modest, because it would only be one additional competition authority to deal with, in the context of deals that may well require several notifications around the world).
118. Although the additional burden on merging parties would be modest, the additional burden on the CMA could be very significant. The European Commission took 99 substantive Phase I merger control decisions in calendar year 2015.²⁴ Of those, 22 specifically analysed competition in UK markets.²⁵ It is likely that all 22 of those mergers would have also needed to be investigated by the CMA if the UK had not been part of the “one stop shop” system in 2015. In addition, many of the other 75 European Commission decisions may have needed to be investigated by the UK if they concerned global, EEA, or regional markets that included but were not limited to the UK. Given

²⁴ See <http://ec.europa.eu/competition/mergers/statistics.pdf>. The European Commission cleared 297 mergers without conditions, but 222 of those were under the “simplified procedure”, meaning that there were no substantive competition issues to address. Mergers of that kind would be unlikely to be notified to the UK even in the absence of the “one stop shop”, because notification in the UK is voluntary. In addition to the 75 substantive unconditional clearances, the Commission also approved 13 mergers subject to conditions, and initiated Phase II proceedings in respect of a further 11 mergers.

²⁵ See the list of Commission decisions in 2015 that specifically analysed competition in UK markets at the end of this paper.

that the CMA only took 62 Phase I decisions in financial year 15/16,²⁶ it is easy to see how leaving the one stop shop system could lead to an increase in workload of 50-100% for the CMA merger team, at least if parties take a conservative approach to notifying the CMA or the CMA itself takes a conservative approach to ensuring that it does not miss any mergers that could plausibly have adverse effects on the UK market. If the CMA's merger filing fees are cost reflective, however, additional receipts from those fees ought to go some considerable way towards funding the additional work required.

119. In addition to those direct effects of leaving the one stop shop, the removal of the UK would also make a small difference to the set of mergers that require notification to the Commission. Some mergers that currently satisfy the EU thresholds may not do so if the UK turnover of the parties does not qualify as EEA turnover. At the same time, a small number of very large UK-centric mergers that are excluded from EU jurisdiction because the merging parties have more than two thirds of their turnover in the UK may require EU notification if the UK leaves the one stop shop. It is easy to imagine, for example, how a merger of two large UK banks might not require clearance from the European Commission if the UK were in the EEA (because UK banks would be likely to have more than two thirds of their EEA turnover in the UK), but might well require clearance from the European Commission if the UK were not in the EEA (because the banks' European operations may still be large enough to meet the EU thresholds even if UK turnover were not counted, but the parties could not benefit from the "two thirds" exclusion if the UK were not part of the EEA). In terms of workload for the CMA or regulatory burden for the parties, these indirect effects are likely to be of second order significance. They could, however, make a substantial difference (in one direction or the other) to the scope of the UK's economic sovereignty. For example, if the *Lloyds/HBOS* merger in 2008 had qualified for notification to the European Commission, it is doubtful that the UK Government would have achieved its (then) policy objective of supporting the merger in the interests of UK financial stability.²⁷

²⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564329/merger-inquiry-outcomes-to-31-october-16.pdf.

²⁷ By decision of 31 October 2008, the Secretary of State decided, notwithstanding the recommendation of the OFT on competition grounds, not to refer the merger to the Competition Commission for a Phase II investigation, on grounds of financial stability.

Implications for the need for coordination on remedies

120. It is a general feature of merger control regimes that the vast majority of notified mergers are ultimately cleared. For example, of the 99 substantive cases that the European Commission examined in 2015, 75 were cleared in Phase I without remedies, 13 were cleared with remedies, and 11 were referred to a Phase II investigation. Even of the eight Phase II decisions that the Commission took in 2015, one was cleared without remedies, and seven were cleared with remedies. Only one merger has been prohibited in the past three years: M.7612 *Hutchinson 3G UK / Telefonica UK* (11/05/16). The position is similar in the UK. Of the 62 Phase I decisions taken by the CMA in financial year 15/16, 42 were cleared without any remedies, nine were cleared with remedies, and 11 were referred to a Phase II investigation. Of the nine Phase II decisions taken by the CMA, eight were cleared without remedies, and one was cleared with remedies.²⁸
121. As explained above, one implication of the UK leaving the one stop shop system is that the CMA will have more work to do: possibly as much as double the case-load that it currently has. It stands to reason that while most of those additional cases will result in further unconditional clearances, there will be at least a handful of additional cases each year that require remedies. As well as being additional work, however, those cases are likely to differ substantially in complexity from the cases that the CMA is used to dealing with. That is because one implication of the one stop shop system is that the cases which fall to be considered by the CMA tend either to be small, or to be highly UK-centric. Any large-scale multi-national merger that has a real impact in the UK is likely to be notified to and considered by the European Commission rather than the CMA. If the UK leaves the one stop shop system, however, that will change: the UK will review large, complex, multinational mergers alongside the European Commission and many other competition regulators around the world.
122. One important implication of that will be the need to work together with other regulators to fashion remedies (especially divestment packages) that address competition issues arising in the various jurisdictions in as coordinated a manner as possible. The CMA already has *some* experience of doing this, as discussed in

²⁸ In both jurisdictions, a handful of mergers were also cancelled at some point in the process, which could be interpreted as a *de facto* prohibition.

paragraphs 2.23-2.24 of the CMA's Merger Remedies Notice. But this will inevitably become a much bigger task for the CMA in the future if the UK leaves the one stop shop. In particular, cooperation with the European Commission will be essential in cases where competition issues arise in geographic markets that extend across the EU and UK. For example, it is often the case that UK and Irish markets overlap. It would make no sense (either for the parties or for competition) for the UK to fashion a different remedy from that adopted by the European Commission to fix a problem in one and the same geographic market. But equally, each authority would be independent and subject to judicial review in its own jurisdiction, so each authority would need to take its own robust decision on the right solution for the merger at hand.

123. In order to facilitate that process of coordination, it would be desirable for the UK either to remain in the EU Merger Working Group or to negotiate some replacement for it, perhaps along the lines of the European Commission's arrangements with the US antitrust authorities. Failing that, the CMA could continue to rely on its practice of exchanging information with third country authorities with the consent of the parties.²⁹ But more formal and ongoing arrangements with the European Commission in particular would be desirable given the extent of overlap that is likely as to the competition issues that the European Commission and CMA would be examining in large European merger cases.
124. One complicating factor in coordinating remedies across borders is the timing of the respective competition authorities' merger control processes. In the cases of the UK and EU processes, the timings are somewhat different:
 - (1) The UK Phase I process can last up to 40 working days from notification, plus a further 10 days for the CMA to accept any proposed remedies on a provisional basis, followed by a further 40 days of negotiation of the detail of any provisionally accepted remedies.
 - (2) The EU Phase I process, however, concludes in 25 working days from notification if no remedies are offered, or up to 35 working days if remedies

²⁹ Mergers: Guidance on the CMA's jurisdiction and procedure, para 19.5.

are offered. There is no further period for detailed negotiation of the remedies after that: they are either accepted or rejected.

- (3) The UK Phase II process lasts for 24 weeks (roughly 120 working days), extendable by up to a further 8 weeks (i.e. roughly another 40 working days).
- (4) The EU Phase II process lasts for up to 125 working days.

125. It is therefore the case that, if a merger were notified to the European Commission and the CMA at the same time, then in the natural way the Commission would come to decide remedies substantially before the CMA would. To some extent that is an inevitable feature of global merger control – it is unrealistic to seek to coordinate the timings of all competition authorities around the world. It is also manageable, to some extent – the parties, and indeed the competition authorities, have considerable flexibility to adjust the start date for the investigation of any particular merger, and can even pause the timelines during the procedure for various reasons (e.g. if the parties have not provided information that the authorities require). Nevertheless, given the particularly close interaction that is likely between UK and EU remedies, it would be worth considering adjusting the UK timeline in the event of Brexit to align more closely with the EU timeline.

Broader reform of the UK merger control system

126. From time to time, the UK Government considers whether to make more radical reforms to the UK merger control system, in particular reforming or removing the voluntary nature of notifications.³⁰ As noted above, the UK regime is unusual in not requiring parties to notify to the CMA mergers that satisfy the statutory criteria for jurisdiction.

127. When the Government last considered introducing mandatory notification, it decided not to do so because of the increased burden on business and the CMA that would be involved, and also because of the interaction of a mandatory notification obligation with

³⁰ Most recently, see the Department for Business Innovation & Skills consultation paper: A Competition Regime for Growth: A consultation on Options for Reform March 2011, Ch 4. This led to a decision to strengthen the regime somewhat in the Enterprise and Regulatory Reform Act 2013, while retaining its voluntary notification system.

the UK unusually wide and fuzzy jurisdictional criteria.³¹ As noted above, the UK's turnover threshold is very low: £70m. As also noted above, there is also an alternative "share of supply" threshold of 25%, which is not straightforward to apply. Furthermore, the UK's definition of a merger is very broad, encompassing not only changes of control of businesses in the usual sense, but also acquisitions of minority stakes that amount to "material influence" over a company. Imposing a mandatory notification obligation for all mergers that satisfy those thresholds would be inappropriate for two reasons: it would lead to far too many notifications of unproblematic mergers; and parties would not be able to tell with certainty in advance whether their merger required notification (because of the flexibility of the "share of supply" and "material influence" criteria), and could therefore be penalised for failing to comply with an obligation that might be said to be fundamentally uncertain.

128. Leaving the one stop shop might be thought to provide an occasion for reconsideration of those issues. As noted above, the CMA's role would be substantially different in a world outside the one stop shop. Rather than focussing almost exclusively on small and UK-centric mergers, a substantial part (perhaps half) of the CMA's diet would consist of very large, global (or at least pan-European) mergers. With such a different mix of work and challenges, it would be natural to consider afresh whether the jurisdictional and notification rules are fit for purpose.
129. Although it would be worth keeping the matter under review, our view is that it would not be desirable to abandon the voluntary regime in the first instance. From the perspective of identifying mergers with competition issues worthy of review, the difficult task is likely to be sifting through the body of small and UK-centric mergers that the CMA currently deals with. Sifting through the few hundred mergers that are notified to the European Commission each year for any that raise competition issues in the UK would certainly involve extra work on the part of the CMA, but the review of an up-to-date public register maintained by the European Commission ought to be a simpler task than sifting through the local and trade press for small UK mergers that might otherwise escape review. If it does transpire that reviewing the Commission's register proves too resource-intensive for the CMA, it would be worth considering a limited mandatory notification obligation for very large mergers (by turnover), and

³¹ See the Government Response to Consultation, March 2012, para 5.8.

retaining voluntary notification for the wider set of mergers caught by the more flexible elements of the UK's jurisdictional thresholds.

130. Another issue that may be identified as warranting reconsideration is whether the substantive test applied by the CMA should be reconsidered. One of the major reforms of the Enterprise Act 2002 was the replacement of a general “public interest” test for mergers with a specific “substantial lessening of competition” test to be applied by the CMA, supplemented by other specific public interest criteria (e.g. media plurality) that the Secretary of State can apply when the need arises.
131. In our view, the question of the substantive test to be applied should not be revisited as part of the Brexit process. The arguments for and against a wider public interest test are entirely independent of the question of whether the UK regime should operate within the one stop shop system. The UK has always been free to adopt a public interest test to mergers falling within its jurisdiction. In our view, there were very good reasons for abandoning the “public interest” approach in the 2002 reforms in favour of one that is based on effect on competition: the Government retains the flexibility to adopt any new public interest consideration that it considers appropriate when the need arises (e.g. a financial stability criterion was introduced specifically to deal with the *Lloyds/HBOS* merger), but in general the focus is on competition and in all cases mergers are judged against clear, objective criteria. That is important for investor confidence in the application of the rule of law to the market for corporate control. We recognise that there are also good arguments in favour of a more flexible ‘public interest’ test, but if the Government is minded to reconsider this issue, in our view it would make sense to do that *after* having given a stand-alone UK system a chance to bed down in the years after Brexit.

Transitional measures

132. If the UK does leave the one stop shop system, it will be necessary to put in place at least some provisional measures for mergers that have already been notified to the European Commission prior to Brexit. Any such mergers should continue to benefit from the “one stop shop” principle and therefore not be subject to separate consideration by the CMA, even if they only complete post-Brexit. That would require amendment to the Enterprise Act 2002.

133. Similarly, even if such a merger no longer qualifies for notification post-Brexit (for example, because once UK turnover is removed, the EU-wide turnover threshold is no longer met), the Commission should retain jurisdiction under the EUMR to complete its investigation and either approve or prohibit the merger. All of its investigatory powers – e.g. to request information or to penalise the provision of false information – should continue. The parties would retain the right, however, to withdraw their notification and then pursue the merger without notification to the Commission if the merger did not qualify for notification at the date of completion. That would require amendment to the EUMR, or some other EU law instrument to the same effect.
134. Those are what we consider to be the essential transitional measures in order to provide for the orderly exit of the UK from the one stop shop. In addition to those measures, it would also be worth considering the desirability of extending the Commission’s enforcement powers in the UK – including the power to carry out “dawn raids” (though that power is rarely used in the mergers context) in respect of mergers that fell within the Commission’s jurisdiction up to the date of the UK’s exit from the one stop shop (and so including any mergers that were analysed by the Commission pursuant to the transitional measures described above). The merit of taking that approach would be that conditions imposed by the Commission for the protection of competition in the UK could continue to be enforced in the public interest of the UK. In addition (perhaps as a quid pro quo for that extension of the Commission’s jurisdiction), it would also be worth considering seeking an extension of merging parties’ UK legal representatives’ rights of audience before the EU courts in respect of those mergers that are the subject of Commission decisions during the transitional period described above.

List of 2015 European Commission Phase I merger decisions that specifically analysed the UK market:

- (1) M.7464 *BLADT INDUSTRIES / EEW SPECIAL PIPE CONSTRUCTIONS / TAG ENERGY SOLUTIONS LIMITED’S ASSETS* (20/01/15)
- (2) M.7417 *SIME DARBY / NEW BRITAIN PALM OIL* (23/01/15)
- (3) M.7276 *GSK/NOVARTIS* (28/01/15)
- (4) M.7478 *AVIVA / FRIENDS LIFE / TENET* (13/03/15)

- (5) M.7480 *ACTAVIS/ALLERGAN* (16/03/15)
- (6) M.7459 *BECTON DICKINSON AND COMPANY / CAREFUSION*
(13/03/15)
- (7) M.7479 *KINGSPAN / STEEL PARTNERS* (16/03/15)
- (8) M.7483 *ABELLIO TRANSPORT / SCOTRAIL* (18/03/15)
- (9) M.7537 *ARDIAN FRANCE / F2I SGI / F2I AEROPORTI* (21/04/15)
- (10) M.7529 *MOHAWK INDUSTRIES / INTERNATIONAL FLOORING
SYSTEMS* (11/06/15)
- (11) M.7435 *MERCK / SIGMA-ALDRICH* (15/06/15)
- (12) M.7523 *CMA CGM / OPDR* (29/06/15)
- (13) M.7541 *IAG/ AER LINGUS* (14/07/15)
- (14) M.7565 *DANISH CROWN / TICAN* (17/07/15)
- (15) M.7583 *CSL / NOVARTIS INFLUENZA VACCINES BUSINESS* (17/07/15)
- (16) M.7498 *COMPAGNIE DE SAINT GOBAIN / SIKA* (22/07/15)
- (17) M.7682 *GOLDMAN SACHS / ALTOR / HAMLET* (05/08/15)
- (18) M.7685 *PERRIGO / GSK DIVESTMENT BUSINESS* (21/08/15)
- (19) M.7663 *DTZ / CUSHMAN & WAKEFIELD* (27/08/15)
- (20) M.7631 *ROYAL DUTCH SHELL / BG GROUP* (02/09/15)
- (21) M.7625 *ADM / AOR* (07/09/15)
- (22) M.7678 *EQUINIX / TELECITY* (13/11/15)

V STATE AID

135. In this section, we first provide a brief summary of the EU State rules and concerns that have been expressed about them, and then consider various options that might be considered for maintaining or replacing the State aid rules, or aspects of them, after Brexit. We conclude by looking at transitional issues that will need to be dealt with, in the agreement with the EU under Article 50 TEU and/or in the Great Repeal Bill, if it is decided not to retain the State aid rules, or to maintain them in a substantially different form.

Summary

136. In our view, it is likely that retention of State aid control will form an essential component of any comprehensive trade deal between the United Kingdom and the EU (whether in or outside the single market). But we also see considerable advantages to the United Kingdom in agreeing to retain such a regime: and such a regime, out of the EU, is likely substantially to reduce a number of the disadvantages of the EU regime.

137. In any event, a number of transitional issues will need to be dealt with in domestic legislation and/or the Article 50 agreement with the EU.

The State Aid rules

Background

138. The essential thinking behind the EU State aid rules (and other international prohibitions on subsidisation, such as the current WTO rules, which we discuss below) is that the grant of subsidies to firms of one State, in a single market or free trade area, will often distort competition to the detriment of competing firms from other participating States. Put shortly, it is one thing to open up your domestic markets to foreign competition, but quite another thing to open your domestic markets up to subsidised competition. And the freedom to export to another country without restriction is of little value if the government of that country can freely subsidise its domestic producers so as to defeat competition from imports.

139. On the other hand, there may well be powerful arguments for subsidies in order to achieve important domestic (or indeed pan-European) policy aims, such as regional development, promoting R&D, encouraging training, dealing with natural disasters,

and supporting important fundamentally viable businesses over short-term market turbulence. These are recognised in the range of justifications that permit the Commission to authorise State aid.

140. The EU State aid rules (now in Articles 107 and 108 TFEU) date from the earliest days of what is now the European Union. State aid provisions formed part of the European Coal and Steel Community Treaty in 1952, and the current provisions in the TFEU are in essential respects the same as those in the 1957 Treaty of Rome. But it may be noted that the historical origins of the State aid rules go even further back, to the 1947 GATT: much of the wording of GATT Article 16 on subsidies found its way into the drafting of the Treaty provisions on State aid.

Brief summary of the State aid rules

141. In a nutshell, the State aid rules prevent Member States from granting State aid save where the Commission has approved that aid as being justified.
142. The essential definition of a State aid is that it is an economic advantage, granted to an undertaking out of State resources, which favours certain undertakings over others (i.e. is selective), and which potentially distorts competition and trade between Member States.
143. Unpacking that definition, the following important points follow in terms of the scope of the EU State aid rules.
 - (a) First, the State aid rules have a wide scope. They apply to all sectors of the economy. They also apply to a wide variety of State measures: not just straight subsidies, but also to measures that are economically equivalent (such as access to government assets on favourable terms, favourable tax treatment, guarantees and so on). That extensive scope means that the rules will usually catch any attempt to dress up in some other legal form what is in economic terms a subsidy. But it also leads to criticism that the Commission, supported by the Court of Justice, has a tendency unduly to expand the scope of the rules. The recent controversy over the Commission's decisions finding that tax rulings given to certain multinational companies

amounted to State aid (decisions currently on appeal to the EU General Court) are a topical example.

- (b) Second, and very importantly in practice, the State aid rules do not apply to measures taken by the State that are equivalent to those that a rational private operator in the market would take (the “market economy operator principle” or “MEOP”). Since it is accepted that, in most cases, rational private investors might take a range of views, the MEOP in practice allows a range of measures to be taken by Member States provided that they ensure that they have sufficient evidence that the measure is one that a rational private operator could realistically have taken.
- (c) Third, they do not apply to measures that do not (even potentially) affect competition or trade between States. It is generally accepted that the case-law of the CJEU and the practice of the Commission has set that hurdle quite low, although the Commission has recently taken a number of decisions that indicate that it is trying to raise that hurdle. Moreover, a *de minimis* regulation has created a safe harbour for many small aid measures.

144. As noted above, the State aid rules acknowledge the existence of a range of powerful policy justifications for subsidies. So the Commission is given wide power under Article 107(2) and (3) TFEU to approve State aids (“declare them compatible with the common market”) on a range of public policy grounds. That approval mechanism has the following key features.

- (a) First, it is unlawful (under Article 108(3) TFEU) for a Member State to implement an aid measure before obtaining approval from the Commission (known as the “standstill obligation”). National courts are required to enforce that rule if the matter comes before them, although there is flexibility in how that is to be done in individual cases.
- (b) Second, however, the effects of that rule have been significantly reduced in recent years by a series of block exemptions (including, most importantly, the so-called General Block Exemption Regulation, applying across a whole range of sectors to numerous types of aid measures) which automatically

clear the bulk of Member States' aid measures without any need to obtain the approval of the Commission.

- (c) Third, where individual clearance is required from the Commission, that can be obtained very rapidly in an emergency (there are some examples of banking aid being given within 24 hours); but in general it is a process that takes months or even years.
- (d) Fourth, though the EU Courts will carefully scrutinise Commission decisions as to whether a measure is or is not State aid (mainly a question of law), they allow the Commission a wide latitude in terms of its aid approval policy, intervening only in the case of legal or procedural errors, or serious flaws in reasoning or fact-finding.

Criticisms of the State Aid rules

- 145. We suspect that there is wide support for the aim of the State aid rules: ensuring that State subsidies that have an economically distortive effect should be given only where they are appropriate and proportionate to deal with market failures. It may be noted that the State aid rules do not prevent either nationalisation or privatisation: and many EU countries manage a range of industrial strategies while fully complying with the State aid rules (Germany, for example).
- 146. Policy concerns about the State aid rules have generally focused on three areas.
- 147. First, as noted above, there is concern that the Commission and the CJEU have tended to widen the scope of the State aid rules to catch measures that should not be the concern of a regime whose principal purpose (at least historically) was to protect competition in the internal market against distortions caused by unjustified subsidies. Those concerns centre on both the definition of State aid and on the approach taken to the requirements that a State distort competition and affect trade between Member States.
- 148. The second set of concerns focuses on the policy of the Commission in deciding whether to approve aid notified to it. Concerns have centred on lack of transparency, lack of economic rigour and, partly as a result of those failings, a concern that the Commission's approach is sometimes too "political". In general, however, it is fair to

say that the Commission (encouraged in particular by successive UK Governments as well as academic commentators) has tended over recent years both to set out its approach in different sectors in considerable detail, and to adopt a more rigorous economic approach to identifying the market failure sought to be addressed by the aid measure and to evaluating whether the measure is the most appropriate means of addressing that failure.

149. The third set of concerns relates to procedural issues: for present purposes the most important of these is the delay caused by the time taken by the Commission to deal with individually notified measures, given the unlawfulness of proceeding with those measures before the Commission's approval has been obtained. Those delays are aggravated by the delays caused by appeals to the EU Courts against Commission decisions. There is no doubt that those delays can prove frustrating to policy-makers and to businesses whose projects depend on State support, and in some cases those delays can stop a desirable project or make it more expensive. On the other hand, the increasing scope of block exemptions has (as noted above) substantially reduced the number of projects that have to be notified to the Commission for approval, with the consequent reduction in the risk of projects being delayed by appeals against decisions to the EU Courts. Another area of concern is the limited procedural rights given to aid recipients in the process, even though (in the case of investigations for unlawful aid) the consequence of a finding of aid is often an order for recovery with very serious adverse effects on the aid recipient.
150. The various concerns summarised above were essentially those expressed by respondents to the Coalition Government's Review of the Balance of Competences. §3.7 of the section dealing with Competition and Consumer Policy reported that "*there was broad agreement in principle on the current balance of competence on State aid, but some expressed concern about its limits, about real or apparent extension of EU competence into areas of domestic policy, and about the way State aid controls are exercised*".

Options available post Brexit

State aid rules in comprehensive trade agreements with the EU

151. We assume here that the United Kingdom will seek to negotiate a comprehensive trade agreement with the EU.
152. We note in that respect that, with the exception of Switzerland, every other European country with which the EU has entered into comprehensive trade agreements has accepted that it will comply with State aid rules. There are, in essence, two models.
- (a) The first is the EEA model. The EEA Agreement effectively replicates the EU State aid rules³², with the EFTA Court playing the same role as the EU Courts and the EFTA Surveillance Authority (“ESA”) playing a role equivalent to that of the Commission. The significant differences of substance are that: -
- (i) the EEA Agreement does not have direct effect³³. However, EEA States are required to (and have) incorporated into their domestic law the obligation not to implement aid unless and until approved³⁴ and to implement, for example, prohibition and recovery decisions by the ESA. Moreover, EEA States must also, under that Agreement, pay damages to any third party harmed by a manifest and serious breach of the standstill obligation³⁵ – and the ESA has indicated that almost any breach of that obligation would trigger a duty to pay damages³⁶;

³² See Art. 61 and 62 of the EEA Agreement. Art. 61 essentially repeats Art.107 TFEU. Art. 62 requires “constant review” of existing and planned measures in the EEA to ensure compatibility with Art.61, a task which in the EEA/EFTA States is allocated to the ESA. The ESA then has, under Art.5 of the Surveillance and Court Agreement (“SCA”), the general duty to ensure the compliance of the EEA/EFTA States with their duties under the EEA Agreement, and Article 24 SCA then enumerates compliance with the State aid rules as an aspect of that duty and points to Protocol 3 SCA. That Protocol effectively incorporates the equivalent provisions to Art.108 TFEU: it provides for the duty to notify new aid (Art.2), and an obligation not to put that aid into effect before approval by the ESA (Art.3).

³³ See e.g. Case E-4/01 *Karlsson v Iceland* at §28.

³⁴ See §22 of the ESA’s guidelines on enforcement of the EEA State aid rules by national courts, available at <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

³⁵ Case E-4/01 *Karlsson v Iceland* at §29.

³⁶ See §§43ff of the ESA’s guidelines on enforcement of the EEA State aid rules by national courts, available at <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

- (ii) the EEA agreement does not apply to agricultural products falling outside the scope of Article 8(3) EEA, or to the fisheries sector³⁷; and
 - (iii) EFTA Court opinions given in response to references from EFTA States are “advisory”, rather than binding on the courts of those Member States – see Article 34 of the Surveillance and Court Agreement.
- (b) The second is what might be called the “domestic implementation” model, and is found in agreements with European countries outside the single market. Perhaps the most pertinent example (since it is with a large State that will not be applying for EU membership for the foreseeable future) is the Association Agreement between the EU and Ukraine (“the Ukraine Agreement”)³⁸. Article 262 of the Ukraine Agreement sets out the State aid rules; Article 264 provides that they are to be applied “*using as sources of interpretation the criteria arising from the application of [the EU State aid rules] including the relevant jurisprudence of the [CJEU], as well as [Commission frameworks and guidance].*” Article 263 requires each of the EU and Ukraine annually to report to each other on the State aid granted on each side. Most interestingly for present purposes, Article 267 requires Ukraine to implement a domestic system of State aid control, with “*an operationally independent authority ... entrusted with the powers necessary for the full application of [the State aid rules]*”³⁹.

153. As far as Switzerland is concerned, it has a series of bilateral agreements with the EU. Of those, the ones that mention State aid are the 1972 Free Trade Agreement and the 1999 Agreement on Air Transport.

- (a) The 1972 FTA contains, at Article 23(1)(iii), a general prohibition on “*any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.*” We understand that this provision has not been applied in Switzerland and that as a matter of Swiss law it is of limited application. However, the Commission has on at

³⁷ Art.4 of protocol 9 to the EEA.

³⁸ [2014] OJ L161/3

³⁹ There are similar provisions in Accession Agreements with Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia, and Turkey.

least one occasion raised what it regards as infringements of Article 23 with the Swiss Government⁴⁰.

- (b) The 1999 Air Transport Agreement is more thorough in its reference to familiar concepts of EU State aid law, containing at Article 13 a provision that closely reflects Article 107 TFEU. However, although specific provision is made in relation to enforcement of the Articles reflecting Articles 101 and 102 TFEU (the general prohibitions on anti-competitive agreements and abuse of dominant position) by the European Commission and the Swiss authorities, no enforcement mechanism for the prohibition is provided other than, at Article 14, a general requirement to keep measures falling within Article 13 under review. No specific authority has been given power on the Swiss side to enforce this rule.
 - (c) We also understand that Swiss law contains general prohibitions on public subsidies that fail to meet conditions of economic efficiency and a general requirement that Swiss government bodies respect competitive neutrality, but we also understand that these are not often invoked before the Swiss courts.
154. The EU has been prepared to negotiate agreements with countries outside Europe – notably CETA (Canada) and the ongoing negotiations on TTIP (United States) – that do not contain prohibitions on the grant of subsidies. However, Article 7 of CETA reflects and reinforces WTO anti-subsidy obligations by providing for notification to each other of subsidies granted and for a consultation procedure between Canada and the EU if either considers that the other is harming it by granting subsidies.
155. What can be concluded from that brief survey is that the EU, as far as Europe is concerned, has generally insisted on compliance with State aid rules as a condition of a comprehensive trade arrangement. (We suspect that, as in other areas, the case of Switzerland is not a reliable precedent.) It is ultimately a question for diplomats, rather than us, whether and to what extent the EU would so insist in the case of the United Kingdom. But it is at least possible that State aid compliance will be a “red line” condition on the EU side, not least because it will be hard to explain to EU voters why

⁴⁰ http://europa.eu/rapid/press-release_IP-07-176_en.htm?locale=en: the Commission decided that certain company tax regimes in Swiss Cantons in favour of holding, mixed and management companies were a form of State aid incompatible with Art.23, and asked the Council for a mandate to negotiate a satisfactory resolution.

their employers should potentially face competition from subsidised UK businesses when their employers are unable to receive equivalent subsidies. Moreover, the EU will bear in mind that (unlike the US or Canada) compliance with State aid rules is not a novelty as far as the United Kingdom is concerned and that the United Kingdom has considerable experience and expertise in applying the State aid rules over the last four decades.

WTO Rules

156. It is also important to be aware that, even outside any trade agreement with the EU containing State aid rules, the United Kingdom will still be bound by WTO anti-subsidy rules.
157. A good account of those rules can be found in a paper by David Unterhalter SC and Thomas Sebastian⁴¹, as well as in Bacon “EU Law of State Aid” Ch.4⁴², which we simply summarise.
158. As they point out, 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. Both concepts involve: (1) measures which are taken by governments or which are imputable to governments; (2) the grant of benefits (to use WTO terminology) or advantages (to use EU terminology) which are assessed using market-based tests; and (3) measures which are not generally applied but which are specific (to use WTO terminology) or selective (to use EU terminology). Moreover, measures which are purely regulatory in nature, for instance exemptions from labour or environmental standards, would fall outside the scope of both sets of rules as WTO law requires the presence of a “financial contribution”/ “income or price support” while EU law requires the involvement of “state resources”.
159. However, as they also point out, there are considerable differences between the concepts. For instance, measures which do not involve any cost to the government, such as a price control measure, would clearly be outside the scope of Article 107(1) TFEU

⁴¹ <http://1exagu1grkmq3k572418odooyoym-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/AFTER-BREXIT.pdf>

⁴² In both the present 2nd and forthcoming 3rd editions.

but may fall within the scope of the SCM Agreement. Likewise, the complex EU law approach to the assessment of selectivity in cases involving tax exemption measures has no direct analogue in WTO law. Further, unlike the State aid rules, the SCM Agreement does not cover services.

160. Moreover, the enforcement mechanisms for the WTO rules are (i) either state-to-state dispute resolution (there being no mechanism for private enforcement, injunctions or damages, or for actions to be brought in ordinary courts) or (ii) the imposition by the adversely-affected state of countervailing duties on products from the infringing state. Calculation of the appropriate rate of countervailing duties is generally more complex than calculating the amount of unlawful State aid that has to be repaid.
161. Finally, there is no procedure in the WTO rules for the approval of justified subsidies on public interest grounds, as is possible under Article 107(2) and (3) TFEU.

Should a State Aid regime be retained post-Brexit?

162. We now turn to the policy considerations which, in our view, the UK Government should bear in mind in deciding, in the context of negotiations with the EU, what, if any, State aid regime should be retained post-Brexit.
163. We appreciate that the State aid question will be but one of numerous issues on which the Government will need to negotiate. However, in deciding its wider negotiating position, the Government will need to form a view on the extent to which a State aid regime imposes burdens on, or benefits, the United Kingdom, and it is this question that we address.
164. We start by acknowledging that any constraint on the ability of public bodies to act as they see fit in relation to the expenditure of public money requires careful justification. That is particularly because the United Kingdom has a number of well-established means of ensuring that public money is well-spent (an advantage not enjoyed to the same degree by all EU Member States).
165. That said, however, we see the following advantages in retaining some form of domestic State aid or anti-subsidy control.

(i) Domestic considerations

166. There seem to us to be two principal domestic considerations
167. The first is that the United Kingdom will want to ensure that it respects its obligations under the WTO SCM Agreement. The UK Government can of course ensure through administrative means that its own conduct complies with those obligations. But there are large number of public bodies which have wide powers to make their own spending decisions without reference to Whitehall. Given the overlap between those obligations and the State aid rules, it has to date been unnecessary to consider the extent to which UK law needs to ensure that public bodies do not take measures that conflict with the SCM Agreement. But in the absence of those rules, it may well be necessary to ensure, by means of domestic law, that support measures adopted by public bodies do not put the United Kingdom in breach of its WTO obligations.
168. The second, linked to the first, is that increasing devolution (both to Scotland, Wales and Northern Ireland and increasingly within England) means that there are now a large number of public bodies with their own substantial tax and spending powers independent from the financial control of the UK Government. That strengthens the case for a form of legal control on the ability of those bodies to subsidise favoured firms: legal control that to date has been provided by the State aid rules (and is provided by the State aid rules in EU Member States with fiscally autonomous regional government, such as Germany and Spain⁴³). We recognise that there are devolution issues here (and that, under the Sewel convention, it may well be that the consent of the devolved administrations would be needed before their powers were limited by a form of State aid control). But there is a powerful policy case for such control, given that it is in no-one's interests for there to be "subsidy races" between different parts of the United Kingdom to attract investment. Moreover, any such provision would do no more than re-instate the limitations until now imposed by the State aid rules.

⁴³In Spain, there is a specific provision (art.11 of Ley 15/2007 de Defensa de la Competencia) allowing the Comisión Nacional de Competencia (the national competition authority: "CNC") to review and report on any State aids when asked by a local or regional Government to do so, and to require local and regional authorities to supply it with relevant information. The CNC is also provided, by the Spanish Ministry of Foreign Affairs, with a copy of all Spanish State aid notifications.

(ii) EU considerations

169. There also seem to us to be advantages of retaining State aid rules in terms of protecting the interests of UK business.
170. First, if the United Kingdom were to enter into a commitment to comply with State aid rules (whether in the form of the EEA Agreement or the Ukraine Agreement), that would carry with it a corresponding obligation on the EU institutions to prevent State aid that harmed competition in the United Kingdom.
171. Further, the EU State aid rules only catch measures that (at least potentially) distort competition in the EU/EEA. If the United Kingdom were to leave not only the EU but also the EEA, a measure that affected competition only in the United Kingdom (for example, potentially, an Irish subsidy aimed at assisting exports to the United Kingdom) would not as such be caught by the EU State aid rules⁴⁴. In practice, the Commission would, if it objected to the measure, often be able to find that even a measure targeted at exports to a non-EU/EEA country has sufficient effects within the EU/EEA to satisfy the “effect on trade between member States” requirement: but if the reality is that the effect of a State aid measure is centred on a State outside the EU/EEA, the Commission is perhaps unlikely to make it an enforcement priority.
172. Those issues would not arise if the UK were to remain within the EEA or were to negotiate an agreement similar to the Ukraine agreement, since the effect of both the EEA and Ukraine agreements is to give the EU institutions the power (and the duty) to regulate State aid measures by EU Member States that harm competition in (respectively) EEA States and Ukraine.
173. Second, when an EU Member State takes State aid measures that harm businesses trading in (respectively) an EEA State or one of the States with agreements similar to the Ukraine agreement, the relevant Agreement gives a right of action in the courts of the Member State concerned to obtain damages. So, for example, if the United Kingdom were party to EEA/Ukraine type State aid provisions, and if the French Government decided to subsidise steel exports to the United Kingdom, UK steel manufacturers would have the right to sue the French Government for breach of the

⁴⁴ see e.g. Case T-34/02 *EURL Le Levant 001* ECLI:EU:T:2006:59 at §§115-117.

State aid rules for losses suffered by them in the United Kingdom. Such actions have been rare to date, though there is no doubt that in principle State liability does arise.

174. Third, in cases where the United Kingdom has granted subsidies to UK companies operating in the EU, the fact that such subsidies have been approved (or block exempted) under provisions analogous to the EU State aid provisions will make it in practical terms difficult for the EU to take retaliatory measures against the United Kingdom under the WTO SCM Agreement.

175. Fourth, under both the EEA and Ukraine-type arrangements, the United Kingdom would retain a role in the development of EU State aid law (which, given the importance of the EU market to the United Kingdom, will remain a matter of important policy concern for the United Kingdom). In the EEA model, the United Kingdom would have a direct role in influencing the practice and jurisprudence of the ESA and EFTA Court, both of which in turn influence the development of Commission and Court of Justice thinking⁴⁵. The United Kingdom's role in the ESA and EFTA Court would be considerable, given its size and importance, and would be likely to increase the influence of the EFTA institutions. And, as an EEA State, the United Kingdom would have the right to intervene, itself, in any EEA-relevant case (including State aid cases) before the Court of Justice⁴⁶. But even in the Ukraine model, the United Kingdom would have a right to be consulted about and to influence any decision or policy development in the State aid field that affected its interests.

(iii) Would retaining a State aid regime outside the EU give scope for improvements vis-à-vis the current EU regime?

176. Compared to the EU regime, we see some advantages for the United Kingdom in moving to a State aid regime along either the EEA or the Ukraine lines.

177. First, although in both cases the notion of State aid would be the same as the EU concept, day-to-day enforcement would be in the hands either of the ESA (in which the United Kingdom would be a major player) in the case of the EEA agreement, or in the

⁴⁵ Art.64 EEA gives the ESA a formal right of consultation in relation to the Commission's development of EU State law and policy, and the ESA may intervene in cases in the EU Courts – indeed it did so recently in a State aid reference from the UK's Court of Appeal in Case C-518/13 *Eventech v Parking Adjudicator* ECLI:EU:C:2015:9.

⁴⁶ As Norway has done in some EU State aid cases: see e.g. Joined Cases T-371 and 394/94 *British Airways et al v Commission* [1998] ECR II-2405

hands of a UK agency in the case of the Ukraine model. As we have already pointed out, in the area of clearance of State aid on the ground of compatibility there is considerable scope for policy judgment even when detailed guidelines exist; and even in terms of the definition of State aid (which is a question of law) we do not think that either agency would be as tempted as the Commission sometimes is “push the boundaries” (see, for example, in its controversial decisions in the tax ruling cases, which are widely argued to be an attempt to deal in the State aid field with what in fact are wider policy concerns about tax avoidance by certain multinational companies). That addresses the policy concern we identified at §147 above.

178. Second, in relation to the policy concern we identified at §148 above (lack of economic rigour and transparency in approval decisions), the United Kingdom would, in relation to either the ESA or a domestic agency, be in a very good position to ensure that the agency took transparent and economically rigorous decisions. Indeed, a number of State aid law practitioners take the view that ESA decisions are clearer and better reasoned than those of the Commission, and involve greater participation by the beneficiary of aid (though that could be because the ESA takes a small fraction of the State aid decisions taken by the Commission).
179. Finally, in relation to the policy concern we identified at §149 above (delay) the United Kingdom would, in relation to both the ESA or a domestic agency, be in a good position to ensure both speedy decision-making and speedy appeals (we note, in that respect, that appeals to the EFTA Court typically take between six months and one year – which compares very favourably to the period of five or more years it can take to appeal a decision to the General Court and ultimately to the Court of Justice). The ability to get substantially swifter decision-making would, in our view, very substantially improve the State aid regime compared to the present situation, and very significantly reduce the constraint and uncertainty the EU regime imposes on public authorities and on business.

(iv) Choice of model

180. If the Government decides that it is right to retain a State aid regime on either the EEA or Ukraine model, which is preferable?
181. That choice is likely largely to be dictated by the extent to which the arrangement with the EU involves UK participation in the EEA. Full membership of the EEA would of

course entail the “EEA option” in the State aid area. But if the United Kingdom decides to make some use of the EEA institutions under some arrangement under which those institutions are “borrowed” for certain purposes, then it would seem to us to be sensible to make use of them in the State aid field, given the established expertise and reputation of both the ESA and EFTA Court. It also avoids the legal issues and likely greater expense of setting up a national State aid regime. It should though be noted that, due to the absence of the principle of direct effect in the EEA Agreement, the United Kingdom would have to make domestic legislative provision for the State aid rules – something which the EU doctrine of direct effect has made unnecessary to date.

182. Creating a national State aid regime would raise a number of issues. The body would have to be demonstrably independent, and (given that much of its work would involve dealing with central and devolved governments) would have to be strongly protected against political pressure. The obvious body to take that responsibility would be the Competition and Markets Authority (“CMA”), but it would have to be recognised that State aid regulation would be a considerable expansion of its responsibilities into an area that it has not to date had to deal with, and it would have to be resourced accordingly. It also has to be recognised that conferring State aid control powers on the CMA would put the CMA in a position where it was effectively reviewing important policy decisions by Ministers. It might be that a more “judicial” model was more appropriate, so that enforcement decisions would be taken by a court, perhaps the Competition Appeal Tribunal, on application by a specialist State aid monitoring body: but although the question of whether a measure is State aid or not is suitable for judicial resolution, the question of whether State aid is justified and should be approved on public interest grounds is not obviously one that should be decided by judges (save on a judicial review basis). A further issue is that it would be difficult to see how, in the UK constitutional system, a State aid regulator would deal with cases where the State aid was in the form of primary UK legislation: its powers would, we would have thought, there need to be confined to a declaratory power. It would also have to be decided what powers the body had to deal with secondary legislation incorporating unlawful State aid.

183. We therefore think that, other things being equal, an arrangement that brought the United Kingdom into the EEA State aid regime would be the best way forward, if the present State aid regime is to be broadly maintained.

Transitional Issues

184. We finally turn to transitional issues that need to be considered. We start here by observing that uncertainty as to the transitional position – particularly if the United Kingdom does maintain some form of State aid control – could well cause delay in infrastructure projects if it is not clear how any new regime will deal with aid necessary to fund those projects. It seems to us that the following issues arise.

- (a) The Article 50 agreement and any new arrangements with the EU or EEA would have to deal with : -
 - (i) State aid notified to or being considered by, but not yet decided by, the Commission at the time of Brexit;
 - (ii) the status of any State aid cases involving the UK that were pending before the EU Courts at the time of Brexit, whether references to the Court of Justice or direct actions in the General Court (or on appeal to the Court of Justice)⁴⁷;
 - (iii) the extent of the United Kingdom’s post-Brexit obligation to annul (and usually recover) any unlawful aid implemented before Brexit;
 - (iv) the extent to which the Commission (or anyone else) had power post-Brexit to order the United Kingdom to recover unlawful aid granted before Brexit, or would the Commission be confined to opening a WTO dispute; and
 - (v) the extent to which the United Kingdom is required, post-Brexit, to comply with the terms of any Commission decisions addressed to it

⁴⁷ An example of a case affecting the UK likely still to be before the EU Courts at that time is Case C-356/15 *Austria v Commission* (Hinkley Point)

before Brexit, including in particular the numerous Commission decisions approving aid schemes.

- (b) If the United Kingdom were to retain a domestic or EEA-type State aid regime, arrangements would need to be made for existing State aid decisions approving ongoing State aid measures to “carry over” to the new regime.
- (c) Provision would also need to be made, whether in any new arrangements with the EU/EEA or as a matter of domestic law, for the status of the residual aid measures currently implemented in the UK that predate the accession of the United Kingdom to the EU and are therefore, under the EU rules, regarded as existing aids that are not subject to the same rules as apply to new aid measures: see, for example, the BBC licence fee arrangements.
- (d) State aid damages actions against the authority granting an unlawful State aid are rare and none have been successful so far in the UK. But in principle, in domestic law, in relation to unlawful State aid put into effect before Brexit, it seems to us to be clear, without any legislation, that third parties would be entitled to damages in relation to the pre-Brexit period, and could sue for such damages after Brexit.

VI. RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COMPETITION LAW REGULATORS

185. In this section we consider the effect of Brexit on the CMA (and other competition regulators) and their relationship with the Commission, the ECN and other non UK regulators.

The existing position with the Commission and the European Competition Network

186. The existing close working relationship between UK and EU competition regulators stems from Regulation 1/2003⁴⁸, which marked the move from centralised enforcement of Articles 81 and 82 of the Treaty Establishing the European Community (including the exemption in Article 82(3) TEC) (now Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU)) by the European Commission to de-centralised enforcement by national competition authorities (NCAs) and the courts of EU Member States.

187. In order to ensure that EU competition rules are applied effectively and consistently, Regulation 1/2003 established a mechanism of close co-operation between all NCAs in the EU. The network of European competition authorities (ECN) was created as a framework for these mechanisms.

188. The Competition and Markets Authority (CMA) is the lead NCA in the UK, but all the concurrent regulators, the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA), the Gas and Electricity Markets Authority (Ofgem), the Northern Ireland Authority for Utility Regulation (NIAUR), the Office of Communications (Ofcom), the Office of Rail and Road (ORR), the Payment Systems Regulator (PSR) and the Water Services Regulation Authority (Ofwat) are members of the ECN.

189. The ECN, composed of EU Member States and the Commission, does not have any autonomous powers or competences. It is not an institution, and it does not have any legal personality. NCAs have parallel competences to those of the Commission, and the ECN rules are set out in the Commission Notice on cooperation within the Network of Competition Authorities (the Network Notice), to which all competition authorities in

⁴⁸ see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

the network have adhered to by a special statement. The Network Notice sets out rules in relation to, *inter alia*, the division of work, the exchange and use of confidential information, cooperation in investigations (including special provisions to do with leniency information) and maintaining consistency in EU competition law.

190. Separately to the ECN framework, the Commission's draft decisions are discussed in an Advisory Committee, which brings together competition experts from the Member States, and was in place prior to Regulation 1/2003. Individual cases dealt with by NCAs may be discussed in the Advisory Committee but without any formal opinion being issued.
191. Related but separate is the European Competition Authorities network (ECA), which is a grouping of all the competition authorities in the European Economic Area (EEA) (EU Member States and the European Commission, Norway, Iceland, Liechtenstein) and the European Free Trade Association (EFTA) Surveillance Authority. The ECN and the ECA exist in parallel. They have different origins and there are no formalised links between the two networks. The ECA is based on informal co-operation and meetings are held at least once a year. The aim of the ECA is to improve co-operation between competition authorities and contribute to the efficient enforcement of national and European competition law across the EEA. Similarly but less formally than through the ECN, co-operation is developed through meetings, working groups, and exchange of information, experience and staff.

Division of work

192. Under the system of parallel competences, EU competition cases are dealt with either by a single NCA, occasionally by several NCAs acting in parallel, or the Commission. Normally, the NCA that opens an investigation after receiving a complaint or launching proceedings *ex officio* retains responsibility for the case. If a single practice affecting trade between Member States is subject to multiple procedures carried out at the same time by several ECN members, the members hold talks between themselves and determine which is best-placed to handle the case or whether more than one authority should handle the case in cooperation.
193. To this end, ECN members are under a duty under Article 11(3) of Regulation 1/2003 to inform the Commission either before or immediately after the first formal

investigative measure, where the NCA is acting under Article 101 or 102 TFEU, which allows for the detection of multiple proceedings (for instance parallel complaints) and re-allocation if appropriate. The Commission is under an equivalent obligation to inform NCAs of its intention to carry out formal investigative measures under Article 11(2) of Regulation 1/2003. Article 11(6) of Regulation 1/2003 provides that where Commission has initiated proceedings in a particular case, no NCA may do so.

194. The Commission is usually considered best placed to handle the case if one or more agreements or practices have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets). Once one or more responsible authority/ies is/are identified, all other proceedings are stayed.

NCAs are able but are not obliged to inform other NCAs of their enforcement activities. The notification normally consists of a standard form containing limited details of the case, such as the authority dealing with it, the product, territories and parties concerned, the alleged infringement, the suspected duration and the origin of the case. Updates in the case are also provided.

Information-sharing

195. A key element of the ECN framework is the ability of all the NCAs to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Articles 101 and Article 102 TFEU. This power is a necessary precondition for the allocation and handling of cases.
196. Article 12 of Regulation 1/2003 (which has direct effect) makes clear that the exchanges of information may take place between an NCA and the Commission as well as between and amongst NCAs.
197. The exchange and use of information is subject to a number of safeguards for undertakings and individuals by virtue, in particular, of Articles 12 and 28 of Regulation 1/2003.

Mutual assistance in investigations

198. Apart from sharing information, Regulation 1/2003 also provides for mutual assistance between members of the network with respect to investigations. Article 22 stipulates that an NCA may ask another NCA for assistance in order to collect information on its behalf, to carry out fact-finding measures on its behalf. Where an NCA acts on behalf of another NCA, it acts pursuant to its own rules of procedure, and under its own powers of investigation.
199. Under Article 22(2) of Regulation 1/2003, the Commission can ask an NCA to carry out an inspection on its behalf. The Commission can either adopt a formal decision pursuant to Article 20(4) or simply issue a request to the NCA. The NCA officials exercise their powers in accordance with their national law, and agents of the Commission may assist the NCA during the inspection.

Leniency

200. There is no European Union-wide system of fully harmonised leniency programmes; therefore leniency applications must be made separately to each competition authority which may have jurisdiction over a potential infringement. As for all cases where Articles 101 and 102 TFEU are applied, where an NCA deals with a case which has been initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network pursuant to Article 11 of Regulation 1/2003. In such cases, however, information submitted to the ECN pursuant to Article 11 cannot be used by other members of the network as the basis for starting an investigation on their own behalf whether under EU competition rules or under national competition law or other laws.
201. Despite the restriction on the use of leniency information, an authority is not prevented from opening an investigation on the basis of information received from other sources or, from requesting, being provided with and using information pursuant to Article 12 from any member of the network (including the network member to whom the leniency application was submitted). However, leniency information may only be passed to another NCA under Article 12 if the leniency applicant consents.
202. Similarly, other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application can only be

transmitted to another authority if the applicant has consented or a written commitment is provided by the receiving authority that it will not use the information to impose a sanction on the leniency applicant or on any other legal or natural person covered by the leniency programme. The same principles apply where a case has been initiated by the Commission as a result of a leniency application made to the Commission.

Maintaining consistency of EU law

203. The NCAs must respect the convergence rule contained in Article 3(2) of Regulation 1/2003, which requires that where an agreement or practice may affect trade, Articles 101 and 102 TFEU must be applied, and no sanction will be applied unless the conduct restricts competition within the meaning of the Treaty provisions. Further, in line with Article 16(2) of the Regulation, NCAs cannot - when ruling on agreements, decisions and practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision - take decisions, which would run counter to the decisions adopted by the Commission.
204. In addition to the obligation to notify the Commission at the start of an investigation, NCAs must notify the Commission at least 30 days before the adoption of a decision which applies Articles 101 or 102 under Article 11(4) of Regulation 1/2003. At the expiry of the 30 day deadline, the decision may be adopted so long as the Commission has not initiated proceedings. The Commission may also make written observations on the case before the adoption of the decision by the NCA.

Function of the ECN

205. In its response to a recent public consultation launched by the Commission about how to empower national competition authorities to become more effective enforcers, the CMA responded in February 2016 that in its opinion the ECN was working well. Since 2004, in addition to enabling case allocation and delivery – nearly 1,000 decisions adopted by the Commission and NCAs in this time – the ECN (including through its Working Groups) had provided its members with the fora to discuss practical matters of mutual interest, share best practices and to achieve ‘soft convergence’. Successes it pointed to included:

- (a) the set of ECN Recommendations on investigative and decision-making powers adopted in December 2013, which provide an advocacy tool vis-à-vis policymakers for promoting consistency and set out the ECN's position on a number of powers ECN members should have in their competition 'toolbox'; and
- (b) the ECN Model Leniency Programme (MLP), which has served to as a major catalyst in encouraging ECN members to introduce leniency programmes and in promoting convergence between them.

206. The NCAs and the Commission also set up a Merger Working Group in 2010, which consists of representatives of the Commission, the NCAs and observers from the NCAs of the EEA. The objective of the group is to foster increased consistency, convergence and cooperation among EU merger jurisdictions. By way of example, a 'Best Practices' document was created to foster cooperation and sharing of information between NCAs in the EU, for mergers that do not qualify for review by the Commission itself but require clearance in several Member States.

The existing position with other non-EU competition regulators

207. While the UK currently has a number of bilateral agreements with third countries on various topics, it does not have any dedicated competition law agreements. It does, however, pursuant to section 243(2) of the Enterprise Act, disclose to an overseas public authority information which it has obtained by using its statutory powers of investigation, in order to facilitate the exercise by the overseas agency of any function relating to the prosecution of crime, including cartels. To this end it has entered into 'Mutual Legal Assistance Treaties' (MLATs), which provide a legally-binding framework for co-operation in criminal matters for signatories.

208. Cooperation in competition matters may also be based on competition provisions contained in Free Trade Agreements (FTAs) between jurisdictions, although these seem to have played a limited role in co-operation between agencies in cartel cases.⁴⁹

Existing EU-third country agreements from which the UK benefits

⁴⁹ <http://ec.europa.eu/competition/international/multilateral/2006.pdf>

209. The EU has reached a number of bilateral agreements with third countries, which are either dedicated entirely to competition (the so-called "dedicated agreements") or include competition provisions or chapters as part of wider general agreements such as Free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements, etc.
210. Of the EU's five dedicated agreements with the United States, Canada, Japan, Korea and Switzerland, only the most recent agreement, known as a 'second generation' agreement, concluded with Switzerland in 2013, provides for the exchange of information obtained in investigations, including in circumstances where the parties who provided the information do not consent. None of the more general agreements provide for such a level of information exchange between competition agencies.
211. The purpose of the EU – Switzerland agreement is to contribute to the effective enforcement of EU and Swiss competition laws through cooperation and coordination, including through the exchange of information between the competition authorities, and to avoid or lessen the possibility of conflicts between the parties' enforcement of their respective competition laws. The framework established by the agreement is not altogether dissimilar from the ECN. It provides for regular contacts in order to discuss policy issues and enforcement efforts and priorities as well as the mutual notification of enforcement activities affecting each other's important interests. Under the agreement, either party may request the other to start enforcement actions against anti-competitive behaviour carried out in the territory of the other party.

Article 7 of the agreement regulates the exchange of information, including information obtained by the investigative process, as necessary to carry out the cooperation and coordination provided for under the agreement. The use of the information is subject to even stricter conditions than those applicable to the ECN.

212. Article 10 of the EU-Switzerland agreement provides that the Commission may share information provided by the Swiss Competition Authority with EU Member States and the EFTA Surveillance Authority in certain circumstances, namely to:
- (a) inform the competent authorities whose important interests are affected of the notifications sent to it by the Swiss competition authority; and

- (b) inform the competent authorities of the existence of any cooperation and coordination of enforcement activities.

213. The Commission may only disclose information transmitted by the Swiss Competition Authority to the competent authorities of the Member States (and to the EFTA Surveillance Authority) in order to fulfil its obligation to provide information under Articles 11 and 14 of Regulation 1/2003 (information-sharing and advisory committee); Article 19 of Regulation 139/2004 (merger regulation); and Articles 6 and 7 of Protocol 23 of the EEA Agreement concerning the cooperation between the surveillance authorities.

The relevance of international competition networks

ICN

214. The International Competition Network (ICN) is not a global version of the ECN; although it shares similar aims, the extent of cooperation is much less limited. The ICN is an informal network of established and newer competition agencies, in which non-governmental advisors (representatives from business, consumer groups, academics, and the legal and economic professions) also participate. It was established in 2001 by 16 agencies and counts more than 100 competition agencies as members.
215. Its purpose is to address practical antitrust enforcement and policy issues. It also facilitates convergence and international cooperation between competition agencies, but, unlike the ECN, it is not used as a forum to cooperate on specific cases (although an intended by-product of the ICN is that closer relations among agency leaders and staff have been fostered, leading to improved bilateral cooperation on cases).
216. The ICN is a voluntary, consensus-based network. Its work products are not legally binding instruments, although they have proven to be influential in shaping the development of competition policy around the world. It was deliberately not set up to be an inter-governmental organisation to ‘avoid top-down, lowest common denominator harmonisation of competition and policies across the world’.⁵⁰ However,

⁵⁰ <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>

its work does complement the work of international governmental organisations that cover competition issues such as the OECD and UNCTAD.

OECD

217. Since its inception in 1961, the Organisation for Economic Co-operation and Development (OECD) and its Competition Committee has played a significant role in shaping the framework for international co-operation among competition enforcement agencies. It has produced recommendations, best practices and policy roundtables, which have served as models for national initiatives as well as drivers for promoting co-operation on a global scale.
218. As is the case with the ICN, the OECD's Competition Committee is not a forum for discussion of specific cases, but it does serve as a platform for officials from member states of the OECD, including the UK, to monitor the state of international co-operation and to develop new solutions to increase its effectiveness.

UNCTAD

219. The United Nations Conference on Trade and Development (UNCTAD) is a permanent intergovernmental body established by the United Nations General Assembly in 1964. It also does a significant amount of work on competition and consumer policies for the benefit of partner countries, including the UK. UNCTAD's Competition and Consumer Policies Programme hosts an annual meeting on consumer protection policies, undertakes competition policy peer reviews, publishes the UNCTAD Model law on competition and a Handbook on competition legislation and implements sector specific and economy-wide competition and consumer policies reforms to create a level playing field amongst companies and consumers, increasing the effectiveness of antitrust and consumer protection policies.
220. Like the OECD and the ICN, international cooperation within UNCTAD does not relate to specific cases but rather seeks to foster competition reforms to improve consumer welfare around the world.

The effect of a soft Brexit

221. The consequences of a soft Brexit are fairly straightforward.

EU law substantively

222. If the UK were to leave the EU but remain in the EEA and join EFTA⁵¹, as noted above, the UK would remain bound by the primary law competition provisions of the EEA Agreement, in which Articles 53 and 54 of the EEA are materially identical to Articles 101 and 102 TFEU as well as the secondary EU legislation pursuant to Article 7 of the EEA agreement.

Relationship with EEA competition regulators

223. As non-EU EEA and EFTA members, the UK's competition regulators would be demoted to observer status in the ECN so it would keep abreast of policy development discussions with the EU, but it would no longer be able to exert direct influence on the development of EU competition policy. As an EEA and/or EFTA member, the UK would remain a member of the 'European Competition Authorities' (ECA) network, and could maintain a regular dialogue with EEA members within the informal framework.
224. The UK would also maintain an influence in "mixed" competition cases, which affected it as an EFTA State and the EU Member States. The Commission and the EFTA Surveillance Authority (the Authority) co-operate, and, under the EEA Agreement, the authority not handling a case has a right to participate in the proceedings. Protocols 23 and 24 of the EEA Agreement contain detailed rules and procedures for co-operation and exchange of information between the Commission and the Authority and for the involvement of national competition authorities, which would include the UK as an EFTA state.
225. Separately from its relationship with the EU and the EEA, the UK will lose the (indirect) benefit of the majority of the EU's bilateral treaties on competition with third countries, which provide for cooperation and the exchange of information with the EU (rather than the EEA). The EU-Switzerland agreement is an exception in that it allows for the Commission to share information with the EFTA Surveillance Authority

⁵¹ Complications would arise if the UK were to remain in the EEA but were not able to join EFTA. Such complications are outside the scope of this paper.

pursuant to its obligations to share information with it under the EEA Agreement. The Authority in turn can share information with its member states.

226. However, the UK would likely gain the benefit of EFTA's Free Trade Agreements with third countries (there are at least 10) and it would be able to influence ongoing negotiations with other countries. Many of the agreements contain a chapter on competition which provides for co-operation and co-ordination on general issues relating to competition law enforcement policy.
227. Despite gaining the benefit of EFTA agreements with a number of third parties, the UK would likely need to reach new agreements or memoranda of understanding with other third countries with whom EFTA has no agreement, such as the US.
228. The UK would remain a member of the ICN, the OECD Competition Committee and UNCTAD as before, which serve to promote international cooperation and convergence in competition law, but do not provide a multilateral forum in which to share information about and discuss specific cross border cases.

The Effect of a Hard Brexit

229. As noted above, the effect of a hard Brexit is potentially significant with respect to the substance of competition law, but the effect on the relationship between regulators remains a fairly straightforward one.

EU law substantively

230. The UK will cease to be a member of the ECN, and therefore, will no longer be bound by the duty of cooperation with and notification to the Commission and other NCAs. Neither will it have access to any of the notifications by others or discussions in respect of specific cases or developments in competition policy within the EEA. It will become a third country with a very similar competition regime (at least until the UK changes them) on the EU's doorstep.
231. There are several options open to the UK and the EU/EEA for cooperation. The first would be to eschew any agreement. However, this would imply a permanent loss of a useful information and analysis regarding competition policy generally and in relation to specific cases. This loss would be particularly keenly felt post-Brexit because the

UK will likely be dealing with, in parallel with the Commission, a great number of 'EU' cases with effects in the UK, which previously would have been handled by the Commission alone.

232. The second option would be to enter into an agreement similar to that which the EU has with Switzerland, which is the closest form of cooperation which the EU has with a third country. Both sides would retain the right, under the bilateral agreement, to be informed of any enforcement activity which would affect the important interests of the other. In such cases, information-sharing would be possible, even without the consent of the parties, where it relates to conduct which both UK and EU authorities are investigating in parallel.
233. The third option would be for the UK to enter into a bespoke agreement with the EU which goes beyond the terms of the EU agreement with Switzerland and provides for more regular information exchange and dialogue, not just between the UK and the Commission but directly with other Member States. Given the proximity of the UK to the EU markets and the longstanding close cooperation between UK and the EU within the context of the ECN, one might envisage some form of voluntary associate status on the ECN, particularly, if the UK's position were that it intended to apply competition rules consistently with EU competition law. There would be various advantages for the UK if it retained a virtual EU competition regime, including maintaining its place as an attractive jurisdiction for follow-on competition damages claims. Businesses certainly will be keen to avoid the increased costs and duplication of compliance for companies, by divergent UK and the EU competition policies. Such an agreement could usefully target:
 - (a) maintaining and strengthening competition policy convergence in policies and processes;
 - (b) mutual assistance in parallel merger investigations and remedies;
 - (c) cooperation on cartel investigations and the handling of leniency applications.

234. Apart from securing its relationship with the EU, post- Brexit the UK should be able to establish new bilateral agreements on competition (or agreements which include competition provisions) with third countries such as the US, Canada and countries in Asia.