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Brexit: competition and State aid

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Q in footnotes refers to a question in oral evidence.

SUMMARY

Since the UK joined the European Economic Community (now the European Union) in 1973, the UK and the EU institutions have shared responsibility for competition matters—encompassing anticompetitive conduct or agreements (antitrust), merger control, and State aid. Withdrawal from the EU is therefore likely to have a significant impact on the UK's domestic competition regime.

While Brexit gives rise to some immediate legal and regulatory issues which will need to be addressed, the most significant implications of Brexit in this field relate to transitional arrangements, future UK policy, and determining the UK's institutional framework for competition matters.

It remains unclear whether the two-year transition, or 'implementation', period sought by the Government would represent a period of phased change to the terms of the future UK-EU trade relationship, or a 'standstill period' where the current EU competition regime would remain in force. Nevertheless, at some point, a transition will take place from the status quo to the assumption of full competence with regard to competition matters by UK courts and authorities. Transitional arrangements will be necessary to clarify jurisdiction in relation to cases and administrative procedures which are 'live' at this point, as well as future cases relating to conduct which occurred while the UK was still part of the EU competition regime.

We support the Government's ambition to reach at least an outline agreement on a transition period with the EU in the first quarter of 2018. This agreement should ensure continuity with current arrangements, so businesses are not faced with the complexity and cost of having to adapt to the implications of Brexit twice.

In terms of future policy, the UK has played a significant role in pushing forward an alignment in the broad principles underpinning European, and global, competition policy. We see no reason to depart from these shared fundamental principles after Brexit. The UK may wish, over time, to depart from EU competition case law, particularly as the Single Market imperative underpinning it may no longer be relevant to the UK. Brexit also offers an opportunity to diverge from the EU in terms of enforcement decisions on some antitrust cases and merger reviews. With the repatriation of responsibility in this area, the UK will be free to take a more innovative and responsive approach to tackling global competition enforcement challenges, including fast-moving digital markets and dominant online platforms.

As an EU Member State, the UK is also a member of the European Competition Network—a forum which enables extensive cooperation between the national competition authorities of Member States, and the European Commission, on investigations and enforcement actions. Continuing this cooperation will be mutually beneficial to the UK and the EU, and we recommend that a comprehensive competition cooperation agreement is negotiated to facilitate this post-Brexit. It will also be important for the UK to re-establish cooperation arrangements with other countries currently covered by existing EU bilateral competition agreements.

The UK will have significant decisions to make with regard to future State aid policy, as the EU's extensive competence in this area leaves a limited national framework to fall back on. It is likely that the EU will insist on some form of State aid controls in any UK-EU Free Trade Agreement (FTA). If this is not case, the World Trade Organization's (WTO) Agreement on Subsidies and Countervailing Measures (ASCM) would not represent an adequate alternative. The ASCM has no domestic application and therefore would not regulate State aid within the UK, creating the risk of intra-UK subsidy races.

The Minister confirmed that the Government had not yet arrived at a settled State aid policy, although it was mindful of the need to have one before 'day one' of Brexit. As introduced, the EU (Withdrawal) Bill would preserve a general prohibition on State aid without specifying what body would assume the Commission's current role of reviewing and approving compatible measures. We urge the Government to address this omission as soon as possible and clarify whether State aid responsibilities will be assumed by an existing, or new, authority.

It will be important for the Government to involve, and secure the support of, the devolved administrations in determining the shape of this future State aid regime, and the UK's wider post-Brexit institutional framework for competition matters. In developing this framework, the UK will have the opportunity to address criticisms of complexity and bureaucracy facing the current EU competition regime, and to create a system more focused on domestic needs and priorities. To inform its policy in this regard, the Government should launch a consultative process, involving the devolved administrations, local authorities, and other stakeholders such as businesses and consumer groups. We hope this report will be a useful contribution to that endeavour.

Brexit: competition and State aid

CHAPTER 1: INTRODUCTION

Brexit: competition and State aid

1. Since the referendum on 23 June 2016, this Committee has published a series of reports on aspects of Brexit, including on the options for trade between the UK and the EU and implications for the protection of consumer rights.[1]

2. This latest report focuses on competition, encompassing prohibitions on anti-competitive behaviour by undertakings (antitrust), merger control, and State aid.[2] It begins with an overview of the current competition regulatory and enforcement landscape, including the balance of competences between the EU and the UK in this area and the strengths of the UK's competition regime. Criticisms of the operation of this current system at UK and EU-level are also considered.

3. Chapter 3 explores the short-term implications of Brexit for competition law and enforcement in the UK, focusing on antitrust and merger control. No such domestic framework exists in the UK for State aid, as EU law is applied directly and enforced by the Commission. Consequently, the implications of Brexit for UK State aid primarily relate to possible transitional issues and future policy decisions, and are discussed in later chapters focusing on transitional arrangements for competition matters (Chapter 4) and future UK State aid policy (Chapter 6). Future UK policy with regard to antitrust and merger control is considered in Chapter 5.

4. Based on the strong view of our witnesses that it would be desirable for the UK to continue cooperating with the EU on competition matters, we consider how this might be achieved through formal and informal arrangements. We examine the consequences of a situation where no UK-EU free trade agreement (FTA) or competition cooperation agreement is reached—particularly focusing on State aid, where the UK currently has only a limited domestic framework. We also address the particular devolution implications of operating under World Trade Organization (WTO) terms.

5. The report concludes by considering the future UK institutional framework for antitrust, merger control, and State aid.

The European Union Committee's work

6. This report forms part of a coordinated series of inquiries undertaken by the European Union Committee and its six sub-committees following the referendum on June 2016. Given the centrality of consumer concerns to both UK and EU competition policy, this report is usefully read alongside our report on Brexit and consumer rights.[3]

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1 European Union Committee, *Brexit: the options for trade* (5th Report, Session 2016–17, HL Paper 72); European Union Committee, *Brexit: will consumers be protected?* (9th Report, Session 2017–19, HL Paper 51)

2 In this report, we use the term 'merger control' to refer to EU and UK regulation and enforcement of mergers and acquisitions.

3 European Union Committee, *Brexit: will consumers be protected?* (9th Report, Session 2017–19, HL Paper 51)

This inquiry

7. The EU Internal Market Sub-Committee, whose members are listed in Appendix 1, met in September, October and November 2017 to take oral evidence, and received a number of written submissions; our witnesses are listed in Appendix 2. The Committee is grateful for their participation in this inquiry. We also thank our Specialist Adviser, Professor Erika Szyszczak.

8. **We make this report to the House for debate.**

CHAPTER 2: THE CURRENT COMPETITION LANDSCAPE

EU competence in competition and State aid

9. The EU's competence in the area of competition law, including State aid rules, dates back to the 1957 Treaty of Rome, which established the European Economic Community and provided for "a system ensuring that competition in the common market is not distorted".[4]

10. Today, the EU's competition policy is derived from rules set out in the Treaty on the Functioning of the European Union (TFEU), and encompasses three 'pillars': antitrust, mergers, and State aid. While the EU retains exclusive competence to establish competition rules necessary for the functioning of the Single Market, the framework is intended to reflect the principle of subsidiarity and focuses on activities under all three pillars which could affect trade or distort competition within the EU.[5]

Antitrust

11. The EU's antitrust legislation (relating to and prohibiting anti-competitive behaviour of, or between, undertakings including anti-competitive agreements and abuse of dominance) is contained in Articles 101 and 102 TFEU.[6]

12. Until 2004, the Commission had the exclusive right to decide on the compatibility with EU law of agreements between undertakings. The entry into force, on 1 May 2004, of Regulation (EC) 1/2003 established a decentralised system of competition enforcement, which made it compulsory for national competition authorities (NCAs)—in the UK, the CMA—to apply EU antitrust rules directly in cases of agreements or practices which might affect trade between Member States.[7]

13. The Regulation also provided for the establishment of the European Competition Network (ECN), which is a framework for close cooperation between NCAs, ensuring consistency in the application and interpretation of EU law, and facilitating the efficient allocation of cases where several NCAs have an interest (Member States are automatically relieved of their competence where the Commission initiates its own proceedings). Significantly, the Regulation also allows NCAs to exchange, and use in evidence, confidential information for the application of EU antitrust law.[8]

4 Article 3(1)g, Treaty establishing the European Community, OJ C325. In the consolidated version of 24 December 2002, common market is replaced with internal market.

5 HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union: Competition and Consumer Policy Report* (Summer 2014): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332779/Review_of_the_Balance_of_Competences_between_the_United_Kingdom_and_the_European_Union.pdf [accessed 5 December 2017]

6 Articles 101–102, Treaty on the Functioning of the European Union

7 European Commission, *'European Competition Network: Overview'* (6 April 2017): http://ec.europa.eu/competition/ecn/index_en.html [accessed 22 November 2017]

8 Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (OJ L 1, 4 January 2003) and written evidence from the Competition and Markets Authority (CMP0002)

Merger control

14. Merger control was only introduced at an EU-level in 1989 with the adoption of the EU Merger Regulation, which was revised and replaced by the current Merger Regulation (EUMR) in 2004.[9]

15. The EUMR prohibits mergers and acquisitions which would significantly reduce competition in the Single Market. The Commission is empowered to examine mergers with an 'EU dimension' (based on certain turnover thresholds in more than one Member State). If a merger meets 'EU dimension' thresholds, companies must notify it to the Commission prior to its implementation, even if the merger affects competition in the market of only one Member State.[10]

16. This system provides a 'one stop shop' whereby merger reviews are usually dealt with either by the Commission or by a Member State authority. In some cases Member States or the parties involved in the merger may request transactions which would otherwise have been reviewed by the Commission to be considered at the Member State level, and *vice versa*. For such cases, the EUMR provides for a referral mechanism for Member States and the Commission to transfer cases between them, subject to the Commission's approval of a reasoned submission from the parties to the merger to justify the transfer.[11]

17. The Competition Appeal Tribunal (CAT) told us that the EUMR "effectively embraces all the larger, international and cross-country mergers", such as the recent London Stock Exchange Group and Deutsche Börse merger—which was blocked by the Commission—and the merger of US-based chemical companies Dow and DuPont, which the Commission approved.[12]

State aid

18. The EU's State aid rules are contained in Articles 107–109 TFEU, which prohibit all State aid by Member States unless it is deemed 'compatible' for reasons of general economic development (including regional aid to disadvantaged areas). Member States are required to notify any planned aid to the Commission, which is then responsible for assessing and issuing a decision on whether the aid meets the compatibility conditions.[13]

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9 Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), (OJ L 24, 29 January 2004)

10 European Commission, '*Merger control procedures*' (13 August 2013): http://ec.europa.eu/competition/mergers/procedures_en.html [accessed 22 November 2017]. The EUMR specifies that there is no 'EU dimension' if each of the undertakings concerned achieves more than two-thirds of its EU-wide turnover in one and the same Member State. The Commission can review and block mergers involving the market in only one Member State—see, for example, European Commission, 'Mergers: Commission prohibits Hutchison's proposed acquisition of Telefónica UK' (11 May 2016): http://europa.eu/rapid/press-release_IP-16-1704_en.htm [accessed 19 January 2018]

11 European Commission, 'Merger control procedures' (13 August 2013): http://ec.europa.eu/competition/mergers/procedures_en.html [accessed 22 November 2017]

12 Written evidence from the Competition Appeal Tribunal (CMP0042)

See also European Commission, 'Mergers: Commission blocks proposed merger between Deutsche Börse and London Stock Exchange' (29 March 2017): http://europa.eu/rapid/press-release_IP-17-789_en.htm and European Commission, 'Mergers: Commission clears merger between Dow and DuPont, subject to conditions' (27 March 2017): http://europa.eu/rapid/press-release_IP-17-772_en.htm [accessed 12 January 2018]

13 Articles 107–109, Treaty on the Functioning of the European Union and written evidence from Herbert Smith Freehills LLP (CMP0029)

19. The Treaty defines State aid as:

> "Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods."[14]

This definition has been broadly interpreted by the Commission and Court of Justice of the European Union (CJEU) to encompass a wide variety of state measures, including subsidies and measures that are economically equivalent—such as access to government assets on favourable terms or favourable tax treatment.[15]

20. To minimise the burden of State aid notification, a General Block Exemption Regulation (GBER) was adopted in 2008, and revised in 2014, which declares certain categories of aid compatible with EU State rules and exempts Member States from the obligation to notify aid under those categories to the Commission. The GBER applies across a range of sectors and numerous types of aid measures, such as aid to support small and medium-sized enterprises (SMEs).[16] The European Commission's *State Aid Scoreboard 2016* shows that more than 96% of new State aid measures in the EU in 2015 were covered by the GBER.[17]

21. The Commission has also issued guidance and adopted additional Regulations with the aim of further simplifying the process of State aid notification and approval. These include, for example, the 2014–2020 regional aid guidelines and the *de minimis* Regulation, which established a threshold for small aids which fall outside the scope of EU State aid control.[18]

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14 Article 107(1), Treaty on the Functioning of the European Union

15 HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union: Competition and Consumer Policy Report* (Summer 2014): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332779/Review_of_the_Balance_of_Competences_between_the_United_Kingdom_and_the_European_Union.pdf [accessed 5 December 2017]

The Court of Justice of the European Union formally includes both the Court of Justice (formerly the European Court of Justice or 'ECJ') and the General Court (formerly the Court of First Instance or 'CFI') (Article 19 Treaty on European Union). In the interests of brevity, throughout this report we use the term CJEU.

16 Regulation (EC) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 or the Treaty, (OJ L 187, 26 June 2014). Other examples of exempted categories include aid to: innovation clusters; make good damage caused by natural disasters; broad band infrastructures; investment for local infrastructure; culture and heritage conservation; transport residents of remote regions.

17 European Commission, *State Aid Scoreboard 2016* (16 November 2016): http://ec.europa.eu/competition/state_aid/scoreboard/technical_note_en.pdf [accessed 7 December 2017]

18 Guidelines on regional State aid for 2014–2020: Acceptance of the proposed appropriate measures pursuant to Article 108(1) of the Treaty on the Functioning of the European Union by all Member States, (OJ C 101, 5 April 2014)

Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid**,** (OJ L 379, 28 December 2006). This was subsequently replaced by Regulation 1407/2013 which maintained the same *de minimis* threshold—€200,000 per undertaking over a three year period.

Public procurement

22. Public procurement in the EU is subject to the provisions of the EU public procurement Directives, which coordinate national procurement rules.[19] Nonetheless, there is a relationship between public procurement and State aid insofar as the awarding of a public contract may confer an economic advantage which an undertaking would not have received under normal market conditions. As a result, there have been instances of uncertainty regarding the application of State aid rules in the case of public procurement.[20]

23. In 2016, the Commission issued a 'Notice on the notion of State aid' to provide clarification on this issue. The Notice confirmed that:

- Public investment for the construction or upgrade of infrastructure is free of State aid, if it does not directly compete with other infrastructure of the same kind;
- Even if infrastructure is built with the help of State aid, there is no aid to its operator and users if they pay a market price;
- EU State aid control focuses on public investments with cross-border effects, so does not cover funding for local infrastructures or local services which are unlikely to attract customers from other Member States;
- If public authorities buy goods or services through tenders which comply with EU public procurement rules, this is in principle sufficient to ensure that the transaction is free of State aid.[21]

24. As such—while Brexit is likely to have implications for public procurement in the UK—we consider these matters outside the scope of this inquiry and do not discuss them further in this report.

Jurisdiction

25. The CJEU is responsible for interpreting competition law, including State aid rules, as they are set out in the Treaties. The CJEU has the jurisdiction to review, cancel or amend fines and Commission decisions. National courts and tribunals can refer cases to the CJEU for a preliminary ruling on the interpretation or validity of EU competition law. Member States can also challenge Commission State aid decisions and intervene in cases before the CJEU which relate to State aid. The CJEU may then rule on whether or not the Commission, in reaching its decision on the compatibility of the aid, has erred in law.[22]

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19 See European Commission, 'Pubic Procurement Legal rules and implementation' (16 January 2018): https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en [accessed 23 November 2017]

20 Competition Policy Newsletter, *Public procurement and State aid control—the issue of economic advantage*, Number 3 (2007): http://ec.europa.eu/competition/publications/cpn/2007_3_15.pdf [accessed 6 December 2017]

21 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (OJ C 262, 19 July 2016)

22 HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union: Competition and Consumer Policy Report* (Summer 2014): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332779/Review_of_the_Balance_of_Competences_between_the_United_Kingdom_and_the_European_Union.pdf [accessed 5 December 2017]

The UK's competition regime

26. The key elements of the UK's competition legal framework are contained in the Competition Act 1998, which prohibits anti-competitive agreements and abuses of market dominance, and the Enterprise Act 2002, which contains provisions on merger control.[23] In relation to State aid, however, as the East of England European Partnership highlighted, "virtually no UK-made rules exist at present", as EU law is applied directly, with the Commission responsible for approving any aid not covered by established block exemptions.[24]

27. The CMA is the UK's lead authority for competition and consumers, with responsibilities including:

- investigating mergers which could restrict competition;
- investigating potential breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions, and suspected breaches of the UK criminal cartel offence;
- conducting market studies and investigations in markets where there may be competition and consumer problems;
- enforcing consumer protection legislation, in particular to tackle practices and market conditions that make it difficult for consumers to exercise choice; and,
- considering regulatory references and appeals.[25]

28. Under the Competition Act 1998, various UK sector regulators have 'concurrent' competition powers and may take action against anti-competitive behaviour and abuses of dominance in their sectors.[26]

29. The CMA and sector regulators enforce the prohibitions against anti-competitive conduct of, or agreements between, undertakings under EU and national competition law through a civil (administrative) regime. Decisions on whether an infringement has taken place can result in fines of up to 10% of an undertaking's worldwide turnover and disqualification from directorship of the individuals involved for up for 15 years. Infringement decisions can also be relied upon in support of follow-on private actions and damages claims.

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23 Written evidence from the Competition and Markets Authority (CMP0002)

Other relevant pieces of legislation include the Enterprise and Regulatory Reform Act 2013, the Consumer Rights Act 2015, and various pieces of sector-specific competition legislation. See National Audit Office, *The UK competition regime* (5 February 2016): https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf [accessed 6 December 2017]

24 Written evidence from the East of England European Partnership (CMP0007)

25 Written evidence from the Competition and Markets Authority (CMP0002)

26 UK regulators with concurrent competition powers include the: Civil Aviation Authority, Financial Conduct Authority, Ofgem, Northern Ireland Authority for Utility Regulation, Ofcom, Ofwat, Office of Rail and Road, Payment Systems Regulator. See UK Competition Network: https://www.gov.uk/government/groups/uk-competition-network [accessed 12 January 2018]. See also Q 11 (Dr Steve Unger, Richard Moriarty and Jonathan Spence)

30. Alongside this, the CMA also has a criminal enforcement function, focusing on individuals involved in cartels. Under the Enterprise Act 2002, individuals convicted of a criminal cartel offence can be fined, imprisoned for up to five years, have assets confiscated, and be disqualified from directorship for up to 15 years.[27]

31. In relation to mergers, under the Enterprise Act 2002, the CMA is tasked with determining whether a relevant merger has or may be expected to result in a substantial 'lessening of competition' within any market or markets in the UK for goods or services.[28] Although the Act establishes the primacy of this competition-based test, it also permits the Secretary of State to intervene in a merger on the specified public interest grounds of national security, media plurality, or maintaining the stability of the UK financial system. Unlike the EU, the UK operates a voluntary merger notification regime, but the CMA does have powers to review mergers which have not been voluntarily notified to it.[29]

32. The Competition Appeal Tribunal (CAT) is the UK's specialist competition tribunal where—by appeal or judicial review—decisions of the CMA and sector regulators relating to mergers and antitrust may be challenged. The CAT also hears private claims for damages or injunctions resulting from infringements of competition law.[30]

Strengths of the UK regime

33. The Commercial Bar Association (COMBAR) told us that the UK's competition regime had been modelled on the EU system, and noted that the Competition Act 1998's antitrust prohibitions closely reflected Articles 101 and 102 TFEU.[31] Dr Bruce Wardhaugh, Senior Lecturer in Law at the University of Manchester, suggested that this close relationship, combined with the authoritative status of CJEU judgments on the interpretation of EU competition law, had resulted in "an alignment of the goals of competition policy between the EU and the UK, with consistency being the paramount objective".[32] Indeed, as the CMA explained, section 60 of the Competition Act 1998 requires UK courts and competition authorities to ensure as little divergence as possible from the way corresponding questions are dealt with under EU law.[33]

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27 Stephen Blake, Senior Director, Cartels and Criminal Group, CMA, Speech on Challenges in the field of economic and financial crime in Europe, 2 December 2014: https://www.gov.uk/government/speeches/stephen-blake-explains-the-benefit-of-specialist-cartel-enforcement-authorities [accessed 30 November 2017]

The criminal cartel offence is contained in the Enterprise Act 2002, section 188.

28 In written evidence to a House of Commons (then) Business, Innovation and Skills Committee inquiry, the CMA explained that this "involves deciding whether a merger may result in worse outcomes for consumers and businesses, such as, higher prices, reduced quality or choice." (ISG128)

29 Slaughter and May, *UK merger control under the Enterprise Act 2002* (June 2016): https://www.slaughterandmay.com/media/2535538/uk-merger-control-under-the-enterprise-act-2002.pdf [accessed 4 December 2017]. The EUMR provides for a broadly similar system where mergers with an 'EU dimension' are assessed according to whether they would significantly reduce competition in the Single Market. Member States are permitted to intervene (including prohibiting a transaction) to "protect legitimate interests" provided they are compatible with community law. The Regulation specifies public security, media plurality and prudential rules as legitimate interests. Member States may act to protect other non-specified interests but these must first be notified to and approved by the Commission.

30 Written evidence from the Competition Appeal Tribunal (CMP0042)

31 Written evidence from the Commercial Bar Association (CMP0038)

32 Written evidence from Dr Bruce Wardhaugh (CMP0005)

33 Written evidence from the Competition and Markets Authority (CMP0002)

34. Witnesses generally agreed that the UK competition regime was well-established and highly regarded internationally. The Law Society, for example, told us that England and Wales was "a leading global centre for competition law", with an experienced judiciary and numerous specialist competition practitioners.[34] Professor Pinar Akman, Professor of Law at the University of Leeds, emphasised that the UK's influence had been "very positive on the development of EU competition law" and that the CMA was a "very respectable authority among its international peers".[35]

35. COMBAR suggested that the strengths of the UK regime were drawn in part from its relationship with the EU system, which had resulted in a "powerful system of deterrence" against anticompetitive conduct, and a "dual system of protection" for UK businesses and consumers. COMBAR warned:

> "There is a risk that Brexit (and particularly a 'hard' Brexit) could serve to substantially undermine the effectiveness of [the UK's competition] regime. The object of post-Brexit competition policy should be to preserve its effectiveness to the maximum extent possible".[36]

Issues with the current system

36. Although witnesses were generally positive about the UK's competition regime—and the wider European framework within which it operates—they highlighted some issues with the current system, particularly the EU State aid regime.

State aid

37. The UK State Aid Law Association (UKSALA) highlighted the problem of delay, with even relatively straightforward cases taking six months or more to complete the process of notification and approval by the Commission.[37] George Peretz QC, Joint Convenor of UKSALA, explained:

> "[Delay] is an even more serious problem once you get outside Whitehall and start talking to local government, where the difficulty is in two stages: if the advice is that they are going to have to notify [the aid], they first have to talk to central government and get them to notify, because that is a matter for central government to do, and then, having overcome that burden, they then have to deal with Brussels, and the time that takes."[38]

38. The Local Government Association (LGA) told us: "Councils find the EU State aid regime to be complex", requiring in-depth knowledge of various pieces of EU legislation, and that the cost of external legal advice could be "disproportional to ensure a small grant is compliant with EU rules".[39] COSLA, the representative body of local government in Scotland, noted that the EU State aid framework and structural and investment funds, while aligned, were "often at odds", with apparently contradictory guidelines

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34 Written evidence from The Law Society (CMP0037). See also written evidence from Hausfeld & Co LLP (CMP0018), Baker McKenzie LLP (CMP0026), and the Commercial Bar Association (CMP0038)
35 Q 20 (Prof Pinar Akman)
36 Written evidence from the Commercial Bar Association (CMP0038)
37 Written evidence from the UK State Aid Law Association (CMP0008)
38 Q 35 (George Peretz)
39 Written evidence from the Local Government Association (CMP0021)

and requirement levels.[40] The East of England European Partnership said that the *de minimis* threshold could "present problems for local authorities procuring public services", as the volume of paperwork required for contracts exceeding the threshold could "severely complicate the provision of services intended to benefit only the local area".[41]

39. Professor Steve Fothergill, Director of the Industrial Communities Alliance, representing local authorities in industrial areas of England, Scotland and Wales, criticised the aid intensity ceilings for regional aid. While noting that allowances were greater in West Wales and the Valleys, and in Cornwall, Prof Fothergill told us: "across the rest of Britain there is a 10% ceiling on support for capital investment", which was "often not enough to influence [companies'] decision-making".[42]

40. Herbert Smith Freehills LLP pointed out the additional restrictions on specific sectors, such as steel, and noted that the issue of EU rules constraining the Government's ability to act during the 2016 steel crisis had featured in the UK's EU referendum debate, particularly in affected communities.[43]

41. EEF, the manufacturers' organisation, told us:

> "Frustrations with the EU State aid framework are often with bureaucracy rather than the regulations/guidelines themselves. The UK Government has actually chosen to take a more stringent approach to awarding compensation than the EU guidelines require, but significant delays and frustrations have been caused by the overly pedantic and legalistic approach Commission officials have taken to considering applications based on a very specific reading of the guidelines rather than any rational concern for negative impacts on competition".[44]

42. Whether, and to what extent, the UK Government has actually been significantly restricted by EU State aid rules is discussed in Chapter 6.

Consumer concerns

43. Caroline Normand, Director of Policy at Which? told us that "not all markets [were] working well in the UK by any stretch of the imagination", highlighting energy prices and home phone and broadband services as significant concerns for consumers. Ms Normand considered that these problems could be solved by improving the operation of the current system without requiring a "fundamental change" in competition rules.[45]

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40 Written evidence from COSLA (CMP0033)
41 Written evidence from the East of England European Partnership (CMP0007)
42 Q 40 (Prof Steve Fothergill)

The Commission's 2014–2020 regional aid guidelines set out the rules under which Member States can grant State aid to companies to support investments in new production facilities in the less advantaged regions of Europe or to extend or modernise existing facilities. The guidelines also contain rules for Member States to draw up regional aid maps of areas where companies can receive regional State aid, and at which intensities. These are known as Assisted Areas maps in the UK. Communication from the Commission amending Annex 1 to the Guidelines on regional aid for 2014–2020, (OJ C 231, 25 June 2016). See also HM Government, *State aid: Assisted Areas – introduction* (October 2014): https://www.gov.uk/government/publications/state-aid-assisted-areas-introduction [accessed 23 November 2017]

43 Written evidence from Herbert Smith Freehills LLP (CMP0029)
44 Written evidence from EEF, the manufacturers' organisation (CMP0016)
45 Q 39 (Caroline Normand)

44. By contrast, think tank Res Publica argued: "Something has gone wrong with our markets and something has gone wrong with our competition law." In particular, Res Publica suggested that UK and EU merger controls had failed to prevent market dominance by online platforms, which were able to buy up innovative, smaller firms in transactions that fell outside the thresholds for merger review.[46]

45. The Financial Services Consumer Panel criticised the underlying assumption of current UK and EU competition policy that consumers could drive competition through their choice of goods and services. They suggested most people were not "empowered" to assess markets and make the best decisions for them, thanks to factors such as "the complexity of products, opacity of pricing and information asymmetry between firm and customer".[47]

46. The opportunities and challenges associated with the UK using Brexit as a chance to address perceived issues by changing its competition regime are discussed in Chapter 5.

Conclusions

47. **EU competition policy is derived from rules set out in the Treaty on the Functioning of the European Union (TFEU), and encompasses three 'pillars': antitrust, mergers, and State aid. EU Member States' courts and competition authorities are required to apply EU antitrust law when considering anti-competitive agreements and conduct which may affect trade between Member States, and to ensure consistency with the principles applied and decisions reached by the Court of Justice of the European Union (CJEU). The European Competition Network (ECN) facilitates cooperation between the national competition authorities of Member States and the European Commission.**

48. **In relation to merger control, the Commission primarily examines larger, international mergers which have an 'EU dimension', based on specified turnover thresholds achieved in more than one Member State. This provides a 'one stop shop' whereby merger reviews are usually dealt with either by the Commission or by a Member State authority.**

49. **The EU has exclusive competence in determining the compatibility of State aid with the internal market, which is prohibited without the approval of the Commission. However, the majority of new State aid measures are now covered by the General Block Exemption Regulation (GBER) and Member States are not required to notify them to the Commission for prior authorisation.**

46 Written evidence from Res Publica (CMP0030). Relevant conclusions on this subject in a report from the European Union Committee, *Online Platforms and the Digital Single Market* (10th Report, Session 2015–16, HL Paper 129), are outlined in Chapter 5.

See also European Union Committee, *Brexit: will consumers be protected?* (9th Report, Session 2017–19, HL Paper 51)

47 Written evidence from the Financial Services Consumer Panel (CMP0014)

50. **The Competition and Markets Authority (CMA) is the UK's lead competition authority, with responsibility for investigating potential breaches of UK or EU antitrust prohibitions and examining mergers which could restrict competition. Certain sectoral regulators also have concurrent competition powers. The UK's antitrust and merger control regime is robust and highly regarded, and the CMA is well-respected among its international peers. By contrast, the UK's domestic State aid framework is very limited, as EU law applies directly and the Commission approves any aid not covered by block exemptions, such as the GBER.**

51. **While stakeholders are generally positive about the operation of the current UK and EU competition regimes, there are some issues such as consumer concerns regarding pricing and dominance in some markets, and delays and bureaucracy in the EU State aid approval process.**

CHAPTER 3: SHORT-TERM IMPLICATIONS OF BREXIT

Antitrust

The relationship between UK and EU antitrust law

52. As noted in the previous chapter, the antitrust provisions in Chapters I and II of the Competition Act 1998 are, in the words of Baker McKenzie LLP, "mirrored" in the corresponding EU provisions in Articles 101 and 102 TFEU.[48] The CAT also explained that the interpretation of these Chapters was governed by the 'consistency principle' under section 60 of the Competition Act 1998, which sets an obligation on UK courts and tribunals to ensure "no inconsistency with the treatment of corresponding questions of EU law, and in particular any principles applied and decision reached by the EU Courts".[49]

53. Most witnesses agreed that Brexit would not require amendments to these domestic antitrust prohibitions. Hausfeld & Co LLP, for example, described the immediate post-Brexit statutory position in this regard as "no change".[50]

54. This leaves open the question of the relationship between UK and EU competition law after Brexit. The CMA said that the 'consistency principle'—or "section 60 in its current form"—would not be required after the UK left the EU.[51] Dr Anca Chirita, Assistant Professor in Competition Law, Durham University, on the other hand, emphasised the value of the existing body of EU case law to the UK, suggesting that the UK's own body of antitrust case law was "insufficiently developed", compared to what Professor Richard Whish QC, Emeritus Professor at King's College London, described as the "rich jurisprudence" of the CJEU.[52] Vodafone Group plc added that maintaining some form of legislative link with EU law would also "mitigate the burden" for UK businesses, particularly cross-border businesses that would continue to be required to comply with both regimes.[53]

55. A number of witnesses suggested that the present 'consistency principle' under section 60 could be replaced with a softer duty, whereby UK authorities would be required to 'have regard to' EU law and precedent.[54] Prof Whish, however, emphasised that this duty "should not be an onerous one", nor should it result in a situation where a UK judge had "to spend a huge amount of time explaining his or her reason for departure" from EU case law.[55]

56. Although witnesses generally agreed that the UK should retain a link with EU antitrust law, Prof Akman suggested that this would not necessarily be a desirable approach in the long-term. She imagined a situation 20 years in the future where UK courts and the CMA were still obliged to 'have regard to' EU case law which had developed without UK judges sitting on EU Courts. Prof Akman pointed out that the Competition Act 1998 also required UK

48 Written evidence from Baker McKenzie LLP (CMP0026)
49 Written evidence from the Competition Appeal Tribunal (CMP0042)
50 Written evidence from Hausfeld & Co LLP (CMP0018)
51 Written evidence from the Competition and Markets Authority (CMP0002)
52 Written evidence from Dr Anca Chirita (CMP0013) and Q 22 (Prof Richard Whish)
53 Written evidence from Vodafone Group plc (CMP0019)
54 See for example written evidence from Baker McKenzie LLP (CMP0026), Centre for Law, Economics and Society at UCL (CMP0032), and Dr Maria Ioannidou (CMP0028)
55 Q 22 (Prof Richard Whish). See also Brexit Competition Law Working Group, *Conclusions and Recommendations* (July 2017): http://www.bclwg.org/wp-content/uploads/2017/07/BCLWG-Conclusions-and-Recommendations-Final.pdf [accessed 5 December 2017]

courts to have regard to Commission decisions, a duty which she told us would be "unimaginable" after Brexit.[56]

57. Dr Matthew Cole, Lecturer on Competition Law and Mergers and Acquisitions at the University of Exeter, favoured an approach of "voluntary coherence", where "as far as practically possible" the UK continued to apply antitrust law in the same way the EU applied its own antitrust rules, but in a "voluntary" and "non-binding" manner.[57]

Block exemptions

58. Hausfeld & Co explained that block exemptions—where specified types of commercial agreements between certain types of undertakings were effectively "exempt from the usual scrutiny of competition rules"—were permitted under both EU and UK competition regimes.[58] The UK Chamber of Shipping gave the example of Regulation (EC) 906/2009, which provided a block exemption for consortia of liner shipping services. This enabled them to reach "various technical, operational or commercial arrangements" to supply joint services, such as using the same vessels and port installations.[59]

59. At present, EU block exemptions automatically apply in the UK by virtue of section 10 of the Competition Act 1998, creating a system of 'parallel exemptions', which Baker McKenzie LLP explained were "heavily relied on by companies for legal certainty".[60] This view was echoed by the Competition Law Committee of the City of London Law Society (the CLLS Competition Law Committee), who said that, after Brexit, the "simplest approach [would] be to preserve these parallel exemptions and guidance in their present form". The CLLS Competition Law Committee added that the intention of the EU (Withdrawal) Bill, as introduced, appeared to be that existing block exemptions would be incorporated into UK law, though they noted "a small risk that the definitions in the Bill may not pick them up".[61]

60. The CLLS Competition Law Committee further highlighted that block exemptions and related guidance were of "limited life", and suggested that there would be value in the UK taking a "common approach" to the EU when legislating for future exemptions after Brexit.[62] Prof Akman pointed to the advantages of this for cross-border businesses, as divergence could lead to UK and EU parties to the same contract (operating under block exemptions) being subject to different competition rules.[63]

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56 Q 22 (Prof Pinar Akman)
57 Written evidence from Dr Matthew Cole (CMP0040)
58 Written evidence from Hausfeld & Co LLP (CMP0018)
59 Written evidence from the UK Chamber of Shipping (CMP0015)

Some EU block exemptions are sector-specific, such as Regulation (EC) 906/2009 (OJ L 256, 29 September 2009) for shipping, while others apply generally, such as the Commission's Vertical Agreements Block Exemption Regulation (VABER)—Regulation (EU) 330/2010 (OJ L 102, 23 April 2010).

60 Written evidence from Baker McKenzie LLP (CMP0026)
61 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
62 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017). See also Q 23 where Prof Whish told us that block exemptions normally last for approximately 15 years, after which they may be renewed.
63 Q 23 (Prof Pinar Akman)

61. Baker McKenzie suggested that section 10 of the Competition Act 1998 could be limited to "preserving the parallel exemptions that are in force as of the date of Brexit for the life of the relevant EU block exemption", and envisaged that the CMA could then "consult on each block exemption as they come up to expiry".[64] On the other hand, Professor Eyad Maher Dabbah, Professor of Competition Law and Policy at Queen Mary University London, said that the UK might not want to wait for current block exemptions to expire, but instead time-limit them—though this would depend on whether the CMA was "willing and planning to adopt its own block exemptions regime".[65]

Private actions and the role of UK legal services

62. Private individuals or businesses can currently bring cases for damages before UK courts following breaches of either domestic or EU antitrust law, and many of our witnesses highlighted the UK's status as an attractive jurisdiction for these private litigants. COMBAR described how private actions in the UK had seen a "substantial boom in the last fifteen years", with litigants "attracted by the reputation of [UK] courts, the procedural protections available and professional expertise".[66] The CLLS Competition Law Committee also pointed out that this had been "a valuable source of work to UK-based lawyers and specialists such as economic experts".[67]

63. Oxera told us that the "largest" private actions in UK courts were frequently made as 'follow-on' claims to breaches of European competition law, and were based on Commission decisions.[68] Hausfeld & Co noted that in such cases litigants "do not have to prove the underlying infringement of competition law as this has already been established by the Commission".[69]

The status of EU antitrust prohibitions

64. The CLLS Competition Law Committee explained that the EU (Withdrawal) Bill, as introduced, would provide that "rights derived immediately before Brexit" would "continue to be recognised and available under UK law". They told us this would enable claims under Articles 101 and 102 TFEU "entirely relating to the pre-Brexit period" to continue to be brought in the UK, but "would provide no basis for claims under EU treaty articles arising after Brexit".[70]

65. For this reason, the CAT concluded that "full policy consideration" would need to be given to whether "contravention of Articles 101 or 102 should continue to be an infringement of UK law"—particularly as, after the UK ceases to be a Member State, those articles would only "concern conduct producing effects *wholly outside* the UK".[71]

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64 Written evidence from Baker McKenzie LLP (CMP0026)
65 Q 23 (Prof Eyad Maher Dabbah)
66 Written evidence from the Commercial Bar Association (CMP0038)
67 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
68 Written evidence from Oxera (CMP0012)

The legal basis for such 'follow-on' claims is set out under sections 47A and 58A Competition Act 1998 which specify that a Commission decision finding an infringement is binding on the High Court and/or the Competition Appeal Tribunal.

69 Written evidence from Hausfeld & Co LLP (CMP0018)
70 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
71 Written evidence from the Competition Appeal Tribunal (CMP0042)

66. The CAT also pointed out that if Articles 101 and 102 were not part of UK law after Brexit, "EU antitrust law would be foreign law"—although COMBAR noted that UK courts were "often called upon to apply foreign law", and suggested that "EU law should, in the future, be no exception".[72]

The status of Commission decisions

67. The CLLS Competition Law Committee argued that the status of Commission antitrust infringement decisions after Brexit would be "of at least equivalent practical significance" to the ongoing status of Articles 101 and 102 TFEU in maintaining the UK's "attraction as a venue for EU competition cases".[73] Hausfeld & Co said that Commission decisions would cease to be binding on UK Courts after Brexit, unless the UK retained membership of the European Economic Area (EEA), meaning that claimants could be "required to prove the underlying infringement of competition law". This could lead them to bring claims elsewhere.[74]

68. Baker McKenzie argued UK courts should regard Commission decisions as "persuasive" after the UK left the EU.[75] Gowling WLG went further, calling for an express legislative provision that "the CAT should be able to accept a (final) European Commission decision without the need for a claimant or defendant to re-prove the content of the decision".[76] On the other hand, Eversheds Sutherland (International) LLP considered it "unlikely" that Commission decisions would be considered binding in UK courts after Brexit, as this "would entail accepting continuing ultimate jurisdiction" of the CJEU.[77]

69. Oxera, while acknowledging that the attractiveness of the UK as a jurisdiction for antitrust damages depended on the future status of EU law and Commission decisions, pointed out that London, in particular, had numerous "agglomeration advantages" that could not easily be replicated. These included its "reputation for robustness and independence of the courts, and the clustering of legal and economic advisers, including for complementary services such as international arbitration".[78]

70. A number of witnesses noted that the UK's status as a leading forum for antitrust damages would also be affected by the extent to which UK judgments were recognised and enforced in the EU after Brexit, currently provided for by the Brussels Regulation.[79]

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72 Written evidence from the Competition Appeal Tribunal (CMP0042) and the Commercial Bar Association (CMP0038)

73 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)

74 Written evidence from Hausfeld & Co LLP (CMP0018)

75 Written evidence from Baker McKenzie LLP (CMP0026)

76 Written evidence from Gowling WLG (CMP0023)

77 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)

78 Written evidence from Oxera (CMP0012)

79 The Brussels Regulation provides for the principle of mutual trust and recognition between the courts of EU Member States. As such, judgments rendered by courts in one Member State are automatically recognised and enforced in other Member States, without any declaration of enforceability being required. Written evidence from the Competition Appeal Tribunal (CMP0042), COSLA (CMP0033) and Dr Maria Ioannidou (CMP0028). See also European Union Committee, *Brexit: justice for families, individuals and businesses?* (17th Report, Session 2016–17, HL Paper 134)

Merger control

71. Merger control in the UK is governed by the Enterprise Act 2002 and enforced by the CMA. Mergers qualify for review by the CMA based on the size of UK turnover of the business to be acquired, or on the level of market share in the UK created by the merging parties. The CMA undertakes a two-phase process during which it determines if the merger will result in the substantial lessening of competition in the UK. The CMA may clear a transaction unconditionally, clear it subject to binding remedies, or prohibit it.[80]

72. As described in Chapter 2, the domestic system of merger control operates alongside the EU Merger Regulation (EUMR), where mergers with a 'European (or community) dimension'—based on turnover thresholds—are subject to exclusive review by the Commission. This arrangement is known as the 'one stop shop'. As COMBAR noted, the UK will no longer be able to participate in the 'one stop shop' after Brexit, "barring a bespoke agreement" to facilitate this.[81]

Loss of the 'one stop shop'

Impact on the CMA and the CAT

73. Witnesses set out a number of practical consequences arising from the loss of the 'one stop shop' after Brexit, including the potential for parallel reviews by the Commission and the CMA—if mergers met relevant turnover and market share thresholds in both jurisdictions—and a likely increase in the number of reviews undertaken by the CMA, as a result of assuming responsibility for cases which would previously have fallen under the exclusive jurisdiction of the Commission.[82] In the financial year ending 31 March 2017, the CMA completed 57 Phase 1 merger reviews and five Phase 2 reviews; the CMA estimated that Brexit could result in an additional caseload of 30 to 50 Phase 1 mergers and "half a dozen or so" Phase 2 cases each year.[83]

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80 The CMA has the jurisdiction to examine a merger where: either the UK turnover of the acquired enterprise exceeds £70 million, or the two enterprises supply or acquire at least 25% of the same goods or services supplied in the UK and the merger increases that share of supply. Competition and Markets Authority, *A Quick Guide to UK Merger Assessment* (March 2014): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288677/CMA18_A_quick_guide_to_UK_merger_assessment.pdf [accessed 5 December 2017]

81 Written evidence from the Commercial Bar Association (CMP0038)

82 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)

83 Written evidence from the Competition and Markets Authority (CMP0002). See also Competition and Markets Authority, *Annual Report and Accounts 2016/17* (12 July 2017): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/628984/cma-annual-report-accounts-16-17-web-accessible.pdf [accessed 5 December 2017]

Phase 1 covers the CMA's initial examination of a merger case including pre-notification discussions on a voluntary notification, the formal merger notification, and an initial assessment. The CMA can then either clear the merger, clear it subject to undertakings from the parties involved, or refer it for a Phase 2 investigation. A Phase 2 'full investigation' may involve written submissions and oral hearings from the parties involved and interested third parties. The CMA can then either clear the merger unconditionally or subject to certain undertakings, or prohibit the merger. '*Merger control in the UK' (England and Wales): overview*, Timothy McIver and Anne-Mette Heemsoth, Debevoise & Plimpton LLP: https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a733361 [accessed 15 December 2017]

74. Witnesses also commented on the likelihood that an increase in the number and complexity of merger cases subject to review by the CMA would require substantial additional resources for the authority. The implications of Brexit for the capacity of the CMA and the CAT are discussed in Chapter 7.

Impact on businesses

75. The CLLS Competition Law Committee explained that the timeline for review, for submission of remedy proposals, and for gathering third party feedback on remedies were "very different" under UK law, compared to the EUMR. This, they said, could "place great strain on the ability of merging parties to ensure consistent results between both authorities".[84] Hogan Lovells noted that businesses could also expect transaction costs to rise, because most mergers investigated by the CMA were subject to a fee, "whereas no fee is payable for transactions reviewed under the EUMR".[85]

76. In relation to the potential burden placed on businesses by having to notify mergers to both the Commission and the CMA, Skadden, Arps, Slate, Meagher & Flom LLP drew a distinction between large multijurisdictional transactions—where "one extra filing may not add significant additional cost"—and smaller transactions currently "subject to notification only in a small number of jurisdictions", where an extra filing would "present a more noticeable burden".[86] The CMA, on the other hand, noted "the many practical similarities and synergies between the EU and UK merger review processes", arguing that these might "mitigate the extent to which businesses must carry out significantly different work for the two investigations".

77. The CMA also suggested that businesses could streamline potential dual review requirements by "agreeing to waivers allowing the European Commission and the CMA to share and discuss information", and confirmed that it would continue to "work on procedural efficiencies that minimise the burden of notification". The CMA further considered that the similarities between how the UK and EU approached merger reviews meant that there were not likely to be frequent "significant divergences" in the outcomes of parallel reviews by the Commission and the CMA.[87]

Impact on the EU

78. Witnesses noted that Brexit would also have implications for merger control within the EU. Hogan Lovells, for example, explained that UK turnover would no longer count towards EUMR thresholds after Brexit, meaning that "some mergers involving UK parties or markets may fall below [these] thresholds". They suggested that, as a result, there could be more notifications in individual Member States, and that this could in turn potentially "trigger a reassessment" of EUMR review thresholds.[88]

84 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
85 Written evidence from Hogan Lovells (CMP0027)
86 Written evidence from Skadden, Arps, Slate, Meagher & Flom LLP (CMP0031)
87 Written evidence from the Competition and Markets Authority (CMP0002)
88 Written evidence from Hogan Lovells (CMP0027)

The Government's position

79. Margot James MP, Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy (BEIS),[89] was clear that, after Brexit, the UK would still have "strong, well-established competition law and a world-class competition authority". Ms James also confirmed that BEIS was "currently drafting statutory instruments" to ensure that UK competition law could "function effectively and independently" after Brexit, but did not provide any further detail on the content of these instruments.[90]

80. In relation to private actions, BEIS told us that the UK had been "at the forefront of promoting private enforcement of competition law". Its "acknowledged expertise" made the UK a popular forum of choice for private actions. BEIS observed that, regardless of the future UK-EU relationship, UK consumers and businesses would be able to bring follow-on actions based on the decisions of UK competition authorities, the number of which, they suggested, could increase as a result of UK authorities undertaking more investigations after Brexit. BEIS acknowledged that other aspects of the UK's private actions regime would be subject to changes resulting from Brexit, but said that the Government was "committed to providing as much certainty and clarity as soon as possible to businesses and consumers".[91]

81. With regard to the implications of losing the EUMR 'one stop shop', BEIS thought that the additional burden on businesses would be "limited", pointing to the UK's voluntary notification regime and the fact that many international mergers already involve "multiple jurisdictions and merger filings with multiple authorities". BEIS noted that the burden of an additional notification would be alleviated by the many "practical similarities" between the EU and UK regimes, and by measures introduced by the CMA to make its merger review process as "efficient and effective" as possible.[92]

Conclusions

82. **Although Brexit does not necessitate a fundamental revision of the UK's well-established domestic competition framework, the 'consistency principle' under section 60 of the Competition Act 1998 will no longer be appropriate in its current form after the UK leaves the EU and EU law no longer has primacy. It would be desirable to replace section 60 with a softer duty, whereby UK authorities might 'have regard to' EU law and precedent, although such an approach may not be appropriate in the longer-term. We call on the Government to clarify this during negotiations on the UK's future relationship with the EU.**

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89 Margot James MP gave evidence to us on 2 November 2017 when she was Parliamentary Under Secretary of State and Minister for Small Business, Consumers and Corporate Responsibility at BEIS. She was replaced as Parliamentary Under Secretary of State at BEIS by Andrew Griffiths MP on 9 January 2018.

90 Q 49 (Margot James MP)

The European Union (Withdrawal) Bill, introduced in the House of Commons in July 2017, creates a new category of domestic law for the UK: 'retained EU law'. Clauses 5 and 6 provide instructions to the courts on the status and interpretation of retained EU law, which are relevant to the consideration in this inquiry of how the UK might continue to 'have regard to' EU competition law and precedent after Brexit. European Union (Withdrawal) Bill [Bill 5 (2017–19)]

91 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)

92 *Ibid.*

83. **The current EU block exemptions are valued by UK businesses in helping them to ensure that certain types of agreements do not fall foul of either EU or UK antitrust prohibitions. Similar arrangements should continue to apply under UK law after Brexit. To provide certainty and minimise disruption for businesses, the Government should clarify whether the EU (Withdrawal) Bill is intended to facilitate the ongoing application of current exemptions, and for how long. The Government will also need to decide the extent to which the UK will continue to take account of future EU block exemptions.**

84. **The loss of the 'one stop shop' arrangement whereby larger mergers fall under the exclusive jurisdiction of the Commission is likely to increase the number of mergers subject to review by the CMA and the number of appeals heard before the Competition Appeal Tribunal (CAT). We welcome the CMA's commitment to continue to work on procedural efficiencies to minimise the burden of dual notifications to businesses, and we support measures to reduce the impact of differences between the statutory timelines for CMA and Commission reviews.**

85. **A further issue is the effect of Brexit on specialist legal services. A number of factors have enabled the UK, and London in particular, to develop into Europe's foremost jurisdiction for private damages actions resulting from breaches of competition law. Many of these features are likely to endure beyond Brexit, but uncertainty surrounding the future status of EU antitrust prohibitions and Commission decisions could put this leading status at risk. The Government should take this into account when it decides whether to repeal or amend the legislative basis for 'follow on' claims in the Competition Act 1998, and whether to allow UK bodies to continue to accept final Commission decisions.**

CHAPTER 4: TRANSITIONAL ARRANGEMENTS

86. The need for transitional arrangements—to establish a bridge between the UK's current EU membership and its future trading relationship with the EU—has been a common theme of many of the Brexit-related reports produced by this Committee. The desirability of such an arrangement was acknowledged by the Prime Minister during her Lancaster House speech in January 2017. In September 2017, she called for a two-year "period of implementation" to allow time to "prepare and implement the new processes and new systems" that will underpin the future UK-EU relationship.[93]

87. We discussed the potential for confusion regarding the meaning of 'transition' in our recent report: *Brexit: deal or no deal*. We noted that the UK Government commonly referred to a period of 'implementation' rather than 'transition', although both terms suggest a similar concept of gradual adaptation to an agreed future UK-EU relationship. In her Florence speech, however, the Prime Minister said that the framework for this period would be "the existing structure of EU rules and regulations", where "the same rules and laws will apply on the day after exit as on the day before". This suggests that the two-year transition (or implementation) period, if agreed, would be more one of 'standstill' than phased change.[94]

88. This Chapter discusses the need for transitional arrangements to cover the point at which the UK assumes regulatory independence and jurisdiction over competition matters—referred to as the 'time (or point) of Brexit'—whether this takes place on 29 March 2019 or at the end of a 'standstill' period.

Transitional issues

89. With regard to competition matters, witnesses told us that transitional arrangements would primarily be needed to address issues of jurisdiction. Dr Andrea Coscelli, Chief Executive of the CMA, warned that, if these issues were not resolved, there could be legal loopholes, with some investigations 'falling through the cracks'. In such circumstances, he said, UK consumers would "pay the price".[95]

Cases 'live' at the point of Brexit

90. Professor Michael Waterson, Professor of Economics at the University of Warwick, highlighted the issue of competition cases within the current competence of the EU that were "'in flight' at the appointed time for separation".[96] The CMA noted that this would include both ongoing antitrust cases and mergers which had been notified but not completed at the point of Brexit, stressing that transitional arrangements would need to confirm whether these cases were investigated and resolved by the Commission or by the CMA.[97]

93 Prime Minister Theresa May, Speech on the Government's negotiating objectives for exiting the EU, 17 January 2017: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech and Prime Minister Theresa May, Speech on a new era of cooperation and partnership between the UK and the EU, 22 September 2017: https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu [accessed 23 November 2017].

94 European Union Committee, *Brexit: deal or no deal* (7th Report, Session 2017–19, HL Paper 46), Chapter 3

95 Q 6 (Dr Andrea Coscelli)

96 Written evidence from Prof Michael Waterson (CMP0003)

97 Written evidence from the Competition and Markets Authority (CMP0002)

91. UKSALA pointed out that a similar issue would arise in relation to State aid cases involving the UK which were still being investigated by the Commission, or had appeals pending before the EU Courts, at the time of Brexit.[98] The CLLS Competition Law Committee observed that the UK and EU would need to decide whether these cases could "continue to judgment and appeal", and also address "the consequences of a subsequent remittal of a case for redecision by the Commission".[99]

Cases relating to pre-Brexit activities

92. The CLLS Competition Law Committee told us that Commission investigations into serious anti-competitive conduct were frequently started towards the end of the limitation period during which the EU can impose fines for anti-competitive conduct, and that the entire process of investigation through to decision-making could take "in excess of 10 years in itself, with civil damages claims potentially following after that." Consequently, there would be a significant period post-Brexit during which the Commission could discover cases relating to pre-Brexit anti-competitive conduct, and during which it would "envisage current co-operation and enforcement rights remaining in place".[100] The CAT suggested that these cases would most commonly involve cartels, but could also encompass cases relating to abuse of dominance.[101]

93. Eversheds Sutherland (International) observed that a similar situation could arise in relation to State aid granted pre-Brexit, suggesting that transitional arrangements would need to clarify whether, post-Brexit, the Commission had the right to "require the recovery of State aid which would have been deemed to have been unlawful under EU State aid rules".[102]

The status and enforcement of pre-Brexit commitments, remedies and decisions

94. The CLLS Competition Law Committee questioned who would be responsible for enforcing commitments, non-monetary obligations, or remedies affecting UK companies which the Commission had taken into account in decisions on antitrust and merger cases taken prior to Brexit.[103]

95. As discussed in Chapter 3, witnesses wanted clarity on the application of Commission decisions in the UK, both during transition and beyond, particularly in relation to private damages cases. The CAT, for example, told us that, if this issue was not addressed:

> "The defendant to a claim for compensation would be able to argue that the Commission decision was wrong, which would hugely increase the burden on those seeking compensation and doubtless deter many from doing so".[104]

98 Written evidence from the UK State Aid Law Association (CMP0008)
99 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
100 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017). The limitation period for the EU to impose fines for anti-competitive conduct is five years from the cessation of the conduct in question; a period which is 'interrupted' when the Commission or a Member State undertakes any action to investigate an infringement and suspended for the duration of any appeals before the EU Courts.
101 Written evidence from the Competition Appeal Tribunal (CMP0042)
102 Written evidence from Eversheds Sutherland (International) LLP (CMP0024). EU State aid rules specify a ten-year limitation period for the Commission to investigate State aid measures which should have been notified but were not.
103 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
104 Written evidence from the Competition Appeal Tribunal (CMP0042)

96. Professor Andrea Biondi, Professor of European Union Law at King's College London, told us it would also be important to clarify the status of Commission decisions in relation to State aid, especially where the Commission had approved the compatibility of the aid.[105] UKSALA noted that these compatibility decisions were often subject to conditions, observing that transitional arrangements would need to specify the ongoing applicability of these conditions in the UK post-Brexit, and who would be responsible for enforcing them.[106]

Possible solutions

Antitrust and merger control

97. Dr Coscelli told us that the CMA was "quite relaxed" about the balance of jurisdiction between it and the Commission during any transition period, although Sarah Cardell, General Counsel at the CMA, acknowledged there might be a "certain efficiency" if cases underway at the point of Brexit stayed with the agency already leading the investigation.[107]

98. The CAT warned that a lack of clarity regarding jurisdiction during the transitional period could lead to "disputes as to which actions or effects [were] properly attributable to the period before and the period after the change in jurisdiction", but did not propose a specific solution.[108]

99. Prof Whish thought that the Commission should continue to have jurisdiction over cases it had opened before Brexit.[109] The CLLS Competition Law Committee agreed, but emphasised the need to clarify when proceedings would be considered "formally commenced", particularly in relation to merger transactions, which involved a lengthy pre-notification process, with "a number of regulatory milestones". In this situation, the CLLS Competition Law Committee considered that the Commission should retain jurisdiction over mergers which met the EUMR 'European dimension' threshold, and where the pre-notification process had begun before Brexit.[110]

100. The CLLS Competition Law Committee acknowledged that an agreement to draw a line at the point of Brexit would not allow the Commission subsequently to assert jurisdiction over pre-Brexit anti-competitive behaviour that was identified only after the UK's withdrawal. Nonetheless, they suggested this could be a "suitable compromise", given the Government's position on the authority of the CJEU in the UK after Brexit.[111]

101. The CLLS Competition Law Committee argued that UK parties should have the same procedural rights as parties in EU Member States for any cases where the EU retained jurisdiction during transition, including rights of representation and legal professional privilege. They also thought that UK judges should remain members of the CJEU when hearing such cases during the transitional period.[112]

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105 Written evidence from Prof Andrea Biondi (CMP0011)
106 Written evidence from the UK State Aid Law Association (CMP0008)
107 Q 7 (Dr Andrea Coscelli and Sarah Cardell)
108 Written evidence from the Competition Appeal Tribunal (CMP0042)
109 Q 25 (Prof Richard Whish)
110 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
111 *Ibid.*
112 *Ibid.*

102. Baker McKenzie thought that commitments on antitrust cases concluded under Regulation (EC) 1/2003 should continue to apply post-Brexit, and suggested that the CMA should have powers to enforce these commitments in UK courts. In relation to mergers which had been cleared under the EUMR before Brexit subject to remedies, Baker McKenzie suggested that the Commission should continue to have jurisdiction to monitor and enforce those remedies.[113]

State aid

103. Rhodri Thompson QC, Christopher Brown, Nicholas Gibson, and Anita Davies—barristers specialising in UK and EU competition law—suggested that transitional issues relating to State aid should be relatively straightforward to resolve, as such cases involved discrete decisions and transactions, rather than ongoing infringements.[114]

104. Eversheds Sutherland (International) anticipated a situation where the EU required full compliance with its State aid rules for the duration of any transitional period. But this would only delay the issue: questions over the ongoing applicability of Commission State aid decisions, and the Commission's ability to review and recover aid granted in the UK pre-Brexit that was subsequently deemed unlawful, would still "ultimately become relevant at the expiry of that period".[115]

The importance of early clarity

105. Prof Maher Dabbah told us that, regardless of the specific arrangements of any implementation period, it should be underpinned by the "key principle of continuity and a smooth transition from the pre- to the post-March 2019 period".[116]

106. Trustonic was clear that "businesses do not want to adapt twice to Brexit", and emphasised that any transitional arrangement which was agreed at the last minute, and which gave way to a new regime shortly afterwards, would result in higher costs for businesses.[117]

Antitrust and merger control

107. The CMA told us that an agreement on transitional arrangements should be concluded "as soon as possible to maximise certainty for businesses and their advisors". This would be particularly important for businesses considering mergers in 2018 or 2019, where the period of review under current EUMR arrangements would span the point of Brexit.[118] The CLLS Competition Law Committee warned: "In the run up to Brexit, there will be numerous transactions in contemplation which will face considerable uncertainty if the jurisdictional position between the UK and EU is uncertain".[119] Vodafone told us it was "completely unclear" what, if any, transitional arrangements would apply to these cases, and suggested that this could lead to a "significant 'cooling' effect on merger activity".[120]

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113 Written evidence from Baker McKenzie LLP (CMP0026)
114 Written evidence from Rhodri Thompson QC, Christopher Brown, Nicholas Gibson, and Anita Davies (CMP0020)
115 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)
116 Q 21 (Prof Eyad Maher Dabbah)
117 Written evidence from Trustonic (CMP0022)
118 Written evidence from the Competition and Markets Authority (CMP0002)
119 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
120 Written evidence from Vodafone Group plc (CMP0019)

State aid

108. The East of England European Partnership told us:

> "It is important that local authorities and business communities have continuity, at least, in the immediate period following Brexit. In terms of state aid policy this would allow businesses … to commit significant resources to … tendering activities safe in the knowledge that the rules of the game will be consistent in the short-term".[121]

109. COMBAR warned that uncertainty around transitional arrangements for State aid jurisdiction and enforcement could significantly delay infrastructure projects, if private sector investors were not clear what regime would be applied to the project before making an investment decision.[122]

UK and EU position papers

110. Both the EU and the UK have published initial position papers regarding ongoing judicial and administrative proceedings at the point of Brexit.

Box 1: Extracts from the EU's position paper on Ongoing Union judicial and administrative proceedings

In relation to proceedings before the Court of Justice, the Withdrawal Agreement should ensure that:

(1) The United Kingdom's withdrawal as such does not deprive the Court of Justice of its competence to adjudicate in proceedings which are pending on the withdrawal date …

(2) The Court of Justice is competent to adjudicate in preliminary references submitted by courts in the United Kingdom after the withdrawal date relating to facts that occurred before the withdrawal date, as well as for infringement procedures relating to such facts, instituted … against the United Kingdom after the withdrawal date.

(3) Judgments of the Court of Justice given before the withdrawal date as well as judgments given in proceedings mentioned under (1) and (2) have binding force in the United Kingdom after the withdrawal date and are enforceable there under the same conditions …

In relation to administrative procedures before the Union institutions, bodies, offices and agencies, the Withdrawal Agreement should ensure that:

(4) The United Kingdom's withdrawal as such does not deprive Union institutions, bodies, offices and agencies of their competence to conduct administrative procedures pending before them on the withdrawal date … Such procedures include, for example, state aid investigations by the Commission …

(5) The Union institutions, bodies, offices and agencies are competent under the same conditions as before the withdrawal date to start and conduct, after the withdrawal date, administrative procedures … relating to facts that occurred before the withdrawal date.

Source: European Commission, Position paper on Ongoing Union Judicial and Administrative Procedures (12 July 2017): https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-ongoing-union-judicial-admin-procedures_en_0.pdf [accessed 23 November 2017]

121 Written evidence from the East of England European Partnership (CMP0007)
122 Written evidence from the Commercial Bar Association (CMP0038)

Box 2: Extracts from the UK's position paper on Ongoing Union judicial and administrative proceedings

The UK has made clear that leaving the EU will end the jurisdiction of the CJEU in the UK … At the same time, the UK is committed to minimising uncertainty and disruption for individuals or businesses, including that arising from changes in the treatment of cases pending at the time of withdrawal …

The UK recognises that beyond a certain point in proceedings, where considerable time and resources have been invested in CJEU proceedings, it may well be right that such cases continue to a CJEU decision. Detailed technical issues would need to be resolved, and the UK will seek to agree with the EU:

- the types of case that would be in scope of any agreement in this area;
- the point at which a case can be considered to be pending;
- the status of any decision reached by the CJEU;
- the status of any interventions which the UK has notified; and
- the role of UK-appointed judges and Advocate General in the Court and the role of UK lawyers appearing before the Court.

… The UK does not consider that the CJEU should remain competent to rule on cases on which it has not been seized before the day of withdrawal, even where the facts arose before withdrawal. This would lead to an uncertain environment in which it would be impossible to predict how long the CJEU would continue to issue judgments in respect of the UK …

It is important that there is agreement between the UK and the EU as to the precise administrative procedures that should be within scope of any discussions… Examples of administrative procedures that may be in scope include the following:

- proceedings on competition and antitrust under Regulation (EC) 1/2003
- procedures on concentration of undertakings/mergers under Regulation 139/2004.

Source: HM Government, Ongoing Union judicial and administrative proceedings position paper (13 July 2017): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627910/FINAL_OFF_SEN_Position_paper_HMG_Ongoing_Union_judicial_and_administrative_proceedings_Position_Papers_FINAL_120717__2___1_.pdf [accessed 5 December 2017]

111. The CLLS Competition Law Committee highlighted key differences between the UK and EU papers. The EU envisaged the EU institutions retaining jurisdiction over any court cases and administrative procedures that were ongoing at the point of Brexit, as well as those which arose post-Brexit relating to facts or activities that occurred while the UK was still a member of the EU. On the other hand, the UK paper invited negotiation on these issues, "but [did] not reveal where the UK would wish to end up".[123]

112. While the Law Society welcomed the Government's recognition that transitional arrangements would be needed for antitrust and mergers proceedings, EEF warned: "The UK's rejection of any role of the CJEU after Brexit … excludes any straightforward form of enforcement".[124]

123 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)

124 Written evidence from The Law Society (CMP0037) and EEF the manufacturers' organisation (CMP0016)

The Government's position

113. BEIS acknowledged that some cases would have started but not concluded at the point of Brexit. They confirmed that "the question of appropriate arrangements for handling these cases, including the jurisdiction which will apply, is within scope of the negotiations concerning UK exit from the EU".[125]

114. The Minister, Margot James MP, told us that the Government had discussed cases live at the point of Brexit—and cases beginning after the UK's withdrawal but related to pre-Brexit conduct—with the EU, but did not provide any further detail on the UK's position. Ms James said that the Government's "most important objective [was] to get some clarity so that businesses know which agency handles which issue".[126]

115. Chris Blairs, Deputy Director for Competition Policy at BEIS, emphasised that he could not provide details on the content of live negotiations, but confirmed that discussions were taking place on "technical" issues such as "jurisdiction over cases, at what point an investigation starts and on what facts".[127]

116. The Minister also declined to comment on "how State aid [rules] might be applied in the hypothetical case that [the UK got a] transition period agreed", but she confirmed that the Government had held "preliminary discussions for the arrangements for State aid with the EU". When pressed, Ms James told us the issue was "definitely exercising those involved in the negotiations, without a shadow of a doubt".[128]

Conclusions

117. **Negotiations on any transition (or implementation) period for the UK's withdrawal from the EU need to be resolved to gain clarity on exactly when the UK will completely withdraw from the EU's competition regime. Nonetheless, whether in March 2019 or at the end of a two-year period where EU rules and regulations remain largely in force, arrangements will be necessary to manage EU court cases and administrative procedures which are 'live' at the point of this transition, including competition cases. We welcome the Government's recognition of the necessity of such arrangements, and expect the Article 50 withdrawal agreement to include provisions to ensure continuity in the handling of such cases.**

118. **We note the differing positions outlined in the EU and UK position papers on ongoing Union judicial and administrative proceedings, particularly with regard to the jurisdiction of the CJEU post-Brexit, which may complicate the process of reaching a transitional agreement on competition matters.**

125 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)
126 Q 50 (Margot James MP)
127 Q 50 (Chris Blairs)
128 QQ 55–57 (Margot James MP)

119. **We recognise the Government's ambition to provide clarity for businesses on these issues, but note that businesses are likely to already be planning future merger transactions and investment projects that will span, or occur after, the point of Brexit. We urge the Government to come to an early agreement with the EU on jurisdiction over competition cases during any transition period, to provide certainty for businesses and to ensure that no cases 'fall through the cracks' during this time, to the cost of UK consumers.**

120. **We support the Government's ambition to reach at least an outline agreement with the EU on a transition (or implementation) period, including competition matters, in the first quarter of 2018. Any transitional agreement on competition issues should ensure continuity with current arrangements, so that businesses are not faced with the additional complexity and cost of having to adapt to the implications of Brexit twice.**

CHAPTER 5: FUTURE UK POLICY: ANTITRUST AND MERGER CONTROL

The advantages of maintaining consistency with the EU

121. The global nature of competition, particularly in relation to mergers and cartel cases, has resulted in a broadly consistent international approach to competition policy. Dr Coscelli identified a "strong push for convergence" and, consequently, he did not expect the UK would significantly change its competition policy post-Brexit.[129] Oxera agreed that there was "little economic rationale for the aims of UK competition policy to differ substantially from those elsewhere in the world".[130]

122. Ms Normand told us that having a strong competition policy was "foundational" for consumers,[131] while Berwin Leighton Paisner LLP highlighted the particular importance of maintaining a "robust and politically neutral" enforcement regime, to provide continuity for businesses during and after the UK's withdrawal from the EU.[132] Vodafone agreed, arguing that—in the context of the significant uncertainty already created by Brexit—changes to the UK competition regime should be limited to those that were "strictly necessary" for the UK's withdrawal from the EU.[133]

123. Dr Wardhaugh noted that, post-Brexit, EU competition rules would continue to apply to UK businesses operating in the EU and cross-border. He argued that divergence in the EU and UK regimes would "impose an additional layer of complexity", incurring costs that would be passed on to consumers or could "thwart an otherwise optimal transaction".[134] The Law Society of Scotland also highlighted the issue of businesses potentially facing "conflicting duties" under differing UK and EU competition regimes.[135]

124. Thompson et al. were concerned that divergence from current principles risked the politicisation of competition law, and suggested the Government had already shown "some tendency towards increased political interference … in regulatory decisions by expert regulators", particularly in the telecoms, energy and financial sectors.[136]

125. Dr Cole argued that maintaining consistency with EU competition law was desirable because it was "superior to the existing alternatives", such as US antitrust law which, he said, was applied in a "very narrow way", and required standards of proof of anti-competitive conduct which were "incredibly difficult to achieve".[137]

129 Q 4 (Dr Andrea Coscelli)
130 Written evidence from Oxera (CMP0012)
131 Q 45 (Caroline Normand)
132 Written evidence from Berwin Leighton Paisner LLP (CMP0025)
133 Written evidence from Vodafone Group plc (CMP0019)
134 Written evidence from Dr Bruce Wardhaugh (CMP0005)
135 Written evidence from the Law Society of Scotland (CMP0036)
136 Written evidence from Rhodri Thompson QC, Christopher Brown, Nicholas Gibson, and Anita Davies (CMP0020)
137 Written evidence from Dr Matthew Cole (CMP0040)

Opportunities for change

126. While there was general agreement that the UK should maintain the principles underpinning its competition policy, witnesses also saw some opportunities for the UK to improve its competition regime outside the EU. Professor Sir John Vickers, Warden of All Souls College Oxford, though, stressed that these should be "evolutionary changes, not revolutionary ones":

> "It would be a great mistake for anyone to take the great uncertainty and upheaval that Brexit will undoubtedly present as a reason to throw up in the air the fundamental principles and institutional framework for competition policy".[138]

Antitrust

127. Prof Akman pointed out that the Single Market imperative (the objective of ensuring the coherence of the EU internal market) had been one of the driving forces behind CJEU decisions in competition cases. Post-Brexit, UK courts might decide to "go down a different route", for example in assessing the acceptability of vertical restraints.[139]

128. Lord Currie of Marylebone, Chairman of the CMA, highlighted that, post-Brexit, the CMA would become a "decision-maker" on enforcement decisions that were previously taken by the Commission. This would give the UK the freedom not just to diverge from the EU, but to lead in taking a "more innovative approach", which other countries might subsequently follow.[140]

129. Dr Coscelli indicated that the UK could "experiment with our national cases … trying to be faster and more effective as an enforcer".[141] Res Publica suggested that the UK could speed up competition enforcement processes by setting page limits for submissions and decisions, adjusting timescales, and making use of modern technology.[142]

Prosecutorial vs. administrative approaches to enforcement

130. Gowling WLG recommended a more 'prosecutorial' model of enforcement post-Brexit, where the CMA's provisional findings in cases would be put to the CAT to decide whether there had been an infringement of antitrust law. They suggested that this approach could promote economy (removing the need for defendants to make written representations, as the CAT would hear cases directly) and transparency (as evidence could be heard in public under oath if necessary).[143]

131. Hogan Lovells, on the other hand, pointed out that the UK had voluntarily adopted the EU's more administrative enforcement procedures, and that the Government had rejected moving to a prosecutorial model after

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138 Q 21 (Prof Sir John Vickers)

139 Q 21 (Prof Pinar Akman)

Vertical restraints are restrictive agreements made between firms at different levels of trade or industry (e.g. between a supplier and a distributor) and concern the parties' feasibility of buying, selling or reselling certain goods or services. European Economic & Marketing Consultants, 'Vertical restraints': http://www.ee-mc.com/expertise/agreements/vertical-restraints.html [accessed 6 December 2017]

140 Q 4 (Lord Currie)

141 Q 9 (Dr Andrea Coscelli)

142 Written evidence from Res Publica (CMP0030)

143 Written evidence from Gowling WLG (CMP0023)

its 2011 consultation on reforming the UK's competition regime.[144] The CLLS Competition Law Committee urged against such a change: "The adoption of adversarial civil processes or moves to a criminal law regime would be counterproductive and would protect UK consumers less well than maintenance of the present approach".[145]

'Effects-based' analysis

132. Oxera explained that competition law distinguished between two types of assessment of anti-competitive conduct:

    (a) form-based, where a type of conduct is known to be, in itself, detrimental to competition, and therefore, once that conduct is proved, there is no need to examine further its impact on the market and consumers; and,

    (b) effects-based, where the impact of a type of conduct may be pro- or anti-competitive, and empirical analysis is needed to determine its effects in the specific case being considered.

    Oxera told us that the Commission and CJEU had been criticised for taking an overly 'form-based' approach, and argued that Brexit gave the CMA the opportunity to adopt a more 'effects-based' focus. Oxera argued this could be "economically advantageous … when faced with increasingly complex competition issues such as those arising in digital markets".[146]

Competition enforcement and the digital sector

133. Dr Coscelli suggested that, post-Brexit, the CMA could establish "more of an individual identity" in the area of non-cartel enforcement, such as in the global debate on how competition authorities should deal with dominant online platforms.[147]

134. Trustonic outlined recent Commission attempts to use EU competition law to restrain the dominance of, mostly US-based, technology firms, which had involved "landmark fines" and "protracted legal appeals". While emphasising the importance of continued consistency with EU interpretations of law in this area, Trustonic argued that the UK should now aim to "become more nimble in its enforcement of antitrust rules", by "showing a greater willingness to halt anticompetitive business practices, while collating a sufficient evidence base to move ahead with full enforcement proceedings". They suggested this could be achieved by establishing a clear policy on, and making proactive use of, interim measures.[148]

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144 Written evidence from Hogan Lovells (CMP0027)

145 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)

146 Written evidence from Oxera (CMP0012)

147 Q 4 (Dr Andrea Coscelli)

148 Written evidence from Trustonic (CMP0022)

Interim measures refer to a requirement to amend allegedly anti-competitive conduct pending the outcome of an investigation e.g. the 2010 French Competition Authority's interim measures decision ordering Google to modify its policy for its online advertising service AdWords. 'Google AdWords lacks transparency: French regulator', *Reuters* (30 June 2010): https://www.reuters.com/article/us-google-france-adword/google-adwords-lacks-transparency-french-regulator-idUSTRE65T1ZS20100630 [accessed 12 January 2018]

In the UK, the CMA may, before completing its assessment of an agreement or conduct, give interim measures directions when: it has a 'reasonable suspicion' that an infringement has occurred and is in the process of investigating the suspected infringement; and, it considers it necessary to act as a matter of urgency for the purpose either of preventing significant damage to a particular person or business, or, of protecting the public interest. Slaughter and May, *An overview of the UK competition rules* (June 2016): https://www.slaughterandmay.com/media/1515647/an-overview-of-the-uk-competition-rules.pdf [accessed 26 November 2017]

135. We considered these issues in our 2016 report on *Online platforms and the Digital Single Market*, concluding that, in fast-moving digital markets, competitors falling foul of anti-competitive conduct could suffer irreversible harm before legal cases concluded. We recommended that the CMA should make greater use of interim measures, and that it should consider introducing time limits for the negotiation of commitments between competition authorities and dominant firms, in order to encourage firms to offer serious proposals (to address competition concerns) from the outset of an investigation.[149]

Merger control

Public interest criteria

136. The takeover of Cadbury by the US-based company Kraft was one of the most controversial foreign acquisitions of a UK firm in recent years. Despite assurances that the takeover would result in increased jobs and investment in Cadbury's Somerdale factory, the closure of this factory was announced a week after the deal was agreed to widespread criticism from the public and the Panel on Takeovers and Mergers.[150]

137. In July 2016, during her campaign to become Leader of the Conservative Party, the Prime Minister criticised the Cadbury-Kraft takeover and the proposed acquisition of the UK-headquartered firm AstraZeneca by the US company Pzifer:

> "A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain".[151]

The Government subsequently announced its intention to review the public interest regime in the Enterprise Act 2002.[152]

138. Following this announcement, there was speculation that the Government would seek to broaden public interest merger criteria to limit foreign ownership in sectors of strategic importance to the UK economy post-Brexit. Several of our witnesses, however, suggested that this possibility was available irrespective of Brexit. The CLLS Competition Law Committee, for example, said that, within the EU, the UK already had "relatively broad scope" to review public interest considerations. Brexit only provided opportunities in relation to the "relatively small number of cases" under the

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149 European Union Committee, *Online Platforms and the Digital Single Market* (10th Report, Session 2015–16, HL Paper 129), paras 199-201

150 'Kraft case showed limits to UK's power to intervene', *Financial Times* (19 February 2017): https://www.ft.com/content/e24ca166-f694-11e6-bd4e-68d53499ed71 [accessed 20 December 2017].

The Panel on Takeovers and Mergers is an independent body which issues and administers the City Code on Takeovers and Mergers and supervises and regulates takeovers and other matters in accordance with the Code. The Code is not concerned with the financial or commercial advantages or disadvantages of a takeover. These are matters for the company and its shareholders. Wider questions of public interest, such as competition policy, are the responsibility of Government and other bodies, such as the CMA and the European Commission. 'The Takeover Panel': http://www.thetakeoverpanel.org.uk/ [accessed 12 January 2018]

151 Theresa May MP, Speech 'We can make Britain a country that works for everyone', 11 July 2016: http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for [accessed 4 December 2017]

152 Department for Business, Energy and Industrial Strategy, 'Government confirms Hinkley Point C project following new agreement in principle with EDF' (15 September 2016): https://www.gov.uk/government/news/government-confirms-hinkley-point-c-project-following-new-agreement-in-principle-with-edf [accessed 4 December 2017]

jurisdiction of the EUMR, where a public interest consideration did not fall within pre-defined categories and would not be accepted as an additional "legitimate interest".[153]

139. While noting the controversy surrounding recent, high-profile foreign takeovers of UK firms, witnesses to this inquiry were generally emphatic that amending the 'lessening of competition' test, or broadening the existing specified merger public interest criteria, would be unwelcome. Eversheds Sutherland (International) argued that this would "be a real step backwards" for UK competition policy, and could contravene "the fundamental purpose of competition law … to ensure a level playing-field and promote a competitive economy".[154] Dr Maria Ioannidou, Senior Lecturer in Competition Law at Queen Mary University of London, suggested that such action could make the UK "an unattractive place for international investors", and COMBAR thought it would place a further regulatory burden on businesses on top of that resulting from the loss of the EUMR 'one stop shop'.[155] Hogan Lovells also noted that the UK had led the way in replacing its public interest-based merger control test with competition criteria, a system which they said was now "well entrenched in merger control systems around the world".[156]

140. On the other hand, the CLLS Competition Law Committee acknowledged that Brexit would enable the Government to respond to unexpected public interest concerns without potentially having "its judgement questioned by a non-UK body". CLES suggested that the UK could consider including "'green' and 'social' economy" criteria in its public interest considerations.[157] Baker McKenzie stressed that any new considerations would need to be clearly defined to avoid "uncertainty for businesses", and should be subject to appropriate review, potentially necessitating "a new independent regulatory body".[158]

Long term sustainability

141. Kate Bell, Head of the Economic and Social Affairs Department at the TUC, called for the "the introduction of a test for mergers and acquisitions relating to long-term company interest", which could be "administered either by a new mergers and acquisitions commission or by the [CMA]". However, she also emphasised that the TUC had been campaigning for such a test "long before Brexit was thought of", and that it was needed because of the way the UK had chosen to act within the EU framework, rather than as a result of a failure of EU law itself.[159]

153 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017). See Chapter 2, footnote 29
154 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)
155 Written evidence from Dr Maria Ioannidou (CMP0028) and the Commercial Bar Association (CMP0038)
156 Written evidence from Hogan Lovells (CMP0027)
157 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017) and the Centre for Law, Economics and Society at UCL (CMP0032)
158 Written evidence from Baker McKenzie LLP (CMP0026)
159 Q 39 (Kate Bell)

Turnover thresholds

142. As we noted in Chapter 2, Res Publica criticised current merger turnover thresholds as being "inappropriate for technology and online media markets", allowing numerous tech sector mergers to be completed "'under the radar'", and leading to increased concentration in the sector over time.[160]

143. In our report on *Online platforms and the Digital Single Market* we concluded that competition authorities should be vigilant to ensure that large online platforms acquiring less-established firms were not, in effect, buying up the competition. We also recommended that the Commission should amend the EUMR to include additional thresholds, such as including the price paid for the 'target' firm, or a version of the UK's 'share of supply' test.[161]

National security and infrastructure investment review

144. During our inquiry, the Government published a Green Paper on its review of the national security implications of foreign ownership or control. The paper proposed that the turnover threshold and 'share of supply' test within the Enterprise Act 2002 should be amended for the military and dual-use sectors, and parts of the advanced technology sector. This would result in the Government being able to review, and potentially intervene in, a greater number of merger cases in these sectors. In the longer term, the paper also proposed that the Secretary of State should be allowed to intervene when they had reason to believe that the acquisition of a UK business posed national security risks, and that there should be a mandatory notification regime for foreign investment in specified sectors.[162]

145. The Government's proposed reforms to merger control are ostensibly restricted to issues of national security, not wider public interest or competition reasons. Nonetheless, the paper recognises that the structure of the Enterprise Act 2002 is such that applying lowering jurisdictional thresholds would "allow the Government to intervene in smaller deals for media plurality or financial stability reasons". The paper stresses, however, that "the UK is committed to free trade and investment", and that security threats "should not be conflated with screening to control market access for protectionist reasons".[163]

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160 Written evidence from Res Publica (CMP0030)

161 European Union Committee, *Online Platforms and the Digital Single Market* (10th Report, Session 2015–16, HL Paper 129), paras 161–163

The 'share of supply' test gives the CMA the jurisdiction to investigate if, as a result of the merger, the combine enterprise will supply or acquire 25% or more of any goods or services in the United Kingdom or a substantial part of the United Kingdom. Jones Day, 'Merger Control in the United Kingdom' (23 June 2015): https://www.lexology.com/library/detail.aspx?g=470ba030-0469–43a5-a92c-0fc67738ff72 [accessed 23 November 2017]

162 Department for Business, Energy and Industrial Strategy, *National Security and Infrastructure Investment Review* (October 2017): https://beisgovuk.citizenspace.com/ccp/nsiireview/supporting_documents/2017%2010%2016%20NSII%20Green%20Paper%20final.pdf [accessed 4 December 2017]. In this paper, the Government defines the military sector as including arms, military and paramilitary equipment and 'dual-use' to include items which could have both military and civilian uses. The advance technology sector includes multi-purpose computing hardware and quantum-based technology. The Government proposes that these sectors be included in the mandatory notification regime along with parts of the civil nuclear, defence, energy, telecommunications, and transport sectors and (potentially) government and emergency services sectors.

163 Department for Business, Energy and Industrial Strategy, *National Security and Infrastructure Investment Review* (October 2017): https://beisgovuk.citizenspace.com/ccp/nsiireview/supporting_documents/2017%2010%2016%20NSII%20Green%20Paper%20final.pdf [accessed 4 December 2017]

Future UK-EU cooperation on competition matters

146. The CLLS Competition Law Committee told us:

> "Cooperation between national competition agencies and the Commission plays an important part in the efficient application of competition law in the European Union including the UK. Further cooperation is therefore essential to ensure a system which is effective in deterring, detecting and preventing unlawful behaviour".[164]

147. Dr Chirita explained that, under Regulation (EC) 1/2003, the UK was able to cooperate with the NCAs of other Member States and the Commission on detecting anti-competitive conduct; sharing confidential information; facilitating cross-border access to evidence; avoiding dual notification of mergers; alignment of national leniency programmes; and mutual recognition of enforcement remedies and court rulings. Dr Chirita argued that continued cooperation in these areas would be important to maintain the "international standing and reputation" of the UK competition regime post-Brexit.[165]

148. Hausfeld & Co told us that not only would it always be in the UK's interest to be informed of potential infringements of competition law, the Commission and other EU NCAs were also important sources of information in this regard. They believed that, without these information flows, "the quality of UK enforcement would very likely deteriorate", and that information-gathering and monitoring activities would place a significant additional burden on the CMA and sector regulators.[166]

149. The CMA said that the EU would also have a strong interest in continuing to cooperate with the UK on competition matters, "for mutual support and to prevent duplication of enforcement efforts".[167] The Centre for Law, Economics and Society at University College London (CLES) agreed, pointing out that the size of the UK economy, and its interconnection with the economies of the EU 27, made it "very likely that many competition law infringements originating in the UK [would] have foreseeable, substantial, and direct effects" in the EU.[168]

Formal bilateral arrangements

150. Many witnesses urged the UK and EU to reach a formal cooperation agreement to facilitate future mutual assistance in competition enforcement after Brexit. Indeed, Ms Cardell told us it would be "critical" for an agreement to replicate, or deliver the equivalent of, current levels of cooperation.[169]

164 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
165 Written evidence from Dr Anca Chirita (CMP0013)
166 Written evidence from Hausfeld & Co LLP (CMP0018)
167 Written evidence from the Competition and Markets Authority (CMP0002)
168 Written evidence from the Centre for Law Economics and Society at UCL (CMP0032)
169 Q 3 (Sarah Cardell)

151. The CMA's written evidence listed several areas where they considered a legal basis should be established for ongoing UK-EU cooperation:

- Notification and coordination of investigative measures;
- Bilateral and multilateral evidence sharing (including confidential information) to facilitate civil and criminal enforcement by overseas agencies;
- Obtaining evidence to assist overseas enforcers;
- Enforcement of investigative measures and remedies.

The CMA was particularly concerned about the second point, arguing that it would be "very inefficient" if, in future, the UK and EU could not share confidential information when investigating the same, or overlapping, cases of anti-competitive conduct.[170]

152. While noting the benefits of continued close UK-EU cooperation in all aspects of competition enforcement, Eversheds Sutherland (International) agreed that the "secure, secret and timely" exchange of information would be the most important aspect of any competition cooperation agreement.[171] Prof Vickers warned that, without a UK-EU agreement on sharing confidential information, public policy could be "greatly frustrated", particularly in relation to international cartel cases which, he said, were "99% about evidence".[172]

Precedents for EU competition cooperation agreements with third countries

153. The CLLS Competition Law Committee observed that the EU already had competition cooperation arrangements in place with a number of non-EU Member States ('third countries'), ranging from memoranda of understanding and guidance to formal bilateral agreements.[173] Dr Wardhaugh thought it likely that the EU might use these existing agreements as "templates (or 'off the shelf' solutions) for future agreements".[174]

154. The EU currently has five bilateral cooperation agreements, with the US, Canada, Japan, South Korea and Switzerland. The first four of these are known as 'first generation' agreements: they contain various instruments of cooperation in the area of competition policy, but do not allow the competition authorities to exchange information and documents acquired in the course of their investigations, unless they have obtained express waivers from the source of the information. The agreement between the EU and Switzerland facilitates contact between the European Commission and the Swiss Competition Commission to discuss policy issues, and enforcement efforts and priorities. It is known as a 'second generation' agreement because

170 Written evidence from the Competition and Markets Authority (CMP0002). The CMA explained that, without this legal basis, the EU would be prevented from sharing confidential information with the UK by professional secrecy provisions in EU law.
171 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)
172 Q 26 (Prof Sir John Vickers)
173 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017). See also European Commission, 'Bilateral relations on competition issues', for an overview of all the third countries with which the EU engages in competition cooperation (17 October 2015): http://ec.europa.eu/competition/international/bilateral/index.html [accessed 27 November 2017]
174 Written evidence from Dr Bruce Wardhaugh (CMP0005)

it allows the two competition authorities to exchange evidence, subject to certain conditions.[175]

155. Dr Coscelli told us that the CMA had looked at these existing EU competition cooperation agreements, and highlighted that the EU-Switzerland agreement had "very interesting provisions about exchange of confidential information in antitrust cases". He acknowledged, however, that it would have some "issues" compared to the UK's current situation.[176]

156. CLES emphasised that "none of the existing international agreements [came] close to the degree of cooperation possible and practiced within the E[uropean] C[ompetition] N[etwork]". They noted that, while the EU-Switzerland agreement was "far-reaching", it did not provide for the sharing of information obtained under leniency programmes and settlement submissions, and placed restrictions on the use of confidential information.[177] CLES concluded it would be "unrealistic" for the UK to believe it could reach an agreement with the EU that replicated current cooperation arrangements under Regulation (EC) 1/2003, even though this would be "highly desirable".[178]

157. Eversheds Sutherland (International) also pointed out that, after Brexit, the UK would no longer benefit from existing bilateral cooperation agreements between the Commission and non-EU competition authorities.[179] CLES called for the Government to re-establish cooperation arrangements with these countries after Brexit, prioritising the UK's major trading partners and countries with "vigorous" antitrust enforcement regimes, such as the US, Canada, Japan, South Korea, Brazil and Chile.[180]

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175 European Commission, 'Competition: Commission welcomes entry into force of Cooperation Agreement with Switzerland' (28 November 2014): http:/europa.eu/rapid/press-release_IP-14-2245_en.htm [accessed 27 November 2017]

Article 17.2 of the recent EU-Canada Comprehensive Economic and Trade Agreement (CETA), which entered into force provisionally in September 2017, relates to competition policy between the two parties. It recognises the "importance of free and undistorted competition" in EU-Canada trade relations and commits both parties to "cooperate on matters relating to the proscription of anti-competitive business conduct" in accordance with the 1999 EU-Canada competition cooperation agreement. Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union [and its Member States] [accessed 20 December 2017]

176 Q 9 (Dr Andrea Coscelli)

177 For example, the EU-Swiss agreement specifies: "No information discussed or transmitted under this Agreement shall be used to impose sanctions on natural persons" whereas Article 12(3) of Regulation (EC) 1/2003 does permit information exchanged by the Commission and NCAs to be used in evidence to impose sanctions on natural persons under certain circumstances. See Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (OJ L 1, 4 January 2003) and the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (OJ L347/3, 3 December 2014): http://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf [accessed 27 November 2017]

178 Written evidence from the Centre for Law Economics and Society at UCL (CMP0032)

179 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)

180 Written evidence from the Centre for Law Economics and Society at UCL (CMP0032)

Informal cooperation

158. Prof Maher Dabbah noted that competition authorities did not necessarily need to be "bound by a formal process" in order to cooperate. He suggested that many competition authorities cooperated cross-border on a *de facto* basis as extensively as they did on a formal basis, with the key being the "will for cooperation".[181] The CLLS Competition Law Committee commented that informal cooperation commonly occurred where countries had strong economic and trade ties.[182]

159. Such informal cooperation would, however, have its limits. Prof Whish noted that informal cooperation would not overcome the "legal obstacles" which prevent authorities exchanging confidential information.[183]

The Government's position

160. BEIS indicated that the Government would not seek to alter the essential underlying principles of UK competition policy after Brexit, confirming that the UK and the EU shared "a fundamental belief in rigorous and fair competition", and that the UK intended to remain "a strong advocate of effective independent competition enforcement".[184]

161. BEIS noted the benefits of international cooperation on competition enforcement, in particular, the importance of preserving the CMA's ability to cooperate with the European Commission through the mutual sharing of confidential information, coordination on merger reviews, and cooperation on investigative and enforcement measures. The Government's aim was to negotiate "a strong future cooperation agreement with the European Commission on all competition matters". BEIS also said that the UK would be able to agree arrangements for bilateral cooperation with non-EU competition authorities "as necessary".[185]

162. The Minister told us it would be "a good thing" for the CMA to continue to be able to share confidential information with its European partners after Brexit, but did not have a "particular shopping list" for the specific details of any UK-EU competition cooperation agreement. Ms James emphasised that the UK would be approaching negotiations with the EU "from a position of absolutely, integrated cooperation", as part of the European Competition Network (ECN), but admitted that a competition cooperation agreement going beyond the levels of cooperation in any of the EU's existing agreements with third countries would be "desirable".[186]

163. We also asked the Minister what the implications would be of a 'no deal' scenario for any agreement to cooperate on competition matters. Ms James acknowledged that a "continued positive relationship" could facilitate some form of informal cooperation. She noted the "gateway" provided under UK law for the CMA to share confidential information with overseas authorities, but acknowledged the EU's inability to reciprocate this information flow would be "the key issue with not getting a deal".[187]

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181 Q 26 (Prof Eyad Maher Dabbah)
182 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
183 Q 26 (Prof Richard Whish)
184 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)
185 *Ibid.*
186 Q 49 (Margot James MP)
187 Q 51 (Margot James MP). See also written evidence from the CMA (CMP0002) explaining that this 'gateway' is provided under section 243 of the Enterprise Act 2002 which allows the UK to consider disclosing information to an overseas public authority on a case-by-case basis.

Conclusions

164. **The UK has played a significant role in recent decades in pushing forward the broad alignment of global competition policy, based on improved economic efficiency that delivers economic growth and development, and long-term consumer welfare. We note that ongoing consistency with the EU's approach to competition policy—at least in the short-term—could help to provide stability and predictability for UK businesses in the face of the significant changes Brexit will bring.**

165. **Nonetheless, Brexit does provide an opportunity for the UK to develop a more effective competition enforcement regime. With the repatriation of responsibility for enforcement decisions previously taken by the European Commission, the UK will have the freedom to take a more innovative and responsive approach to antitrust enforcement and merger control, including in relation to fast-moving digital markets and dominant online platforms.**

166. **In terms of the potential for the UK to review public interest criteria in merger control, the UK is already able to intervene on larger mergers within the jurisdiction of the EU Merger Regulation (EUMR) on public interest grounds that closely match those specified under UK law. Member States are also able to make interventions based on other "legitimate interests", subject to approval by the Commission. We conclude that EU rules have not materially prevented the UK from amending its approach to merger control. Indeed, the current competition-based approach was pioneered by the UK.**

167. **We recognise that, post-Brexit, there may be pressure for wider public interest criteria to be considered—particularly in relation to foreign takeovers—as well as opposing pressures, for example to dilute merger controls to encourage more inward investment. On balance, we do not consider that Brexit should be seen as an opportunity to make significant changes to existing public interest criteria.**

168. **The extent of trade between the UK and the EU 27 makes it likely that future substantial antitrust and merger cases will have effects in both markets. It will therefore be in the mutual interests of the EU and the UK to continue to cooperate on competition matters post-Brexit. The best way to facilitate this cooperation would be for the UK and EU to negotiate a formal cooperation agreement, covering both antitrust and merger case investigations and enforcement actions. Any such agreement should enable reciprocal evidence-sharing (including of confidential information) which would not be possible under informal cooperation arrangements without express consent from the undertakings involved. We note that parties to mergers would be more likely to provide this consent to ensure that merger transactions can go ahead as quickly as possible.**

169. **The UK and the EU start from a position of extensive mutual assistance within the ECN. Nevertheless, we note that, if it is to achieve the CMA's desire for the same, or equivalent, levels of current cooperation, the Government will need to negotiate the most comprehensive competition cooperation arrangement the EU has ever agreed with a third country. The UK will also need to re-establish competition cooperation arrangements with countries currently covered by existing EU bilateral agreements.**

CHAPTER 6: FUTURE UK POLICY: STATE AID

The impact of EU State aid rules in the UK

170. As we noted in Chapter 2, witnesses drew our attention to various issues experienced by UK bodies and authorities in relation to EU State aid rules, and noted that the opportunity for greater freedom in the provision of State aid outside the EU had featured in the UK's 2016 EU referendum debate.[188]

171. Given the public debate on this matter, we expected to receive greater evidence on the possibility for the Government to pursue a more 'interventionist' approach to State aid post-Brexit. Most witnesses to this inquiry, however, were keen to emphasise that, despite frustrations with the application of the rules, it was unclear how far they had actually curtailed successive UK Governments' ability to grant State aid.

172. UKSALA observed that the UK (under both Labour and Conservative Governments) had played a significant role in shaping EU State aid policy, and had generally been "vigorously" supportive of the EU's overall policy approach. While acknowledging that delays could be frustrating to Ministers, UKSALA argued that "checks and balances [were] not always a bad thing", and that the discipline imposed by the EU regime often resulted in a "significantly improved policy".[189]

173. Prof Fothergill told us:

> "The fundamental problem that we face in Britain at the moment is less the EU rules and more the failure of the UK Government to exploit the present rules to the full".[190]

A similar view was reflected in the Coalition Government's 2014 Balance of Competences review, in which stakeholders attributed the perceived problems with EU State aid rules to "an over-interpretation or under-interpretation at national level of what was allowed, either too laissez-faire or too restrictive".[191] Berwin Leighton Paisner suggested that "Ministers have sought to hide behind the State aid rules as a reason for not pursuing interventions", and that the recent steel crisis was an example of this.[192]

174. Several witnesses pointed to the historic disparity between the amount spent by the UK on State aid and that spent by other Member States. Oxera, for example, told us that the UK spent on average €100 per capita on State aid between 2009 and 2015, compared to €181 per capita in Belgium, €224 per capita in France, and €266 per capita in Germany over the same period. This implied that the EU State aid rules had not been a "significant limiting factor in UK policy interventions".[193]

188 See for example written evidence from Herbert Smith Freehills LLP (CMP0029). See also 'The Labour case for a leave vote in the EU referendum', *The Guardian* (21 June 2016): https://www.theguardian.com/politics/2016/jun/21/the-labour-case-for-a-leave-vote-in-the-eu-referendum [accessed 20 December 2017]

189 Written evidence from the UK State Aid Law Association (CMP0008)

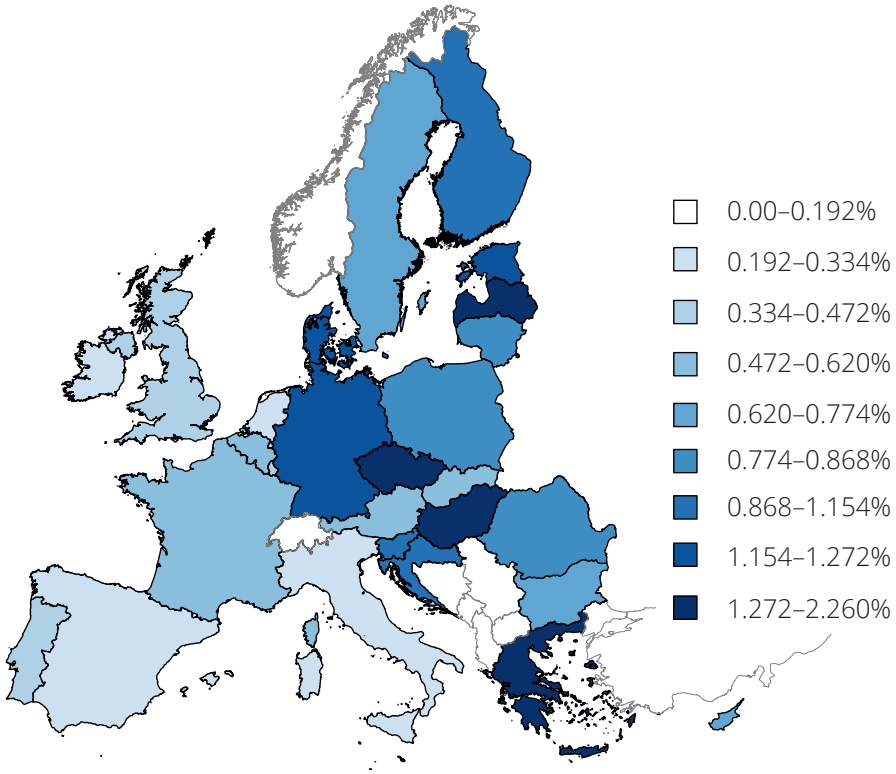
190 Q 39 (Prof Steve Fothergill)

191 HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union: Competition and Consumer Policy Report* (Summer 2014): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332779/Review_of_the_Balance_of_Competences_between_the_United_Kingdom_and_the_European_Union.pdf [accessed 5 December 2017]

192 Written evidence from Berwin Leighton Paisner LLP (CMP0025)

193 Written evidence from Oxera (CMP0012). Oxera's analysis of these figures was based on the European Commission *State Aid Scoreboard 2016* and population data from the World Bank.

Figure 1: Total State aid expenditure as % of GDP in 2015, less railways



Source: European Commission State Aid Scoreboard 2016 (16 November 2016): http://ec.europa.eu/competition/state_aid/scoreboard/technical_note_en.pdf [accessed 24 November 2017]

175. Witnesses pointed to the UK's positive record in securing approval for State aid measures notified to the Commission. Herbert Smith Freehills highlighted the Commission's approval of the UK Government's "support package" for the construction of the Hinkley Point C nuclear power station in 2014 as an example of how EU rules had been "sufficiently flexible to enable UK State intervention in a number of significant and novel cases".[194]

State aid and the future UK-EU trade relationship

176. The European Council's guidelines for negotiating the UK's withdrawal from, and future relationship with, the EU specify:

> "Any future free trade agreement must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices".[195]

In light of this—and to avoid having to justify potential competition from subsidised UK businesses to EU voters—UKSALA was confident that State aid controls would be a 'red line' for the EU in trade negotiations with the UK.[196]

194 Written evidence from Herbert Smith Freehills LLP (CMP0029). See also European Commission, 'State aid: Commission concludes modified UK measures for Hinkley Point nuclear power plant are compatible with EU rules' (8 October 2014): http://europa.eu/rapid/press-release_IP-14-1093_en.htm [accessed 28 November 2017]

195 European Council, *Guidelines following the United Kingdom's notification under Article 50 TEU* (29 April 2017): http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf [accessed 4 December 2017]

196 Written evidence from the UK State Aid Law Association (CMP0008)

Precedents for State aid control in EU trade agreements with third countries

177. Herbert Smith Freehills explained that there were two principal forms of State aid control in existing EU FTAs with third countries:

(a) 'Parallel' State aid systems, substantially equivalent to the EU's State aid regime; and,

(b) 'WTO plus' systems, which extend the WTO rules for subsidy control.[197]

Parallel systems

178. The recent Ukraine-EU Association Agreement could be a model for the type of parallel State aid system the EU will seek for its future relationship with the UK. Baker McKenzie explained that, under this agreement, Ukraine had to implement a domestic system of State aid control with "an operationally independent authority", and to apply State aid rules using sources of interpretation including the CJEU and Commission frameworks and guidance. Ukraine and the EU also agreed to report to each other annually on the State aid each has granted.[198]

179. Mr Peretz observed that these provisions did "not look like a relationship of equals": it was "clear who [was] following whom". He noted that the UK had "been faithfully applying the State aid rules for a very long time", and so might be able to "get something that looks a little less uneven" in any UK-EU FTA.[199]

180. Eversheds Sutherland (International) pointed out that parallel State aid systems in recent EU trade agreements applied to countries "interested in achieving full EU membership". Although this would not be the case for the UK, they thought that the EU might still "seek to ensure that any access to its internal market, is conditional on approximation of various EU competition law requirements including in relation to State aid legislation".[200]

181. COMBAR pointed out that Switzerland was an exception to the general requirement to comply with EU State aid rules.[201] Hogan Lovells explained that there were some State aid provisions in the 1972 EU-Swiss FTA and the 1999 EU-Swiss air transport agreement, but neither of these agreements contained enforcement powers, and Switzerland was not required to establish a national enforcement authority to ensure compliance.[202] Mr Peretz, however, emphasised that the EU had expressed "extreme unhappiness" over its arrangements with Switzerland on State aid. It was "very unlikely that the EU would extend that historical accident to us".[203]

197 Written evidence from Herbert Smith Freehills LLP (CMP0029). Herbert Smith Freehills further noted that parallel State aid systems were found in the EEA system (Norway, Iceland and Liechtenstein), EU trade agreements with current accession candidate countries (Albania, Macedonia, Montenegro, Serbia and Turkey), and EU trade agreements with other Eastern European countries which might become accession candidates (Bosnia and Herzegovina, Kosovo, Moldova and Ukraine).

198 Written evidence from Baker McKenzie LLP (CMP0026)

199 Q 32 (George Peretz)

200 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)

201 Written evidence from the Commercial Bar Association (CMP0038)

202 Written evidence from Hogan Lovells (CMP0027)

203 Q 33 (George Peretz)

'WTO plus'

182. Herbert Smith Freehills pointed to the EU-South Korea FTA and the EU-Canada Comprehensive Economic Trade Agreement (CETA) as examples of the 'WTO plus' model, though the two agreements provided for very different systems. The EU-Korea FTA "supplements the WTO anti-subsidy rules by adding to the list of so-called prohibited subsidies", while the CETA only enhances procedural provisions such as reporting obligations. Herbert Smith Freehills noted that these agreements did not require the establishment of a State aid enforcement authority, but also that they did not "envisage market integration akin to that within the EU internal market", which the UK may seek to achieve after Brexit.[204]

183. UKSALA concluded that State aid controls would probably form a key part of any future "deep and special" partnership between the UK and the EU, but argued this should not necessarily be regarded as "an unwelcome price" for the UK, given that such rules would also "serve a number of important purposes within the United Kingdom".[205]

State aid under WTO rules

184. As Alan Davis, Head of the Competition, EU & Trade Group at Pinsent Masons, pointed out, in a 'no deal' scenario the UK would still be bound by obligations under the WTO's anti-subsidy regime.[206]

185. Prof Biondi explained that the central element of this regime was the Agreement on Subsidies and Countervailing Measures (ASCM), which contains specific provisions to prohibit subsidies and defines a 'subsidy' under broadly similar terms to those in Article 107(1) TFEU.[207] On the other hand, several witnesses emphasised the significant differences between the WTO and EU regimes, including that:

- The provisions on subsidies in the ASCM only apply to goods (not services)[208];
- The ASCM has no mechanism for *ex ante* approval, so there is the risk that subsidies given will subsequently be deemed illegal;
- EU rules allow businesses and individuals to bring State aid complaints to the Commission—and to bring claims in national courts—while the WTO relies on state-to-state enforcement, so businesses who believe there has been a breach of ASCM rules have to persuade their government to take action on their behalf;
- The EU emphasises the removal of anti-competitive effects through the recovery of illegal State aid. By contrast, the WTO focuses on dispute resolution by a requirement to withdraw the measure in question (without the need to repay aid received to date) or by the use of trade defence instruments (TDIs). TDIs are typically duties imposed on imported goods sold below market price (anti-dumping measures) or to offset subsidies given to the producers of those goods in their countries (anti-subsidy, or countervailing, measures);

204 Written evidence from Herbert Smith Freehills LLP (CMP0029)
205 Written evidence from the UK State Aid Law Association (CMP0008)
206 Q 33 (Alan Davis)
207 Written evidence from Prof Andrea Biondi (CMP0011)
208 We note the particular relevance of this in the UK context, as services account for around 80% of UK GDP and the UK is the second largest exporter of services in the world. See European Union Committee, *Brexit: trade in non-financial services* (18th Report, Session 2016–17, HL Paper 135)

- Unlike the EU, the WTO has no concept of an 'approvable' aid with benefits (such as public interest grounds) that can be balanced against any negative effect on trade;

- The ASCM's 'threshold' for complaint is high—to obtain a decision terminating a subsidy, complainants must prove the existence of serious threat to the interests of another WTO member as well as the impairment of market access.[209]

186. There was general agreement that the WTO subsidy rules were more limited than those of the EU, though some witnesses questioned how far operating under the ASCM would change levels of state funding provided in the UK. Dr Chirita told us that favourable tax arrangements, for example, could still be considered a subsidy under WTO rules, while BEIS thought that WTO members would be likely to challenge subsidies either to industries which had world surpluses (such as steel), or to highly competitive sectors like the automotive industry.[210]

187. Oxera also questioned the economic desirability of the UK using any freedom offered by ASCM rules to "unilaterally [increase] the level of state support or selective tax benefits to industry"; any such action would require analysis of potentially distortive effects on competition.[211]

188. Dr Wardhaugh argued that it would be a "grave error" for the UK to use Brexit as an opportunity to encourage export industries and national champions, as this would be "susceptible to capture by rent-seekers", who might seek to secure a "monopoly for themselves or protection for their industry".[212] Eversheds Sutherland (International) believed that this approach would also be inconsistent with the Government's message that international businesses would able to "compete on the UK markets on the basis of a level-playing field" after Brexit.[213]

Devolution implications

189. BEIS drew our attention to the fact that the ASCM had no domestic application: "If only WTO rules applied there would be no State aid control within the UK. There would therefore be a risk of domestic subsidy races and distortions of competition between various parts of the UK".[214] Hogan Lovells also highlighted the risk of subsidy races between devolved administrations, noting that "EU state aid rules have ensured a degree of coherence of industrial strategy across the UK".[215] Most of our witnesses therefore agreed that the UK would need some form of domestic State aid regime, regulated at the national level.

190. Nonetheless, COSLA (representing Scottish local authorities), argued that a State aid regime developed and controlled by Westminster alone would be "at odds with the constitutional nature of the UK", and unacceptable to the

209 See written evidence from the Competition Law Committee of the City of London Law Society (CMP0017), the Department for Business, Energy and Industrial Strategy (CMP0041), Prof Andrea Biondi (CMP0011), and EEF, the manufacturers' organisation (CMP0016), and Q 3 (George Peretz)
210 Written evidence from the Dr Anca Chirita (CMP0013) and the Department for Business, Energy and Industrial Strategy (CMP0041)
211 Written evidence from Oxera (CMP0012)
212 Written evidence from Dr Bruce Wardhaugh (CMP0005)
213 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)
214 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)
215 Written evidence from Hogan Lovells (CMP0027)

devolved administrations.[216] A similar view was reflected in written evidence from the Scottish and Welsh Governments. The Scottish Government noted that the "effective functioning of the internal UK market [would] require close co-operation on State aid between all the UK administrations", and emphasised it would be "vital" for the devolved administrations to be fully involved in developing the post-Brexit UK State aid regime.[217]

191. The Welsh Government also accepted there would be a need for "some form of domestic State aid authority … to oversee the UK internal market", but stressed that the devolved administrations should be involved as "equal partners" in the development of a UK State aid framework. Any State aid authority would need to be seen to be independent of the UK Government, "in order to develop and retain credibility".[218]

192. The Welsh Government also drew our attention to the principles agreed by the Joint Ministerial Committee (EU Negotiations)—the mechanism established for the UK Government to engage with the devolved administrations on Brexit issues—on 16 October 2017. At this meeting, the UK and devolved governments—with Northern Ireland represented by the Parliamentary Under Secretary of State for Northern Ireland and a senior civil servant from the Northern Ireland Civil Service—agreed that common frameworks setting out a UK, or GB, approach should be established in areas where EU law currently intersects with devolved competence, in order to ensure the functioning of the UK internal market and compliance with international obligations after Brexit. The JMC (EN) agreed that any frameworks developed will:

    - respect the devolution settlements, including that the competence of the devolved administrations will not normally be adjusted without their consent;
    - maintain flexibility to tailor policies to the specific needs of each territory; and,
    - lead to a significant increase in decision-making powers for the devolved administrations.[219]

    We note that these issues remain under discussion, including in the context of Clause 11 of the European Union (Withdrawal) Bill, which limits the competence of the devolved legislatures to amend "retained EU law", whether or not that law relates to matters that have hitherto been either devolved or reserved.[220]

193. Given the political situation in Northern Ireland it was not possible to receive evidence from the Northern Ireland Executive during this inquiry.

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216 See QQ 40–41 (Prof Steve Fothergill) and written evidence from Herbert Smith Freehills LLP (CMP0029), UK State Aid Law Association (CMP0008), The Law Society (CMP0037) and COSLA (CMP0033)

217 Written evidence from the Scottish Government (CMP0039)

218 Written evidence from the Welsh Government (CMP0043)

219 Joint Ministerial Committee (EU Negotiations), *Communiqué* (16 October 2017): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf [accessed 28 November 2017]

220 European Union (Withdrawal) Bill, clause 11 [Bill 5 (2017–19)]

Options for UK State aid control

194. Mr Peretz expressed concern that the Government had said very little publicly regarding its position on State aid, suggesting that this silence "may, like the dog that did not bark in the night, tell you something".[221]

195. Isabel Taylor, a Partner at Slaughter and May, noted that the EU (Withdrawal) Bill, as introduced, would incorporate the EU rule prohibiting State aid—unless notified to and approved by the Commission[222]—but not other aspects of the EU regime, and that the Bill did not specify what UK body would have the power to assess and approve State aid.[223] Mr Peretz described this as a "deficiency", which would need to be addressed by the Government "one way or another".[224]

The need for a domestic State aid authority

196. The Law Society of Scotland told us that, if the UK chose to operate a system of State aid control, this would require a dedicated authority.[225] Prof Biondi agreed, stating that the UK would need a domestic authority to "provide reassurance that public spending will be transparent, fair and not distort the market".[226] Eversheds Sutherland (International) believed that, if the UK adopted an EU model with an automatic prohibition on State aid pending assessment of compatibility with State aid rules, then an "independent regulator" would be needed to investigate proposed aids, decide whether they were compatible with whatever State aid rules the UK put in place, and to consider complaints.[227]

197. On the other hand, the CLLS Competition Law Committee did not think that a UK State aid authority would be needed to enforce subsidy agreements that "operated purely as part of an international trade agreement", and suggested that any domestic State aid rules could be applied directly by the organisations involved with enforcement through UK courts.[228] Berwin Leighton Paisner also thought that State aid enforcement should be "in the hands of judges".[229] UKSALA, however, strongly opposed this approach, arguing that courts would be "ill-equipped" to assess whether public policy objectives justified "the distortion of competition inherent in State support".[230]

198. Dr Chirita suggested that "governmental action" would be sufficient to control State aid, but COSLA warned against a system where "one tier of government would be both regulator and beneficiary". COSLA suggested that an "independent, partnership based regulator" would be "more in line with the political and constitutional realities of the UK".[231]

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221 Q 33 (George Peretz)
222 Using powers conferred under Clause 4 of the Bill: see the Explanatory Notes to the European Union (Withdrawal) Bill, clause 4
223 Q 31 (Isabel Taylor)
224 Q 33 (George Peretz)
225 Written evidence from the Law Society of Scotland (CMP0036)
226 Written evidence from Prof Andrea Biondi (CMP0011)
227 Written evidence from Eversheds Sutherland (International) LLP (CMP0024)
228 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
229 Written evidence from Berwin Leighton Paisner LLP (CMP0025)
230 Written evidence from the UK State Aid Law Association (CMP0008)
231 Written evidence from Dr Anca Chirita (CMP0013) and COSLA (CMP0033)

199. If the UK decided to establish a domestic State aid authority, the CLLS Competition Law Committee thought the CMA would be the "obvious candidate". There was a "strong logic for grouping expertise on State aid control with other aspects of competition policy and enforcement".[232] UKSALA said that the CMA already had "the necessary combination of legal, economic and policy expertise", and its "independence is widely recognised".[233]

200. On the other hand, the BICL suggested that taking on the role of State aid authority could strain the relationship between the CMA and the Government, particularly if the CMA took "enforcement action against the Government for providing unlawful State aid".[234]

201. When we put the possibility of expanding the CMA's remit to include State aid, Lord Currie told us that the CMA was "not pitching for extra work", but he could see that it was a task that might have the CMA's "name on it".[235]

202. The wider post-Brexit institutional competition framework is discussed in Chapter 7.

The EEA model

203. The Government has ruled out the possibility of UK membership of the EEA after it leaves the EU.[236] Nonetheless, Mr Peretz believed the UK could still "dock in" to EEA membership for the purposes of State aid. He acknowledged that this would require the agreement of the other EFTA states, which might be "politically difficult".[237]

204. Prof Biondi explained that, under the terms of the EEA Agreement, the EFTA Surveillance Authority (ESA) undertook a State aid function "almost identical to that exercised by the European Commission", with judicial oversight provided by the EFTA Court.[238]

205. The UKSALA argued that using the EEA mechanism for State aid control "would be the most pragmatic approach", and noted it would have the further advantage of preventing trade defence instruments between parties to the agreement.[239]

Administration of the future State aid regime

206. A number of witnesses considered how regional State aid could be administered more efficiently after the UK's withdrawal from the EU. The LGA explained that regional support funds—including the European Structural and Investment Funds (ESIF), the Regional Growth Fund, and Enterprise Zone grants—have required "clearance under the EU's regional aid regime", and noted that after Brexit the Government would be able to "create its own approach to regulating regional aid". The LGA argued that

232 Written evidence from the Competition Law Committee of the City of London Law Society (CMP0017)
233 Written evidence from the UK State Aid Law Association (CMP0008)
234 Written evidence from the British Institute of International and Comparative Law (CMP0010)
235 Q 8 (Lord Currie and Dr Andrea Coscelli)
236 See Prime Minister Theresa May, Speech on a new era of cooperation and partnership between the UK and the EU, 22 September 2017: https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu [accessed 23 November 2017]
237 Q 33 (George Peretz)
238 Written evidence from Prof Andrea Biondi (CMP0011)
239 Written evidence from the UK State Aid Law Association (CMP0008)

the UK's future State aid policy should be simple to implement, including "light-touch notification and reporting requirements; rapid and transparent assessment and … a national training programme for local authority aid practitioners". LGA also favoured a *de minimis* threshold of £500,000 over three years, compared to the current EU limit of €200,000 over three years.[240]

A local focus

207. COSLA saw Brexit as an opportunity to develop a more consistent, simple set of State aid rules, drawing on the accumulated knowledge of local authorities. They stressed that any UK new State aid regime should be designed "in partnership" with central, devolved and local governments.[241]

208. The LGA also called for successor arrangements to the EU regional aid funds to be "place-based to enable local areas to set their own priorities". For example, the LGA said that if broadband were recognised as a "fourth utility alongside water, electricity and gas"—and UK State aid rules set accordingly—councils would be able to address current and future gaps in broadband provision through their own initiatives or public-private partnerships.[242]

209. The East of England European Partnership noted that 'Assisted Area Status' (for which see footnote 42 in Chapter 2) had been effective in "nudging investment towards otherwise overlooked areas". However, they considered the EU rules were "quite restrictive", and called on the Government to provide more flexibility for "differently sized companies" or to increase the "intensities of public aid that can be provided" after Brexit.[243]

The Government's position

210. BEIS explained that the intention of the EU (Withdrawal) Bill was to "preserve the EU State aid rules and to give a UK body the power to police those rules". They did not, however, clarify whether they intended that body to be BEIS itself, the CMA, or a new State aid authority.[244] When asked about the option to extend the CMA's remit to take on the role of State aid authority, the Minister said this was a possibility to which the Government would "have regard".[245]

211. When pressed on the possibility that the EU (Withdrawal) Bill could create a 'legal hiatus' in relation to State aid authorisation, the Minister told us that the Government had "not arrived at a settled policy" on the UK's post-Brexit

240 Written evidence from the Local Government Association (CMP0021)

The ESIF include the: European regional development fund, European social fund, Cohesion fund, European agricultural fund for rural development, European maritime and fisheries fund. They are jointly managed by the European Commission and the EU countries.

The Regional Growth Fund provides financial support for private enterprises in England with the intention of creating sustainable jobs.

Enterprise Zones are designated areas across England where businesses may benefit from tax breaks and Government support.

241 Written evidence from COSLA (CMP0033)

242 Written evidence from the Local Government Association (CMP0021). We note that 'aid for broadband infrastructures' is one of the categories of aid covered by the GBER Regulation with investment allowed to cover broadband-related civil engineering works and for the deployment of: passive broadband infrastructure, basic broadband networks, and next generation access networks. (OJ L 187, 26 June 2014)

243 Written evidence from the East of England European Partnership (CMP0007)

244 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)

245 Q 52 (Margot James MP)

State aid regime—though Bridget Micklem, Deputy Director for State aid Policy at BEIS, reassured us that the Government was clear it would need to have a policy by the time it got to "day one, or exit point".[246]

212. The Minister was able to comment on the principles informing the Government's consideration of its future policy on State aid. Firstly, she noted that the UK had "always been in the vanguard of supporting open markets", and pointed to the Prime Minister's Florence speech, during which she said: "Trying to beat other countries' industries by unfairly subsidising one's own is a serious mistake".[247]

213. Secondly, Ms James emphasised that the Government wanted to ensure there would be no distortions of competition within the UK, so that "wealthier areas are not simply able to outspend other areas without regard to the interests of the UK as a whole". The Minister was also "very mindful indeed of our responsibility to involve the devolved administrations closely" in discussions on the UK's future State aid policy.[248]

Conclusions

214. **While it is clear that the EU's State aid rules have been the source of some frustration in the UK, successive Governments have found them flexible enough to provide support for major projects. Moreover, other EU Member States spend significantly higher sums on State aid. This indicates that the EU rules have not been the decisive factor in limiting State aid in the UK, during the time it has been an EU Member State.**

215. **The EU has, in almost every case, insisted that trade agreements with third countries include some form of controls on State aid, and it is highly likely that any deep and comprehensive UK-EU Free Trade Agreement (FTA) will include State aid provisions. There is also likely to be a link between the level of access to the Single Market the UK hopes to secure and the degree of coherence with the EU State aid regime the UK is required to maintain.**

216. **If no agreement is reached with the EU—or in the unlikely event that the agreement does not contain State aid provisions—the UK will still be bound by its obligations under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM). This would be a less intrusive system of subsidy control than the EU regime, but the extent to which it would change levels of state support in the UK is questionable.**

217. **We recognise that after the UK leaves the EU there may be domestic pressures for a more interventionist industrial strategy with greater use of State aid measures at national, devolved, and local levels. On the other hand, should the Government significantly increase State aid to UK businesses, this could undermine the UK's ambition to become an open, global trading nation after Brexit. We therefore welcome the Prime Minister's assurance that the Government will not attempt to "beat" other countries' industries by unfairly subsidising our own.**

246 Q 52 (Margot James MP and Bridget Micklem)
247 QQ 48–52 (Margot James MP) and Prime Minister Theresa May, Speech on a new era of cooperation and partnership between the UK and the EU, 22 September 2017: https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu [accessed 23 November 2017]
248 QQ 48–54 (Margot James MP)

218. **The ASCM has no domestic application and therefore would not regulate State aid within the UK. Outside the EU, a UK-wide State aid framework will be necessary to avoid the risk of domestic subsidy races and distortions of competition between various parts of the UK. A UK State aid authority may also be required in some form, whether by extending the remit of an existing authority or creating an entirely new entity. We note the possibility that the CMA could take on this role but also that it has no experience in this activity. It would also be important to ensure that such an extension of the CMA's remit did not detract from its existing responsibilities.**

219. **In developing this framework, the Government should take into account calls from local authorities for a less complex and burdensome approval process than under the current EU regime. The Government should also involve and secure the support of the devolved administrations in this process, including in agreeing the terms of reference, remit and priorities of any new UK State aid authority. It was made clear to us that any approach where the UK Government was perceived to be both 'rule maker' and 'rule taker' would probably be unacceptable to local and devolved governments.**

220. **The EU (Withdrawal) Bill, as introduced, seeks to preserve the general prohibition on unapproved State aid, but does not specify what approval mechanism State aid would be subject to after Brexit. We urge the Government to clarify this omission, and its position on the shape of the future UK State aid regime, as soon as possible, to provide certainty to local authorities and businesses.**

CHAPTER 7: DETERMINING THE UK'S FUTURE INSTITUTIONAL FRAMEWORK

221. The exact shape of the UK's post-Brexit institutional framework with regard to competition matters remains unclear, and subject to future policy decisions. Nevertheless, it is clear that Brexit—and the resultant repatriation of responsibilities from the EU—will have a significant impact on existing institutions with a statutory competition remit, as well as necessitating the creation of new ones. Determining the shape of this framework will require careful consideration of how to ensure the most appropriate and cost-effective use of public resources.

222. In this Chapter we examine the implications of Brexit for existing competition bodies, the CMA and the CAT. We also consider the development of a coherent post-Brexit institutional structure for competition matters encompassing, for example, the possible UK State aid authority (discussed in Chapter 6) and the Trade Remedies Authority proposed by the Government in its recent Trade Bill.

Resource implications for the CMA and the CAT

223. Barring a specific arrangement to facilitate continued participation, the loss of the 'one stop shop' regime (see Chapter 3) will increase the number of mergers reviewable in the UK. The CMA estimated that this might mean "an additional 30 to 50 Phase 1 mergers per year", which could lead to "half a dozen or so additional Phase 2 cases".[249]

224. In addition to increased merger reviews, Dr Coscelli estimated that UK authorities would assume responsibility for an additional five to seven large antitrust cases per year.[250] Lord Currie explained that, similarly to mergers, these were also likely to be "much bigger and arguably more complex cases" than those investigated by the CMA hitherto.[251]

225. The CMA considered it "imperative" to have sufficient resources to deal with this anticipated caseload, to ensure there would be no "detriment to the quality of its investigations or its ability to undertake its other important functions, in particular conducting market investigations and consumer law enforcement".[252] Lord Currie told us that the CMA had been "fully engaged" both with BEIS and the Treasury, but emphasised that it could not be totally confident that the necessary resources would be put in place "until the cheque [was] actually signed".[253]

249 Written evidence from the Competition and Markets Authority (CMP0002)

In the financial year ending 31 March 2017 the CMA reported issued nine civil enforcement infringement decisions and £100 million in fines. For mergers, it completed 57 Phase 1 reviews. Of these, substantial lessening of competition was found in 14; five were referred to Phase 2 and undertakings in lieu were accepted in the remaining nine. Competition and Markets Authority, *Annual Report and Accounts 2016/17* (12 July 2017): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/628984/cma-annual-report-accounts-16-17-web-accessible.pdf [accessed 5 December 2017]

250 Q 1 (Dr Andrea Coscelli)

251 Q 1 (Lord Currie)

252 Written evidence from the Competition and Markets Authority (CMP0002)

253 Q 2Q 2 (Lord Currie)

226. As for human resources, Dr Coscelli said that the CMA was "quite successful in attracting talent, from both the private sector and other public sector bodies", but recognised the salary levels the CMA could offer might present an issue. Ms Cardell suggested: "It is quite an exciting prospect for people to come to work at the CMA post-Brexit and get involved in the kind of cases we will be taking on".[254]

227. The CAT also expected greater demand on its own resources post-Brexit, as an increase in the number of domestic decisions would mean a concomitant increase in the number of decisions subject to appeal before the Tribunal. The CAT noted the complexity of large antitrust cases and said that related appeals would likely make "heavy demands" on its work. Similarly, the loss of the 'one stop shop' would "significantly increase" judicial review of merger decisions.[255]

228. Ofwat told us that any resource constraints on the CMA could have a "knock-on impact" on the ability of the CMA to work with sector regulators—particularly on competition issues emerging in new markets, such as the business customer retail market in the water sector.[256] On the other hand, Dr Steve Unger, Group Director and Board Member of Ofcom, welcomed the opportunity to be "more clearly part of the decision-making process in some key merger transactions and some key antitrust cases".[257]

229. For a consumer perspective, Ms Normand told us it would be important to ensure the CMA was "well-resourced" as—even prior to discussions on the impact of Brexit—Which? had had concerns that "the CMA's role in using its consumer powers and enforcing them is crowded out by some of the other activity it undertakes on antitrust and other matters".[258]

Possible solutions

230. Hogan Lovells did not support a reallocation of the CMA's present responsibilities in order to manage an increased caseload after Brexit. They told us it would be important to "ensure consistency and predictability" for businesses.[259]

231. The BICL instead suggested a number of procedural changes, including changing the CMA's 'duty to refer' a merger found to substantially lessen competition to a Phase 2 investigation to a 'discretion to refer'. The BICL also thought that the CMA could investigate "fewer smaller mergers" or increase review thresholds. We note that such an approach would appear to be at odds with the Government's recent Green Paper on national security and infrastructure investment (for which see Chapter 5).[260]

254 Q 6 (Dr Andrea Coscelli and Sarah Cardell)
255 Written evidence from the Competition Appeal Tribunal (CMP0042)
256 Written evidence from Ofwat (CMP0035)
257 Q 15 (Dr Steve Unger)
258 Q 44 (Caroline Normand)
259 Written evidence from Hogan Lovells (CMP0027)
260 Written evidence from the British Institute of International and Comparative Law (CMP0010)

Future institutional arrangements

The Trade Remedies Authority

232. In October 2017 the Department for International Trade published a paper on future UK trade policy, announcing that, as part of operating an independent trade policy after Brexit, the Government would put in place a trade remedies framework, to protect UK industry against unfair and injurious trade practices, such as state-assisted subsidies and dumping. Currently trade remedies are within the competence of the EU, and investigations, decisions and monitoring of trade remedy measures are performed by the Commission on behalf of all Member States. The policy paper states that, after the UK leaves the EU, these functions will be taken on by a new, independent, trade remedies investigating authority.[261]

233. In November 2017 the Government introduced a Trade Bill in the House of Commons, which provides for the establishment of a Trade Remedies Authority (TRA) and sets out the body's broad remit.

Box 3: Extract from the Trade Bill relating to the role of the Trade Remedies Authority (TRA)

1. The TRA must provide the Secretary of State with such advice, support and assistance as the Secretary of State requests in connection with—
   (a) the conduct of an international trade dispute,
   (b) functions of the Secretary of State relating to trade, and
   (c) functions of the TRA.
2. Advice, support and assistance requested under subsection (1) may include, among other things—
   (a) analysis of trade remedy measures imposed in countries or territories other than the United Kingdom, and
   (b) analysis of the impact of such measures on producers and exporters in the United Kingdom.

Source: Trade Bill, clause 6 [Bill 122 (2017–19)]

234. Given the relevance of these developments to our inquiry, we wrote to the Secretary of State for International Trade, Rt Hon Liam Fox MP, requesting further information about the remit and resource requirements of the TRA. We also asked whether the TRA or the Secretary of State would have the final say on what trade remedy measures were applied following TRA investigations.

235. In his response, Dr Fox told us that the remit of the proposed TRA was based on WTO rules, and that it would be operational in time to provide UK companies with continuous access to a trade remedies service as the UK leaves the EU. He noted that the TRA would be an executive, non-departmental public body of the Department for International Trade. It was important for the TRA to be an arm's-length body, as this would demonstrate and preserve its impartiality, and give businesses confidence in

261 Department for International Trade, *Preparing for our future UK trade policy* (9 October 2017): https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy [accessed 28 November 2017]

its investigative processes. The estimated cost of the TRA would be £15–20 million annually. Finally, he indicated that the decision-making process through which trade remedies will be investigated and applied—including the role of Government Ministers in this process—would be set out in a forthcoming Bill on taxation and cross-border trade.[262]

236. The Taxation (Cross-Border Trade) Bill was subsequently introduced in the House of Commons on 20 November 2017. The Bill indicates that ultimate decision-making power on trade remedies will reside with the Secretary of State for International Trade, who, if they accept a recommendation by the TRA on the imposition of trade remedies, will be responsible for making provision to give effect to that recommendation.[263]

237. Given the timing of the inquiry and the introduction of the Trade Bill, we received little evidence on what relationship the proposed TRA might have with the CMA and other institutions within the UK's existing competition framework. There would also likely be interactions between the roles of the TRA and any new domestic State aid authority (discussed in Chapter 6), particularly with regard to trade dispute cases. With related and possibly overlapping remits, clear channels of communication and mechanisms for cross-working will be needed to ensure all these institutions operate efficiently and effectively alongside each other.

Other stakeholders

238. Several witnesses saw an opportunity to involve other stakeholders, without a statutory competition remit, in the design and the development of this framework. COSLA, for example, told us that the role of local government had "scarcely featured" hitherto, and that the UK's future domestic competition and State aid regime should be designed "in partnership between central, devolved and local governments".[264] Which? called on the Government to "pay greater attention to consumer interests", and involve consumer bodies in determining the UK's approach to competition policy after Brexit.[265]

The global competition community

239. As well as establishing a joined-up domestic institutional framework, UK bodies such as the CMA and TRA will also need to build on existing relationships and develop new links with other competition and trade authorities around the world. As the only existing structure, evidence received in this inquiry focused on the implications of Brexit for the CMA in this regard.

240. We heard concern over the prospect of the CMA losing its place in the ECN, to the detriment of UK competition enforcement.[266] On the other hand, witnesses were generally positive on the outlook for the CMA's future influence on global competition policy, pointing out that the CMA would continue to be a member of other important international fora, such as the

262 Letter from The Rt Hon Dr Liam Fox MP, Secretary of State for International Trade to the Chairman of the House of Lords EU Internal Market Sub-Committee, 15 November 2017: http://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/15-Nov-2017-DIT.pdf [accessed 28 November 2017]

263 Taxation (Cross-border Trade) Bill, section 13 [Bill 128 (2017–19)]

264 Written evidence from COSLA (CMP0033)

265 Written evidence from Which? (CMP0034)

266 Written evidence from the Centre for Law, Economics and Society at UCL (CMP0032). See also written evidence from Hausfeld & Co LLP (CMP0018)

International Competition Network (ICN), the OECD, and the United Nations Conference on Trade and Development (UNCTAD).[267]

241. In February 2017, Dr Coscelli gave a speech on the CMA's role in the context of Brexit, stating:

> "It is my strong hope and expectation that the CMA will continue to be a key member of the international competition and consumer law enforcement community and as such will seek to continue to maintain and develop strong relationships with other enforcers, both within Europe and beyond".[268]

Dr Coscelli emphasised that the CMA frequently met "counterparts around the world to discuss issues of mutual interest, and to build personal links". He noted that the CMA would continue to "contribute to and influence the development of global policies" through these networks, and envisaged that the CMA would do so "even more directly—post-Exit".[269]

242. The Law Society of Scotland told us that the UK was "highly respected" within international competition fora, while Hogan Lovells thought it likely that the CMA would continue to have "good cooperative relationships with other agencies and command influence over global competition policy".[270]

The Government's position

243. The Minister said that the Government understood the implications of regaining jurisdiction over antitrust and merger cases after Brexit, and that this would "undoubtedly" lead to increased demands on the CMA's resources.[271]

244. Ms James noted the CMA's estimates on its additional caseload after Brexit, and acknowledged that this was likely to involve "larger and more complex [cases] than many … the CMA currently investigates". She noted that the Chancellor had committed £250 million to help departments and partner bodies prepare for Brexit, and that the Government would continue to "work with the CMA with regard to its future resource requirements as the negotiations proceed".[272]

245. We also asked the Minister how many additional cases might result from the Government's recent proposals on public interest criteria for intervention in merger cases. She informed us that the Government did not expect large numbers of cases to be scrutinised under these proposals, and that it would bring forward an impact assessment in due course.[273]

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267 See for example written evidence from Baker McKenzie LLP (CMP0026)

268 Dr Andrea Coscelli, Speech on The CMA and its place in a changing world, 4 February 2017: https://www.gov.uk/government/speeches/andrea-coscelli-on-the-cmas-role-as-the-uk-exits-the-european-union [accessed 5 December 2017]

269 *Ibid.*

270 Written evidence from the Law Society of Scotland (CMP0036) and Hogan Lovells (CMP0027)

271 Q 47 (Margot James MP)

272 Q 47 (Margot James MP)

We note that following our evidence session, the Chancellor committed an additional £3bn over the next two financial years for Brexit preparations in the Autumn Budget 2017. Philip Hammond MP, Speech on the Autumn Budget 2017, 22 November 2017: https://www.gov.uk/government/speeches/autumn-budget-2017-philip-hammonds-speech [accessed 5 December 2017]

273 Letter from Margot James MP, Minister for Small Business, Consumers and Corporate Responsibility, to the Chairman of the House of Lords EU Internal Market Sub-Committee, 20 November 2017: http://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/20%20Nov%202017%20-%20Letter%20to%20Chairman%20from%20Margot%20James%20MP%20on%20Brexit%20competition.pdf [accessed 29 November 2017]

246. The Minister said that it was "important to establish clarity" over future competition arrangements, and that the Government had been "working closely with the CMA and sector regulators".[274] BEIS also confirmed that the Government had no plans to give more powers to sector regulators: "The current allocation of competition responsibilities … has many benefits, in terms of consistency, clarity, expertise and efficiency".[275]

247. When asked about the relationship between the TRA, the CMA, and any UK State aid authority, the Minister told us she was sure that the TRA would have a "close relationship with the CMA and bodies in that field", but with "a distinct role and focus".[276]

248. In terms of the CMA's international influence, BEIS said that the CMA had "a strong track record of effective engagement" in the development of global competition policy through international networks, which the Government would expect the CMA to maintain after Brexit.[277]

Conclusions

249. **As a direct consequence of Brexit, the CMA will assume responsibility for a greater number of large and complex cases, and is likely to require more funding and more staff to meet this additional demand. It will be imperative to ensure that the CMA is appropriately resourced—and has staff with the right skills and experience in place—in good time to prepare to take on its post-Brexit caseload. We welcome the Government's current high levels of engagement with the CMA on this issue, and call on the Government to confirm its resourcing plans for the CMA and other affected institutions, like the CAT, as soon as possible.**

250. **As well as existing bodies, the UK's future institutional framework for competition matters will involve a number of other organisations, including the proposed Trade Remedies Authority (TRA), and possibly a new State aid authority. It will be important to ensure that all these organisations are sufficiently resourced, have clearly defined remits, and that they work together to deliver a cohesive and effective competition regime. The Government should also bear in mind the need to avoid duplication and ensure that public resources are used cost-effectively.**

251. **In developing this regime, the UK will have the opportunity to design a system that more closely reflects domestic needs and priorities, and is more inclusive of the devolved administrations and local authorities, as well as other stakeholders such as businesses and consumer groups. We urge the Government to make full use of this opportunity and launch a consultative process, involving all relevant stakeholders, to inform its decisions and any related legislation. We hope this report will be a useful contribution to that endeavour.**

274 Q 46 (Margot James MP)
275 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)
276 Q 56 (Margot James MP)
277 Written evidence from the Department for Business, Energy and Industrial Strategy (CMP0041)

252. **Finally, we were encouraged by witnesses' confidence that Brexit should not affect the UK's influence in international networks such as the International Competition Network (ICN), OECD, and United Nations Conference on Trade and Development (UNCTAD). We urge the CMA to maintain, and increase, its engagement in these fora to help enhance its influence in the global competition community post-Brexit. It will also be important for the TRA, once established, to build relationships with international networks and other trade authorities.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The current competition landscape

1. EU competition policy is derived from rules set out in the Treaty on the Functioning of the European Union (TFEU), and encompasses three 'pillars': antitrust, mergers, and State aid. EU Member States' courts and competition authorities are required to apply EU antitrust law when considering anti-competitive agreements and conduct which may affect trade between Member States, and to ensure consistency with the principles applied and decisions reached by the Court of Justice of the European Union (CJEU). The European Competition Network (ECN) facilitates cooperation between the national competition authorities of Member States and the European Commission. (Paragraph 47)

2. In relation to merger control, the Commission primarily examines larger, international mergers which have an 'EU dimension', based on specified turnover thresholds achieved in more than one Member State. This provides a 'one stop shop' whereby merger reviews are usually dealt with either by the Commission or by a Member State authority. (Paragraph 48)

3. The EU has exclusive competence in determining the compatibility of State aid with the internal market, which is prohibited without the approval of the Commission. However, the majority of new State aid measures are now covered by the General Block Exemption Regulation (GBER) and Member States are not required to notify them to the Commission for prior authorisation. (Paragraph 49)

4. The Competition and Markets Authority (CMA) is the UK's lead competition authority, with responsibility for investigating potential breaches of UK or EU antitrust prohibitions and examining mergers which could restrict competition. Certain sectoral regulators also have concurrent competition powers. The UK's antitrust and merger control regime is robust and highly regarded, and the CMA is well-respected among its international peers. By contrast, the UK's domestic State aid framework is very limited, as EU law applies directly and the Commission approves any aid not covered by block exemptions, such as the GBER. (Paragraph 50)

5. While stakeholders are generally positive about the operation of the current UK and EU competition regimes, there are some issues such as consumer concerns regarding pricing and dominance in some markets, and delays and bureaucracy in the EU State aid approval process. (Paragraph 51)

Short-term implications of Brexit

6. Although Brexit does not necessitate a fundamental revision of the UK's well-established domestic competition framework, the 'consistency principle' under section 60 of the Competition Act 1998 will no longer be appropriate in its current form after the UK leaves the EU and EU law no longer has primacy. It would be desirable to replace section 60 with a softer duty, whereby UK authorities might 'have regard to' EU law and precedent, although such an approach may not be appropriate in the longer-term. We call on the Government to clarify this during negotiations on the UK's future relationship with the EU. (Paragraph 82)

7. The current EU block exemptions are valued by UK businesses in helping them to ensure that certain types of agreements do not fall foul of either EU or UK antitrust prohibitions. Similar arrangements should continue to apply under UK law after Brexit. To provide certainty and minimise disruption for businesses, the Government should clarify whether the EU (Withdrawal) Bill is intended to facilitate the ongoing application of current exemptions, and for how long. The Government will also need to decide the extent to which the UK will continue to take account of future EU block exemptions. (Paragraph 83)

8. The loss of the 'one stop shop' arrangement whereby larger mergers fall under the exclusive jurisdiction of the Commission is likely to increase the number of mergers subject to review by the CMA and the number of appeals heard before the Competition Appeal Tribunal (CAT). We welcome the CMA's commitment to continue to work on procedural efficiencies to minimise the burden of dual notifications to businesses, and we support measures to reduce the impact of differences between the statutory timelines for CMA and Commission reviews. (Paragraph 84)

9. A further issue is the effect of Brexit on specialist legal services. A number of factors have enabled the UK, and London in particular, to develop into Europe's foremost jurisdiction for private damages actions resulting from breaches of competition law. Many of these features are likely to endure beyond Brexit, but uncertainty surrounding the future status of EU antitrust prohibitions and Commission decisions could put this leading status at risk. The Government should take this into account when it decides whether to repeal or amend the legislative basis for 'follow on' claims in the Competition Act 1998, and whether to allow UK bodies to continue to accept final Commission decisions. (Paragraph 85)

Transitional arrangements

10. Negotiations on any transition (or implementation) period for the UK's withdrawal from the EU need to be resolved to gain clarity on exactly when the UK will completely withdraw from the EU's competition regime. Nonetheless, whether in March 2019 or at the end of a two-year period where EU rules and regulations remain largely in force, arrangements will be necessary to manage EU court cases and administrative procedures which are 'live' at the point of this transition, including competition cases. We welcome the Government's recognition of the necessity of such arrangements, and expect the Article 50 withdrawal agreement to include provisions to ensure continuity in the handling of such cases. (Paragraph 117)

11. We note the differing positions outlined in the EU and UK position papers on ongoing Union judicial and administrative proceedings, particularly with regard to the jurisdiction of the CJEU post-Brexit, which may complicate the process of reaching a transitional agreement on competition matters. (Paragraph 118)

12. We recognise the Government's ambition to provide clarity for businesses on these issues, but note that businesses are likely to already be planning future merger transactions and investment projects that will span, or occur after, the point of Brexit. We urge the Government to come to an early agreement with the EU on jurisdiction over competition cases during any transition period, to provide certainty for businesses and to ensure that no cases 'fall through the cracks' during this time, to the cost of UK consumers. (Paragraph 119)

13. We support the Government's ambition to reach at least an outline agreement with the EU on a transition (or implementation) period, including competition matters, in the first quarter of 2018. Any transitional agreement on competition issues should ensure continuity with current arrangements, so that businesses are not faced with the additional complexity and cost of having to adapt to the implications of Brexit twice. (Paragraph 120)

Future UK policy: antitrust and merger control

14. The UK has played a significant role in recent decades in pushing forward the broad alignment of global competition policy, based on improved economic efficiency that delivers economic growth and development, and long-term consumer welfare. We note that ongoing consistency with the EU's approach to competition policy—at least in the short-term—could help to provide stability and predictability for UK businesses in the face of the significant changes Brexit will bring. (Paragraph 164)

15. Nonetheless, Brexit does provide an opportunity for the UK to develop a more effective competition enforcement regime. With the repatriation of responsibility for enforcement decisions previously taken by the European Commission, the UK will have the freedom to take a more innovative and responsive approach to antitrust enforcement and merger control, including in relation to fast-moving digital markets and dominant online platforms. (Paragraph 165)

16. In terms of the potential for the UK to review public interest criteria in merger control, the UK is already able to intervene on larger mergers within the jurisdiction of the EU Merger Regulation (EUMR) on public interest grounds that closely match those specified under UK law. Member States are also able to make interventions based on other "legitimate interests", subject to approval by the Commission. We conclude that EU rules have not materially prevented the UK from amending its approach to merger control. Indeed, the current competition-based approach was pioneered by the UK. (Paragraph 166)

17. We recognise that, post-Brexit, there may be pressure for wider public interest criteria to be considered—particularly in relation to foreign takeovers—as well as opposing pressures, for example to dilute merger controls to encourage more inward investment. On balance, we do not consider that Brexit should be seen as an opportunity to make significant changes to existing public interest criteria. (Paragraph 167)

18. The extent of trade between the UK and the EU 27 makes it likely that future substantial antitrust and merger cases will have effects in both markets. It will therefore be in the mutual interests of the EU and the UK to continue to cooperate on competition matters post-Brexit. The best way to facilitate this cooperation would be for the UK and EU to negotiate a formal cooperation agreement, covering both antitrust and merger case investigations and enforcement actions. Any such agreement should enable reciprocal evidence-sharing (including of confidential information) which would not be possible under informal cooperation arrangements without express consent from the undertakings involved. We note that parties to mergers would be more likely to provide this consent to ensure that merger transactions can go ahead as quickly as possible. (Paragraph 168)

19. The UK and the EU start from a position of extensive mutual assistance within the ECN. Nevertheless, we note that, if it is to achieve the CMA's desire for the same, or equivalent, levels of current cooperation, the Government will need to negotiate the most comprehensive competition cooperation arrangement the EU has ever agreed with a third country. The UK will also need to re-establish competition cooperation arrangements with countries currently covered by existing EU bilateral agreements. (Paragraph 169)

Future UK policy: State aid

20. While it is clear that the EU's State aid rules have been the source of some frustration in the UK, successive Governments have found them flexible enough to provide support for major projects. Moreover, other EU Member States spend significantly higher sums on State aid. This indicates that the EU rules have not been the decisive factor in limiting State aid in the UK, during the time it has been an EU Member State. (Paragraph 214)

21. The EU has, in almost every case, insisted that trade agreements with third countries include some form of controls on State aid, and it is highly likely that any deep and comprehensive UK-EU Free Trade Agreement (FTA) will include State aid provisions. There is also likely to be a link between the level of access to the Single Market the UK hopes to secure and the degree of coherence with the EU State aid regime the UK is required to maintain. (Paragraph 215)

22. If no agreement is reached with the EU—or in the unlikely event that the agreement does not contain State aid provisions—the UK will still be bound by its obligations under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM). This would be a less intrusive system of subsidy control than the EU regime, but the extent to which it would change levels of state support in the UK is questionable. (Paragraph 216)

23. We recognise that after the UK leaves the EU there may be domestic pressures for a more interventionist industrial strategy with greater use of State aid measures at national, devolved, and local levels. On the other hand, should the Government significantly increase State aid to UK businesses, this could undermine the UK's ambition to become an open, global trading nation after Brexit. We therefore welcome the Prime Minister's assurance that the Government will not attempt to "beat" other countries' industries by unfairly subsidising our own. (Paragraph 217)

24. The ASCM has no domestic application and therefore would not regulate State aid within the UK. Outside the EU, a UK-wide State aid framework will be necessary to avoid the risk of domestic subsidy races and distortions of competition between various parts of the UK. A UK State aid authority may also be required in some form, whether by extending the remit of an existing authority or creating an entirely new entity. We note the possibility that the CMA could take on this role but also that it has no experience in this activity. It would also be important to ensure that such an extension of the CMA's remit did not detract from its existing responsibilities. (Paragraph 218)

25. In developing this framework, the Government should take into account calls from local authorities for a less complex and burdensome approval process than under the current EU regime. The Government should also involve and secure the support of the devolved administrations in this process, including in agreeing the terms of reference, remit and priorities of any new UK State aid authority. It was made clear to us that any approach where the UK Government was perceived to be both 'rule maker' and 'rule taker' would probably be unacceptable to local and devolved governments. (Paragraph 219)

26. The EU (Withdrawal) Bill, as introduced, seeks to preserve the general prohibition on unapproved State aid, but does not specify what approval mechanism State aid would be subject to after Brexit. We urge the Government to clarify this omission, and its position on the shape of the future UK State aid regime, as soon as possible, to provide certainty to local authorities and businesses. (Paragraph 220)

Determining the UK's future institutional framework

27. As a direct consequence of Brexit, the CMA will assume responsibility for a greater number of large and complex cases, and is likely to require more funding and more staff to meet this additional demand. It will be imperative to ensure that the CMA is appropriately resourced—and has staff with the right skills and experience in place—in good time to prepare to take on its post-Brexit caseload. We welcome the Government's current high levels of engagement with the CMA on this issue, and call on the Government to confirm its resourcing plans for the CMA and other affected institutions, like the CAT, as soon as possible. (Paragraph 249)

28. As well as existing bodies, the UK's future institutional framework for competition matters will involve a number of other organisations, including the proposed Trade Remedies Authority (TRA), and possibly a new State aid authority. It will be important to ensure that all these organisations are sufficiently resourced, have clearly defined remits, and that they work together to deliver a cohesive and effective competition regime. The Government should also bear in mind the need to avoid duplication and ensure that public resources are used cost-effectively. (Paragraph 250)

29. In developing this regime, the UK will have the opportunity to design a system that more closely reflects domestic needs and priorities, and is more inclusive of the devolved administrations and local authorities, as well as other stakeholders such as businesses and consumer groups. We urge the Government to make full use of this opportunity and launch a consultative process, involving all relevant stakeholders, to inform its decisions and any related legislation. We hope this report will be a useful contribution to that endeavour. (Paragraph 251)

30. Finally, we were encouraged by witnesses' confidence that Brexit should not affect the UK's influence in international networks such as the International Competition Network (ICN), OECD, and United Nations Conference on Trade and Development (UNCTAD). We urge the CMA to maintain, and increase, its engagement in these fora to help enhance its influence in the global competition community post-Brexit. It will also be important for the TRA, once established, to build relationships with international networks and other trade authorities. (Paragraph 252)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Aberdare
Baroness Donaghy
Lord German
Lord Lansley
Lord Liddle
Lord Mawson
Baroness McGregor-Smith
Baroness Noakes
Baroness Randerson
Lord Rees of Ludlow
Lord Wei
Lord Whitty (Chairman)
Lord Wigley

Declarations of interest

Lord Aberdare

No relevant interests

Baroness Donaghy

No relevant interests

Lord German

Shares in Royal Mail

Shares in Virgin Money

Lord Lansley

Senior Advisor at Low Europe

Lord Liddle

Co-Chair, Policy Network Think Tank

Pro-Chancellor, Lancaster University

Member, Cumbria County Council

His wife, Caroline Thomson, is Chair of Digital UK; a Director of VITEC plc (with large European trading interests); a Director of the English National Ballet; a Director of CN Group; a non-executive member of NHS Improve and UKGI; and a non-executive director of London First.

Lord Mawson

Interests as set out in the Register of Lords' Interests

Baroness McGregor-Smith

No relevant interests

Baroness Noakes

Deputy Chairman, Ofcom

Shareholdings as set out in the Register of Lords' Interests

Baroness Randerson

Pro Chancellor of Cardiff University

Lord Rees of Ludlow

No relevant interests

Lord Wei

No relevant interests

Lord Whitty (Chairman)
Vice President, Chartered Trading Standards Institute
Vice President, Local Government Association
Lord Wigley
Director, Gwernafalau Cyf
Trustee, Sir Kyffin Williams Trust, Llangefni
Vice President, Local Government Association
Vice President, MENCAP

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Lord Boswell of Aynho (Chairman)
Baroness Armstrong of Hill Top
Baroness Brown of Cambridge
Baroness Browning
Baroness Falkner of Margravine
Lord Jay of Ewelme
The Earl of Kinnoull
Lord Liddle
Baroness Neville-Rolfe
Lord Selkirk of Douglas
Baroness Suttie
Lord Teverson
Baroness Verma
Lord Whitty
Baroness Wilcox

During consideration of the report the following Members declared an interest:

Baroness Brown of Cambridge
Non-executive Director of the Offshore Renewable Energy Catapult
Chair, Sir Henry Royce Institute
Chair, STEM Learning Ltd
Shareholdings as set out in the Register of Lords' Interests
Baroness Neville-Rolfe
Former Minister of State at the Department for Business, Energy and Industrial Strategy
Former Commercial Secretary (Minister of State) at HM Treasury
Independent Non-executive Director, Capita plc
Shareholdings as set out in the Register of Lords' Interests
Lord Selkirk of Douglas
Diversified investment portfolio in McInroy & Wood, income fund managed by third party
An interest in a small family company as Director and Chairman, with a specific interest in one or two wind turbines and areas of land
House of Commons pension, Scottish Parliament pension, and state pension

A full list of Members' can be found in the Register of Lords Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at http://www.parliament.uk/brexit-competition-inquiry for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with a ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

**	Sarah Cardell, General Counsel, Competition Markets Authority	QQ 1–9
**	Dr Andrea Coscelli, Chief Executive, Competition and Markets Authority	
**	Lord Currie, Chairman, Competition and Markets Authority	
*	Richard Moriarty, Group Director of Consumers and Markets and Deputy Chief Executive, Civil Aviation Authority	QQ 10–19
*	Dr Steve Unger, Group Director and Board Member, Ofcom	
*	Jonathan Spence, Partner, Ofgem	
*	Professor Pinar Akman, University of Leeds	QQ 20–29
*	Professor Eyad Maher Dabbah, Queen Mary University of London	
*	Professor Sir John Vickers, Oxford University	
*	Professor Richard Whish QC, King's College London	
*	Alan Davis, Pinsent Masons	QQ 30–37
*	George Peretz QC, Monckton Chambers	
*	Isabel Taylor, Slaughter and May	
*	Kate Bell, Head of the Economic and Social Affairs Department, Trades Union Congress	QQ 38–45
*	Professor Steve Fothergill, Director, Industrial Communities Alliance	
**	Caroline Normand, Director of Policy, Which?	
**	Chris Blairs, Deputy Director, Competition Policy, Department for Business, Energy and Industrial Strategy	QQ 46–57
**	Margot James MP, Parliamentary Under Secretary of State, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy	

** Bridget Micklem, Deputy Director, State Aid Policy, Department for Business, Energy and Industrial Strategy

Alphabetical list of all witnesses

*	Professor Pinar Akman, University of Leeds (QQ 20–29)	
	Baker McKenzie LLP	CMP0026
	Berwin Leighton Paisner LLP	CMP0025
	Professor Andrea Biondi	CMP0011
	British Institute of International and Comparative Law	CMP0010
	Dr Anca Chirita	CMP0013
*	Richard Moriarty, Group Director of Consumers and Markets and Deputy Chief Executive, Civil Aviation Authority (QQ 10–19)	
	Co-operatives UK	CMP0006
	Dr Matthew Cole	CMP0040
	Commercial Bar Association	CMP0038
	Competition and Markets Authority (QQ 1–9)	CMP0002
	Competition Appeal Tribunal	CMP0042
	Competition Law Committee of City of London Law Society	CMP0017
	COSLA	CMP0033
	Department for Business, Energy and Industrial Strategy (QQ 46–57)	CMP0041
	East of England European Partnership	CMP0007
	EEF, the manufacturers' organisation	CMP0016
	Eversheds Sutherland (International) LLP	CMP0024
	Financial Services Consumer Panel	CMP0014
	Gowling WLG	CMP0023
	Hausfeld & Co LLP	CMP0018
	Herbert Smith Freehills LLP	CMP0029
	Hogan Lovells	CMP0027
	Stephen Hornsby	CMP0009
*	Professor Steve Fothergill, Director, Industrial Communities Alliance (QQ38–45)	
	Dr Maria Ioannidou	CMP0028
**	Margot James MP, Parliamentary Under Secretary of State, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy (QQ 46–57)	CMP0041

	The Law Society	CMP0037
	Law Society of Scotland	CMP0036
	Local Government Association	CMP0021
*	Professor Eyad Maher Dabbah, Queen Mary University of London (QQ 20–29)	
*	George Peretz QC, Monckton Chambers (QQ 30–37)	
*	Dr Steve Unger, Group Director and Board Member, Ofcom (QQ 10–19)	
*	Jonathan Spence, Partner, Ofgem (QQ 10–19)	
	Ofwat	CMP0035
	Oxera	CMP0012
*	Alan Davis, Pinsent Masons (QQ 30–37)	
	Res Publica	CMP0030
	Scottish Government	CMP0039
	Skadden, Arps, Slate, Meagher & Flom LLP	CMP0031
*	Kate Bell, Head of the Economic and Social Affairs Department, Trades Union Congress (QQ 38–45)	
	Rhodri Thompson QC, Christopher Brown, Nicholas Gibson, and Anita Davies	CMP0020
	Trustonic	CMP0022
	UK Chamber of Shipping	CMP0015
	UK State Aid Law Association	CMP0008
*	Professor Sir John Vickers, Oxford University (QQ 20–29)	
	Vodafone UK	CMP0019
	Dr Bruce Wardhaugh	CMP0005
	Michael Waterson	CMP0003
	Welsh Government	CMP0043
	Which? (QQ 38–45)	CMP0034
*	Professor Richard Whish QC, King's College London (QQ 20–29)	

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords EU Internal Market Sub-Committee, chaired by Lord Whitty, has decided to launch an inquiry into the impact of Brexit on UK competition policy. The inquiry will explore the opportunities and challenges of leaving the EU for antitrust rules, merger control and State aid, as well as considering the potential future relationship between UK and EU competition authorities.

Background

Through its enforcement of competition rules, the European Commission aims to ensure consumers are provided with more choice, better quality and lower prices. The EU has exclusive competence over establishing the competition rules necessary for the functioning of the internal market and these rules apply directly to Member States. The Commission enforces EU competition rules together with the national competition authorities of the EU countries, with cooperation facilitated by the European Competition Network.

The UK's competition regime is underpinned by domestic statutes modelled on EU law, and includes provisions to ensure consistent interpretation with European legislation. This close interconnection between EU and domestic competition policy presents a number of opportunities and challenges for re-shaping the UK regime post-Brexit.

With regard to antitrust and mergers, existing domestic legislation will remain in force but UK competition authorities will need to assume aspects of enforcement previously undertaken by the European Commission. The UK will also need to consider whether it wishes to establish cooperation arrangements with the EU to facilitate future mutual assistance and information sharing with European competition authorities.

State aid, an exclusive area of EU law controlled solely by the European Commission, presents a different challenge. In this case, absent membership of the European Economic Area, the UK will need to establish an entirely new domestic framework.

The inquiry

The Internal Market Sub-Committee intends to contribute to public debate on the opportunities and challenges of leaving the EU for UK competition policy, and to inform and influence the UK Government's consideration of these issues.

Public hearings will be held from September 2017 until November 2017. The Sub-Committee aims to publish its report, with recommendations, early in 2018. The report will receive a response from the Government and will be debated in the House.

The Committee seeks written evidence on the following questions from anyone with a relevant interest. You need not address all questions in your response, and respondents from a particular area or sector are invited to focus on the questions most pertinent to them. Submissions are sought by Friday 15 September 2017.

General

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

Antitrust

- Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?
- Will Brexit impact the UK's status as a jurisdiction of choice for antitrust private damages actions?
- Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?
- Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?
- How will Brexit affect the CMA's ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK's influence in developing global competition policy?
- Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK's withdrawal from the EU? If so, what transitional issues would such arrangements need to address?

Mergers

- What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?
- Does the Competition & Markets Authority (CMA) have the capacity to manage an anticipated increase in UK merger notifications post-Brexit? Could regulators with concurrent competition powers, e.g. Ofgem and Ofcom, play a greater role?
- How burdensome would dual CMA/European Commission merger notifications be for companies?
- How likely is it that parallel merger reviews by the European Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?
- Do either the CMA or the European Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews?
- Will it be necessary for the UK and EU to agree a transitional arrangement for merger control after the UK's departure from the EU? If so, what transitional issues would such an arrangement need to address?

State aid

- Are State aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU State aid arrangements?
- Will the UK require a domestic State aid authority after Brexit?

- What would be the opportunities and challenges for State aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK's ability to support industries, or individual companies, through favourable tax arrangements?
- How will the Government's industrial strategy shape its approach to State aid after Brexit? To what extent has the European Commission's State aid policy limited interventions that the UK Government may have otherwise pursued?
- What, if any role, might the devolved institutions play in UK State aid control post-Brexit? Are there any potential implications for the UK internal market?
- Will it be necessary for the UK and EU to agree a transitional arrangement for State aid matters after the UK's withdrawal from the EU? If so, what transitional issues would such an arrangement need to address?

APPENDIX 4: GLOSSARY

ASCM	WTO Agreement on Subsidies and Countervailing Measures
BEIS	Department for Business, Energy and Industrial Strategy
BICL	British Institute of International and Comparative Law
CAT	Competition Appeal Tribunal
CETA	EU-Canada Comprehensive Economic Trade Agreement
CJEU	Court of Justice of the European Union
CLES	Centre for Law, Economics and Society at University College London
CMA	Competition and Markets Authority
COMBAR	Commercial Bar Association
DExEU	Department for Exiting the European Union
ECN	European Competition Network
ECJ	European Court of Justice
EEA	European Economic Area, covering all those party to the EEA agreement: all EU Member States and Norway, Liechtenstein and Iceland
EFTA	European Free Trade Area. This consists of a free trade area between the EFTA states (Norway, Liechtenstein, Iceland and Switzerland). EFTA conducts FTA negotiations on behalf of its members; and for those members party to the EEA Agreement, it also provides the basis for the EFTA Surveillance Authority and the EFTA Court.
ESA	EFTA Surveillance Authority
ESIF	European Structural and Investment Funds
EUMR	EU Merger Regulation
FTA	Free Trade Agreement
GBER	General Block Exemption Regulation
ICN	International Competition Network
JMC (EN)	Joint Ministerial Committee (EU Negotiations)—the mechanism established for the UK Government to engage with the devolved administrations on Brexit issues.
LGA	Local Government Association
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
Single Market	The Single Market refers to the market which exists between the EU's Member States. It consists of the free movement of goods, people, services and capital through harmonised rules interpreted by the Court of Justice of the European Union.
SME	Small and medium-sized enterprises

TDI	Trade defence instrument
TFEU	Treaty on the Functioning of the EU
TRA	Trade Remedies Authority
TUC	Trades Union Congress
UKSALA	UK State Aid Law Association
UNCTAD	United Nations Conference on Trade and Development
VABER	Vertical Agreements Block Exemption Regulation
WTO	World Trade Organization