Law Society of Scotland

Consultation Response

House of Lords EU Internal Market Sub-Committee inquiry into the impact of Brexit on UK competition policy

September 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-Committee welcomes the opportunity to consider and respond to the House of Lords EU Internal Market Sub-Committee's call for evidence *Brexit: competition*.[1] The Sub-committee has the following comments to put forward for consideration.

Summary

EU competition law lies at the heart of the Internal Market and applies to all business entities operating within that market, whether or not they are established in a Member State. EU competition law will therefore continue to affect all UK business – including law firms – wishing to offer goods or services within the Internal Market following withdrawal from the EU.

An effective competition regime creates a level playing field for businesses and while it offers benefits, ensuring compliance with this regime, as with all other regulatory obligations, imposes costs. At present the UK domestic regime runs in parallel to the EU one and costs for compliance with EU and national regimes are minimised because the regimes are so similar. If the UK were to adopt a dramatically different approach to competition law, this could create serious compliance difficulties for UK companies wishing to trade with or within the EU as they would need to comply with two regimes with the potential for conflicting duties under each.

For this reason, we recommend consistency with the current regime upon withdrawal; at present and in the short term we consider that this is the best option. It would succeed in terms of minimising compliance costs and offering businesses legal certainty, particular when there could be many changes for businesses to make in light of the withdrawal arrangement and any subsequent trading relationship. If at some future juncture it is considered that changes to the structure or principles of the UK domestic regime would be

1 http://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/brexit-competition/CfE-brexit-competition.pdf

advantageous, the benefits of alignment with the EU regime could be reconsidered along with all other relevant factors.

For all of these reasons we believe it is imperative that transitional arrangements are put in place to ensure legal certainty as to the applicable competition and state aid rules throughout the withdrawal process and on a practical level to allow businesses and their advisers time to adjust to whatever new relationship follows.

Upon withdrawal it is essential that competition and state aid policy is arranged so as to ensure that no individual market within the UK is disproportionately advantaged or disadvantaged as the result of overall domestic policy. Domestic competition policy must take account of the impact on the devolved nations and there will be cases where it is appropriate to assess the impact on Scottish markets as distinct from "the UK market". A key example would be a merger which might have a detrimental impact on the smaller Scottish market which might not be picked up if analysis was carried out at UK level. Similarly competition market enquiries may be required into arrangements affecting Scottish markets where there is no impact on other parts of the UK. State aid regulation will also need to take account of the separate regions both in terms of ensuring parity between the regions and allowing sufficient transparency and oversight to ensure compliance and effective enforcement at the appropriate level.

We are also particularly concerned with the impact that withdrawal from the EU will have on UK lawyers specialising in competition law and in the resulting impact on their clients. As outlined in proposals for negotiating priorities[2] we consider that securing continued recognition of legal privilege for communications between UK qualified lawyers and their internal market clients should be a priority for the UK government in withdrawal negotiations; if this cannot be achieved the issue must be dealt with explicitly in transitional arrangements. Furthermore we considered that the UK Government should seek to ensure that UK lawyers retain rights of audience in the EU/EEA courts following withdrawal. These professional practice issues tie in with the importance of maintaining cooperation in terms of recognition and enforcement of judgments which in turn enhances the attractiveness of the UK as a place to bring damages claims.

General remarks

The theory underpinning competition law is the creation of efficient markets which results in increased choice and lower prices for consumers. Furthermore, most modern/developed markets operate a competition law framework. We therefore anticipate that the UK will continue to operate a national regime upon withdrawal.

[2] *Negotiation Priorities on leaving the EU: Proposals by the Law Society of Scotland,* November 2016 - https://www.lawscot.org.uk/media/1117907/proposal-uk-government-negotiation-priorities-on-leaving-the-eu-final-021216-.pdf

At present the UK's membership of the EU means it is part of the Internal Market, along with all other EU members and signatories to the European Economic Area (EEA) Agreement - the EEA/EFTA[3] states of Norway, Iceland and Liechtenstein. It is important to recognise that even after the UK becomes a "third country",[4] UK based businesses will - like those of any third country, such as the USA - continue to be subject to EU competition law and (virtually identical) EEA Competition law to the extent that their commercial/ trade activities have an actual or potential effect on trade between EU states or EEA contracting parties. Whether the same principles will apply to effects on other trade between the UK and the EU/EEA will depend on agreement reached by the EU and the UK for the post-Brexit period. In this context it may be helpful to look at the effect of recent Association Agreements between the EU and third countries.[5]

Competition policy: Scottish issues

We believe it is important to highlight here a couple of points which merit further consideration with regard to Scotland but may also be applicable more generally and to Wales and Northern Ireland in particular.

As noted above, competition policy centres around regulating markets with a view to ensuring effective competition and a level playing field for businesses of different sizes, thereby guarding against monopolies or unfair market arrangements which could reduce consumer choice and lead to artificially inflated prices. Determining the relevant market is a key aspect of any competition claim or investigation and in certain cases the appropriate market to consider may be the specific Scottish market rather than the UK market as a whole. The Scottish market is much smaller and therefore something which might have no discernible impact on the UK market could have a very real detrimental effect in a purely Scottish context. This must be borne in mind, not only in terms of setting competition rules – eg those governing merger control thresholds - but also in ensuring that the authorities are appropriately trained and resourced to ensure fair and effective enforcement procedures.

A further aspect that merits a short discussion is what impact the UK's exit from the EU might have for the competence in competition policy conferred on the Scottish Government through the Scotland Act 2016 as a result of the debate engendered by the Smith Commission.[6] Under s.63 of the Act, which amends s.132(5) of the Enterprise Act 2002, the Scottish Ministers have the power to ask the relevant Secretary of State or the Secretary of State and Minister(s) of the Crown to make a reference to the Competition and

[3] The four members of the European Free Trade Association (EFTA) are Norway, Iceland, Liechtenstein and Switzerland but Switzerland is not a signatory to the EEA Agreement.

[4] "Third country" is the term used by the EU to refer to countries (or territories) which are not part of the EU

[5] For example the agreement with the Ukraine

[6] Smith Commission, Final Report, 27 November 2014, available at: http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf.

Markets Authority (CMA) jointly with them if they are either dissatisfied with the CMA's decision not to make a reference or are "satisfied that the CMA is aware of whatever evidence has led the 'appropriate Minister' to form a suspicion and is not likely to reach a decision as to whether or not to launch a market study (to determine whether a reference is appropriate) within a reasonable period of time".[7] Thus, this power is to be exercised jointly by the competent Ministers sitting in, respectively, the Scottish and the UK Governments.[8]

The challenges that Brexit poses for the work of the CMA and more broadly for the functioning of the UK competition regime could impact on the way that Scottish Ministers may seek to effectively exercise their powers under the new s.132 of the Enterprise Act: as the competition agency is going to acquire a far more burdensome case log due to the intervening lack of the European Commission as a "central", EU-wide enforcer and the inability to rely on the existing cooperation framework provided by the European Competition Network (ECN), it could be legitimately queried whether making a case for the CMA to investigate a "Scottish case" may become harder.[9]

Scottish aspects of the impact of withdrawal in terms of state aid are further detailed in our response to the state aid questions.

Impact on the Scottish solicitor profession

At present, Scottish solicitors along with other lawyers qualified in the UK jurisdictions (UK qualified lawyers) may exercise their rights to establish and provide services in other Member States and to have their legal qualifications recognized there. However, it is not clear whether this will continue following Brexit. As set out in our paper on negotiating priorities,[10] we believe that the UK Government should negotiate the transnational practice of law and legal professional privilege to ensure that UK qualified lawyers can continue to practise throughout the EU/EEA and Switzerland.

This is a particular concern for UK qualified lawyers specialising in competition law who work in the EU/EEA arena. Two issues which merit particular consideration in the context of bringing competition actions in an internal market context are legal professional privilege and rights of audience.

[7] Explanatory Note to Section 63, Scotland Act 2016.

[8] See further Arianna Andreangeli and Siobhan Kahmann, *Scottish Universities Legal Network on Europe, e-book chapter "Brexit and Competition Law"*, September 2017

[9] See further Arianna Andreangeli and Siobhan Kahmann, *Scottish Universities Legal Network on Europe, e-book chapter "Brexit and Competition Law"*, September 2017

[10] https://www.lawscot.org.uk/media/1117907/proposal-uk-government-negotiation-priorities-on-leaving-the-eu-final-021216-.pdf

Legal professional privilege

Legal professional privilege (LPP) is conceptually a right of the client and is central to the rule of law and administration of justice. Its scope may vary slightly between jurisdictions but in general terms LPP protects confidential communications between companies or individuals and their legal advisers made for the purposes of, or legal advice in contemplation of, litigation. It is not possible to force such communications to be disclosed in legal proceedings or to regulators or other third parties.

However, restrictions may be set as to who qualifies as a legal adviser in this context. The Court of Justice of the European Union (CJEU) and General Court of the European Union (GCEU) only recognise the privileged nature of communications between clients and lawyers[11] where the lawyer is qualified in the EU/EEA member state and is regulated by the relevant professional body in one of the EU/EEA Countries.[12] [13]

As EU law stands today, unless specific arrangements are agreed between the EU and UK (whether transitional or otherwise), EU client communications with UK lawyers would no longer be protected by LPP post-Brexit because UK qualified lawyers will no longer meet the criteria of being regulated by an EU/EEA professional body.[14]

Any business based in the EU that obtain legal advice from a UK qualified lawyer on EU competition law matters must have the same protections afforded by the LPP under EU law or Member States rules as if the advice was given by an EU/EEA lawyer .

The ability of UK qualified lawyers to provide advice on the basis that the privileged nature of those communications will be respected is also of key importance to the legal sector as a major contributor to the UK economy.

We believe that securing legal privilege for communications between EU clients and UK qualified lawyers should be a priority for the UK Government in the negotiations in order to ensure that UK qualified lawyers can function fully when acting for EU clients (or other third country clients) who wish to access their legal services and advice.

[11] Excluding in-house lawyers

[12] *AM&S Europe v the Commission* [1982] ECR 1575 paras 25-26

[13] See also *Akzo Nobel* (C-550/07 P, *Akzo Nobel* v *Commission* [2010]) which confirmed *AM&S Europe v Commission* and also decided that a further requirement is that the lawyer must be independent: the case further decided that in-house lawyers are not considered independent and therefore communications with in-house lawyers do not qualify for privileged status.

[14] Scotland (like England and Wales) recognises legal professional privilege for communications with lawyers qualified in other jurisdictions and we do not anticipate that this would be affected by UK withdrawal.

Continuing recognition of privilege for communications made prior to withdrawal

There is also a question of how communications made between UK qualified lawyers and their non-UK EU clients during UK membership of the EU, and indeed the period of any transitional agreement, would be treated by the EU and EU Member State authorities as regards privilege following UK withdrawal.

It is the nature of competition law that certain infringements come to light many years after the event (namely cartels). For this reason, it is important to ensure that at a minimum any communications between UK qualified lawyers and their EU clients made prior to withdrawal continue to be protected in the future. Competition investigations spanning the 'Brexit timeline' (the period of negotiation through withdrawal and throughout the transitional period anticipated to follow upon formal withdrawal) must also be afforded the requisite LPP protection in a manner that is certain and does not lead to costly litigation.

This continuing protection of privilege must be specifically secured in the withdrawal agreement, including in relation to any transitional period to safeguard the rights of businesses in both the UK and remaining EU.

Maintaining rights of Audience

The second issue to be considered is standing before the courts of the EU – both the Court of Justice of the EU and the courts of individual Member States.[15]

At present UK lawyers have rights of audience before the CJEU and GCEU and European Commission as well as the courts of other Member States, those states which are party to the EEA Agreement, and Switzerland. The ability to appear before all of these courts and especially the EU level ones is essential to allowing UK lawyers to appropriately continue to represent their clients' interests. This is a key concern for competition lawyers (and their clients), particularly given the fact that competition cases so often have multi-jurisdictional relevance and involve cross-border investigations, which are often adversarial in nature and continue for significant lengths of time.

We consider that the UK Government should seek to ensure that UK lawyers retain rights of audience in the EU/EEA Courts following withdrawal.

[15] Subject to laws of individual Member States which can reserve this activity to lawyers with host country title. The Member States also have the possibility to require "home and host country lawyers" to work together.

Response to questions

General

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

UK competition policy has both informed and followed EU competition law for decades. The EU approach in general terms, and in particular the consistency between the two regimes, is viewed in a positive light by many competition law practitioners.[16] To the extent possible, the UK should continue to maintain the current approach upon withdrawal. This will avoid unnecessary legal uncertainty and will ensure that compliance costs for businesses operating in the UK and EU are not duplicated unnecessarily. In the longer term, the benefits of any policy divergence must be weighed against increased compliance costs due to adjustments and occasional uncertainty associated with a change of policy direction.[17]

Antitrust

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

The EU operates a well-established anti-trust law enforcement regime, which is internationally regarded as one of the leading regimes, alongside the US. The UK should continue to maintain consistency with the EU on the interpretation of antitrust law as far as is practicable upon withdrawal. Were material differences to result in the evolution of EU antitrust law in a way that did not suit UK interests, changes could be made at that point in the future.

However, even if the UK were to adopt a materially divergent antitrust regime from the EU, UK undertakings doing any business in the EU would remain subject to the EU antitrust regime. While UK undertakings might be fully compliant with a new UK antitrust regime, they would be open to significant risk of investigation from the European Commission in Brussels, where their actions have any effect on the European market, particularly if the UK were to take a more lax approach to antitrust enforcement.

[16] BCLWG Conclusions and Recommendations, 26 July 2017 - http://www.bclwg.org/activity/bclwg-conclusions, inter alia para 1.5.

[17] This recommendation is in line with the BCLWG conclusion "that the interests of the UK economy, and those of businesses and consumers within it, will be best served by continuity of UK competition law and policy, so far as is possible following Brexit." BCLWG Conclusions and Recommendations, 26 July 2017- http://www.bclwg.org/activity/bclwg-conclusions, para 10.1

It is estimated that 44%[18] UK exports of goods and services are provided to the rest of the EU. Any significant divergence from the EU antitrust regime would place a greater burden on those UK exporters which would need to incorporate two different sets of antitrust rules into their competition compliance programmes. In practice this would require a strict review procedure to ensure compliance on a transaction-by-transaction basis or they would need to continue to uphold the stricter EU antitrust regime rules. The greater the divergence between the two regimes, the greater the compliance costs would be for businesses wishing to provide their goods or services in both markets.

Furthermore, given the long arm of DG Competition's jurisdiction, the issue is not limited to UK businesses doing direct business in the EU. In addition a company producing component parts in the UK which ended up in a product (for example manufactured in Africa or Asia) which is sold in the EU would similarly be subject to the EU antitrust regime, since its actions would also be capable of affecting competition in the EU market. UK businesses could therefore need to ensure compliance with the EU anti-trust regime even if their products were being sold to another non-EU country.

Consequently, it is recommended that any divergence of UK antitrust law from the current EU regime upon withdrawal should be strictly limited. In assessing any potential changes to the anti-trust regime in the longer term, regard must be had to the likely adverse consequences of divergence.

We have set out some suggestions as to how these objectives could be achieved in practice: these are set out in Annex I. These alterations to the system should both improve efficiency for regulators and also make processes more business-friendly without adding unnecessary cost or creating uncertainty.

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

The answer to this question will ultimately depend upon the terms of the UK's withdrawal agreement or any additional agreement on the UK's future relationship with the EU. However, it seems likely that Brexit will have some kind of impact on the UK's status as a jurisdiction of choice for antitrust private damages actions.

Businesses frequently choose to bring competition damages claims in the UK as a result of its reputation for reliable, efficient courts and relatively generous and flexible rules on the discovery of evidence among other factors. This brings clear benefits for the UK legal services' industry, which in turn contributes to the economy as a whole. Instrumental to this degree of success is the possibility for claimants to rely on the well-established rules provided by the Brussels I Regulation in respect to both the establishment of

[18] Statistic for 2015 -see http://visual.ons.gov.uk/uk-trade-partners/

jurisdiction and the mutual recognition and enforcement of judgments within the EU.[19] The advantages of the current jurisdictional regime are especially visible in respect of multi-defendant cartel cases where claimants have been able to "concentrate" a potentially significant number of claims before one forum, thereby avoiding parallel proceedings and inconsistent adjudication.[20]

We are also concerned about the negative consequences that might result if the benefits of participation in the Brussels I regime are lost. This could be of detriment to clients if UK judgments in infringement or competition cases will not automatically be enforced in the remaining EU countries. This could also represent a significant risk of further reducing European claimants' appetites to bring claims for European loss in the UK – a potential concern to UK competition lawyers whose practice focuses on advice to and represent of these clients.

Another potential adverse consequence might be an increase in parallel proceedings in the EU and UK where the UK is left outside the EU regime of jurisdictional rules. This would be inefficient and more expensive for both claimant and defendant, and risks differing outcomes in the same damages action.

We therefore recommend that the UK Government seeks to maintain arrangements to ensure certainty of jurisdiction and continued mutual recognition and enforcement of judgements with the remaining EU Member States, and indeed to pursue continued participation in the Lugano Convention to continue cooperation with the non-EU signatories.

Furthermore, it is recommended that to remain viable with regards to the provisions of the Damages Directive itself, the UK regime should preserve the status of DG Competition antitrust decisions and the status of Member States decisions in order for actions involving EU decisions to be recognised in UK courts in the first place. At the same time however, it would be imperative for UK law to uphold the various confidentiality protections provided within the EU regime, with regard to the leniency and immunity provisions of the Damages Directive, and other confidentiality claims.

[19] See e.g. the studies conducted by Rodger: "Competition law litigation in the UK courts: a study of all cases, 2005-2008", (2009) GCLR 93; "Competition law litigation in the UK courts: a study of all cases, 2009-2012", (2013) GCLR 55

[20] See further Arianna Andreangeli, *"The consequences of Brexit for competition litigation: an end to a success story?",* (2017) 38(5) ECLR 228, pp. 226-233

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

The CMA currently cooperates with the European Commission and national European competition regulators within the ECN framework. For EU-level antitrust cases, DG Competition would currently take charge of the case and national regulators would not normally open parallel investigations by virtue of the power of pre-emption under Regulation 1/2003.[21]

Brexit carries a significant risk that the CMA will be forced to conduct parallel investigations with the European Commission or national competition authorities of the EU Member States, since the UK will now have to investigate all infringements affecting the UK market. The extent of this risk is likely to be dependent upon the degree of co-operation which is ultimately achieved between the UK and EU regulators going forward.

In the conduct of these investigations, each of the regulators will likely be placed at a disadvantage when compared with current arrangements as they will be unable to carry out dawn raids on undertakings located outside their jurisdiction. Undertakings based in the UK being investigated by the European Commission for anticompetitive effects on the EU market will only be subject to requests for information (RFIs) from the European Commission, as opposed to direct dawn raids, and the same will be true for the UK regulator investigating EU companies.

In the worst case scenario there may be an increase in parallel proceedings in EU and UK where the UK is left outside the EU regime of jurisdictional rules. This would be inefficient and could significantly increase costs for both sides in a damages action. There would also be a duplication of work for both UK and EU authorities where investigations overlap, although this could be reduced by agreement that the UK and EU authorities should continue to share information where appropriate. There is a further risk of differing outcomes in the same investigation or damages action. This could lead to further costs in those particular cases if both parties decided to pursue appeals but could also increase confusion as to the law itself and/or result in divergence between the two systems. Both uncertainty and the need to comply with very different sets of rules generate costs for businesses which are often (at least partially) passed on to consumers in turn.

All or most of the above could be avoided, depending on the degree of co-operation agreed between the UK, European Commission and national competition authorities. (Please see our response to question 5 for more information.)

[21] Article 11(6) Regulation 1/2003, “The initiation by the Commission of proceedings for the adoption of a decision under Chapter II shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already on a case, the Commission shall only initiate proceedings after consulting with that national competition authority”.

The implications of parallel investigations being conducted by the UK and the European Commission include the following:

- Increased costs for undertakings present in both the EU and UK, potentially having to defend themselves against two different investigations;
- Potentially conflicting developments in the investigations, timeframes and ultimately the decisions taken;
- A potential risk of double jeopardy in terms of increased fines imposed on undertakings, in comparison to the level of fine which would have been imposed on the same undertaking prior to Brexit for the same infringement; and
- A significant risk applies for leniency applicants considering "whistle-blowing" to the competition authorities who will face a more difficult application process, having to file in multiple jurisdictions directly - which may also deter companies coming forward in the first place.

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

A post-Brexit competition co-operation agreement would be beneficial to both the EU and UK. Generally, the provisions necessary would depend on the level of co-operation involved, but should allow for efficiencies to be achieved.

A special relationship allowing the UK to remain a full member of the European Competition Network could also be of benefit as it should enable this efficient form of co-operation to continue. Where this is not possible, a lighter touch approach would never the less be beneficial, especially where this involves co-operation on dawn-raids and exchange of information on cases.

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

Brexit is unlikely to have a particularly negative impact on the CMA's ability to co-operate with non-EU competition authorities, particularly given the UK's prominent position on the global anti-trust stage. Going forward, it seems likely that we will see further movement towards bi- and multilateral cooperation mechanisms. Reaching potential multilateral arrangements with groups such as the EU and ASEAN[22]

[22] Association of South East Asian Nations

competition regulators may represent one approach, in addition to bilateral deals with other individual leading competition regulators such as those in the US and Australia – developments which we consider should provide benefits for both companies and the regulators themselves.

In terms of impact on the UK's influence in developing global competition policy, it is noted that both the UK and the EU are highly respected in this regard. The UK should seek to form good relationships in the global arena and thereby seek to strengthen its influence in global competition policy over time.

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

It will be imperative for the UK and the EU to agree a transitional arrangement for antitrust enforcement after the UK's withdrawal from the EU, to ensure legal certainty and transparency for both business and regulators. This is particularly important for ongoing cases which will straddle the UK's exit process from the EU.

Arrangements will be needed to address the following transitional issues:

- Article 101/Chapter I infringement investigations: who takes ownership of ongoing investigations, what is the relevant stage of investigation (i.e. informal, or post Statement of Objections), which courts can hear applicable appeals and how those decisions would be enforced;
- Article 102/Chapter II abuse investigations: who takes ownership of ongoing investigations, what is the relevant stage of investigation (i.e. informal, or post Statement of Objections), which courts can hear applicable appeals;
- Article 101/Chapter I infringement commitments: who takes ownership of ongoing monitoring, who can take sunset decisions, which courts can hear applicable appeals;
- Article 102/Chapter II abuse commitments: who takes ownership of ongoing monitoring, who can take sunset decisions, which courts can hear applicable appeals;
- Whether the UK will give effect to EU leniency applications made before Brexit;
- Whether the EU Block Exemptions will continue to apply post-Brexit, and for how long;
- Whether damages actions for EU competition infringement claims can be legitimately heard in the UK courts.

Mergers

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

The regime applicable to mergers falling within the jurisdiction of the UK is not based on the EU Merger Regulation (EUMR),[23] therefore such opportunity already exists regardless of Brexit. With respect to mergers that do not meet the EU thresholds, the UK national merger regime applies where the UK jurisdictional thresholds are met. The only significant change is that after Brexit, the UK will have parallel jurisdiction over the UK part of mergers that currently meet the thresholds of the EUMR and will be able to apply substantive UK merger control rules in parallel to the EU.

The current UK merger regime already includes limited possibility to apply the national interest criteria. For example, intervention may be permissible on non-competition grounds where a merger gives rise to certain specified public interest concerns, such as national security, media plurality and financial stability.[24] A limited public interest test is also included in the EUMR (Article 21), but it is only very rarely used. To date, Article 21 has only been applied in eight cases.[25]

Introducing a broader application of the current UK national interest criteria outside of these limited exceptions would result in a number of significant disadvantages. The competition law community generally advises against doing so.[26] Widening the national interest criteria is well-documented as leading to legal uncertainty and therefore results in costs to the detriment of businesses, their advisers and consumers.[27] One key criticism against applying broader public interest criteria is that there is no universal definition of public interest considerations, and therefore such criteria will be subject to varying interpretation and continual change depending on the applicable political context.

If a new public interest criterion is adopted in the UK outside the existing limits, then a precise and narrow definition would be recommended. Legal certainty, transparency and predictability can be aided by

[23] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal L 24, 29.01.2004, p. 1-22.

[24] Chapter 16: Public Interest Cases, Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2, January 2014 (pp129-37).

[25] European Commission Merger Statistics, http://ec.europa.eu/competition/mergers/statistics.pdf.

[26] BCLWG Conclusions and Recommendations, 26 July 2017, http://www.bclwg.org/activity/bclwg-conclusions, para 3.9.

[27] See for example OECD Working Party No. 3 on Co-operation and Enforcement, Executive Summary of the Roundtable on Public Interest Considerations in Merger Control, 14 June 2016.

adopting soft law documents, such as guidelines or notices on the interpretation of the public interest test. In addition, it is noted that public interest tests are difficult to administer for enforcement authorities.[28]

In the UK, the public interest test that was historically in place was changed with the adoption of the Enterprise Act 2002; the policy reasons for that change are well documented. One of the primary objectives for the change was to remove political influence from the UK control system.[29] Consequently, any public interest concerns should be addressed outside of the UK merger regime.

Lastly, it is observed that introducing a widened public interest test in merger control in the UK post-Brexit could result in unnecessary frictions with the devolved governments in the UK regarding the interpretation of "public interest". From a Scottish perspective we note that at present the public interest exception intervention cannot be used by Scottish Ministers in respect of concentrations having a projected impact on Scottish markets. It would be helpful if the extent of the Scottish Ministers' ability to intervene in merger cases having effects in Scottish markets could be clarified in this regard.

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

Historically the CMA appears to have adapted well to fluctuations in merger control notifications, which are common and follow market developments.[30] We note that the CMA will need to address capacity concerns to respond to the anticipated increase in workload following Brexit, including in the area of mergers.

However, it is expected that the CMA should be able to restructure to address an increase in merger notifications if necessary but we anticipate that further resources would be required to accomplish this. It is possible to assess such an increased workload proactively by reviewing a number of cases that may come CMA's way following Brexit based on current cases with a UK angle that fall within the EU jurisdiction. One way to manage the merger workload could be by reviewing the notification thresholds, and budgetary constraints could be addressed by reviewing the level of filing fees. However, increasing the notification

[28] On this subject, the OECD round table concluded that "public interest clauses may raise challenges in how competition authorities weigh competition and public interest considerations in merger analysis. Striking the right balance may not be easy: the assessment of the same merger on the basis of competition or public interest criteria could reach different conclusions." The OECD report goes on to say that the "jurisdictions which intend to make more extensive use of public interest considerations in merger control should consider the risks to the certainty and predictability of their merger control system, and the need to ensure consistency of cross-border merger reviews." OECD Working Party No. 3 on Co-operation and Enforcement, Executive Summary of the Roundtable on Public Interest Considerations in Merger Control, 14 June 2016.

[29] For example, Alex Chisholm speaks about public interest and competition-based merger control, https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control.

[30] For example, years before the financial crisis merger decisions by the CMA significantly exceeded 100 cases, whereas the annual total decisions in the years following the crisis did not exceed this threshold. – See Merger inquiry outcomes, updated 1 August 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/634605/merger_inquiry_outcomes_to_31_July_17.pdf.

threshold could itself have the disadvantage of further decreasing the potential for mergers which have significant impact in respect of defined parts of the UK, such as Scotland, to be caught by the thresholds at all.

Whilst it might appear attractive to share the CMA's competition workload with other regulators with competition powers, such a decision should only be taken after a robust impact assessment. In particular the following issues would need to be considered:

- The possibility of divergent decisions/approach taken by numerous regulators, which would lead to legal uncertainty lack of predictability.
- The fact that mergers require a speedy turnaround within the strict statutory time limits. A detailed framework would have to be established to provide a transparent mechanism for the allocation and re-allocation of cases, and the merger control statutory framework would need to be extended to the regulators in question.
- The fact that the business community has developed significant levels of trust in the expertise and practice of the CMA in dealing with the mergers and there is a need for this trust to be preserved.
- The reputation for independence which the CMA enjoys within the business community and the importance of maintaining this. There is already significant criticism in the way other UK sector regulators have a dual role extending to competition law. The impartiality (perceived and actual) of sector regulators may be difficult to maintain if they are tasked with assessing mergers instead of the CMA, as well as performing their duties as sector regulators.
- The fact that the merger review procedures require the merging parties involved to provide substantial amounts of commercially sensitive information to competition authorities. The business community is always very protective of such information. Additional guarantees that the information will not be released to other departments etc may be necessary if the sector regulators are tasked with merger review. Strict Chinese walls within the regulator itself may be necessary.

It may be useful to review the position in other jurisdictions with multiple regulators when considering whether merger enforcement should be allocated to regulators other than the CMA. For example, the Spanish competition regime provides substantial devolution to regional competition authorities over antitrust enforcement within their respective jurisdictions. Nonetheless, merger control remains within the exclusive jurisdiction of the Spanish National Competition Authority.[31]

[31] See Getting the Deal Through 2016, Spain, https://gettingthedealthrough.com/area/20/jurisdiction/21/merger-control-2017-spain/

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

Dual merger notifications add significant legal and business costs, both monetary and in terms of management time. More importantly, the possibility of divergent decisions on the same case - as occurs every so often on an international scale - adds significant concern to businesses that may reconsider investment options (for example, where possible the parties may decide to exclude certain markets from their deal where uncertainties over merger control arise).

Alignment of the time frames under the UK and EU merger regimes could provide a practical benefit, although we note that both regulators should continue to work to improve efficiencies in terms of decision-making. This will assist the notifying parties to co-ordinate their filings within the EU and UK, and will enable such dual notifications to be concluded in the UK within a time period which is in line with EU merger deadlines.

It may also be burdensome on the parties to obtain information necessary to review whether a merger application is required in parallel in the EU and UK jurisdictions (ie if the merger notification thresholds are met). For example, the EUMR applies a turnover test, whereas the UK applies a market share test. It is often easier for the parties to provide turnover figures, whereas market share analysis requires an assessment of the entire market and is subject to interpretation.

There are no filing fees under the EUMR. However, legal costs associated with an EU notification are significant. The UK merger notification fees currently range from £40,000-£160,000, depending on the turnover of the acquired enterprise(s). In addition to these fees, significant legal costs apply with compiling the filing and dealing with the regulator.

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

As noted above, divergent merger control outcomes are particularly unattractive to businesses. However, it is important to note that notifications in the UK and the EU would deal with different substantive merger tests, and different geographic markets and it therefore may be justified to reach different conclusions depending on the effects on the particular market. In certain cases, the merging companies could even ultimately be faced with the decision of whether to merge and exit one market, or remain as two separate entities in the two markets. The same could also apply where strict remedies are imposed by only one regulator.

What should be avoided, however, is the adoption of a legal test open to wide interpretation post-Brexit. This would include, for example, the situation in which the UK returns to a widened national interest test - resulting in a significant legal uncertainty as to how the merger may be analysed.

The points discussed in relation to the increased costs of compliance with multiple regimes are also relevant here, as are the potential costs associated with uncertainty. Given the historic links between the UK and EU markets, and geographic proximity, the potential for parallel reviews and therefore incidences of divergent outcomes may be increased. A formal cooperation mechanism, or at the least facilitating dialogue between the European Commission and CMA with a view to reaching consensus when carrying out parallel merger reviews, could help to mitigate potential problems.

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

The CMA currently cooperates with the European Commission and national European competition regulators within the ECN framework. Within the ECN, the EU Merger Working Group is tasked with fostering increased consistency, convergence and cooperation among EU merger jurisdictions.[32] This cooperation is extremely efficient and effective. The EU National Competition Authorities (NCAs) have adopted best practices and use the ICN model waiver to encourage merging parties to waive confidentiality of information where a number of EU NCAs are reviewing the same merger. Under the current framework, confidential information can be shared amongst the EU NCAs in the area of mergers where a specific waiver of confidentiality is obtained from the merging parties. It is desirable that this position continues post-Brexit, whereby the UK CMA and the European Commission, as well as the EU NCAs will be able to benefit from sharing confidential information where parties consent to such exchange by way of a formal waiver.

Where third country regulators are concerned, the European Commission strives to align the timing of its investigations with other authorities worldwide whenever possible. In the area of mergers, it has adopted specific cooperation instruments with the US[33] and China.[34] The European Commission also has in place a number of competition agreements with third countries that cover cooperation on various antitrust related matters.[35]

Currently, the CMA cooperates internationally with other competition authorities via the ECN, the OECD and the International Competition Network (ICN). Post-Brexit, the CMA will no longer automatically be part of the ECN and would not therefore be able to contribute to the EU Merger Working Group. However, in view of its true worth, any possibility to negotiate that the CMA could continue to be an ECN member, or

[32] The EU Merger Working Group, http://ec.europa.eu/competition/ecn/mergers.html

[33] US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, *available at* http://ec.europa.eu/competition/international/bilateral/eu_us.pdf; http://www.justice.gov/atr/public/international/docs/200405.htm; and http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm

[34] Practical guidance for merger cooperation between DG COMP and Mofcom (2015).

[35] EU Commission Bilateral relations on competition issues http://ec.europa.eu/competition/international/bilateral/index.html

uphold a ‘special relationship’ with the ECN would be of immense benefit to all parties concerned, including regulators and merging parties. (See also response to question 4.)

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

Yes: transitional arrangements for merger control are imperative, not only for the regulators involved but also to giver certainty to those undertakings involved in merger transactions on the withdrawal date. Clear guidance on the applicable jurisdiction that will take ‘ownership’ of the review, and potentially ongoing monitoring of commitments will have to be adopted for the immediate period when the EUMR will cease to apply to the UK. It will also be necessary to set out rules so that there is legal clarity around mergers with a UK dimension which are notified to the European Commission during the period spanning Brexit. For these cases the relevant appellate court should also be identified. Amongst other matters covered by the EUMR, the question of whether the same merger will then need to be notified to the CMA as well will need to be addressed.

State aid

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

It is likely that any future trade agreement between the UK and EU will include state aid provisions in some form.

Anti-subsidy control will already be necessary in order for the UK to be compliant with the basic anti-subsidy provisions in the WTO agreement. As an example the Ukraine agreement suggests that a comprehensive preferential trade agreement with the EU would be likely to include additional obligations. Furthermore the European Council negotiating paper states that any such comprehensive fair trading agreement "must ensure a level playing field in terms of competition and state aid."[36]

The importance to the EU of ensuring that those with a particularly close trading relationship with the EU countries commit to state aid provisions is evidenced by the EEA Agreement under which the EEA/EFTA

[36] European Council (Article 50) Guidelines on Brexit Negotiations, 29 April 2017, para 20, - http://www.consilium.europa.eu/en/meetings/european-council/2017/04/29-euco-guidelines_pdf

states apply the same substantive state aid rules as the EU. It is the EU which decides what those rules are but compliance is monitored and enforced by the EFTA Surveillance Authority.

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

Assuming that the UK continues to operate a state aid system, it would require a domestic authority to deal with state aid. This would need to be an independent body.

One option would be to expand the remit of the CMA. As noted in relation to competition law above, if the CMA is tasked with greater responsibility for monitoring and enforcement following Brexit, additional safeguards should be put in place to facilitate and guarantee its independence. This will be particularly important from the point of view of ensuring that no perception is allowed to develop that the CMA polices state aid by the UK Government less aggressively than it polices state aid by devolved administrations. Extending the CMA's remit would of course require extensive additional resourcing and investment in terms of capacity and expertise. One solution which could offer practical benefits could be to consider recruiting previous employees of the EU's state aid units under DG Competition.

The role of the devolved administrations should also be considered.

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

As noted above, the extent to which the UK would continue to be affected by EU rules on state aid would depend on the nature of its future relationship. We note that the WTO anti-subsidy rules only apply to trade in goods whereas the EU rules also cover services. The EU rules are therefore much wider in scope than those set down at a WTO level but they are also significantly more restrictive, including in the way they relate to tax arrangements. The EU state aid regime includes a complex assessment of the selectivity requirement in cases involving tax arrangements whereby agreements are reached with individual corporations; this has resulted in a number of high profile cases.[37]

It is worth noting that in a solely domestic context, state aid and subsidies are heavily influenced – both in terms of provision and restraint – by policy or political considerations. Whether a particular measure presented an opportunity, a challenge, or indeed a threat, could depend entirely on individual politics and principles.

[37] For example, EU Commission case ruling that tax arrangements by the Republic of Ireland granted to Apple constituted illegal state aid (Case SA.38373 – see press release: http://europa.eu/rapid/press-release_IP-16-2923_en.htm).

However, we note that participation in the EU system, while setting the rules by which UK businesses are bound, also provides them with recourse to redress if they have a complaint about financial aid granted by other Member States. This will change upon withdrawal as a complaint could only be brought under the WTO anti-subsidy rules by the UK itself against the EU.[38] There are a number of disadvantages to this in terms of rights enforcement when assessed from the point of view of a UK business. Firstly, it would need to persuade the UK to bring the case; political/diplomatic factors could play into this decision. Secondly, the WTO processes are widely recognised as slow-moving and do not benefit from the enforcement powers which allow the European Commission to effectively oversee compliance with the EU's state aid rules. Subsidies that are found by the WTO dispute settlement mechanism to be in breach of WTO rules only need to be discontinued or the adverse effects caused by them removed; unlike the European Commission, the WTO cannot force repayment where a subsidy has been given. Furthermore, the WTO anti-subsidy legislation does not provide the same level of detailed guidance and there is much less case law, meaning a higher level of legal uncertainty for those businesses seeking redress. It is also not possible to claim compensation under the WTO rules where a business has been negatively affected.

The UK would continue to be limited in relation to favourable tax arrangements for particular companies under the WTO anti-subsidy rules. Tax arrangements (eg tax credits) fall within the WTO definition of a subsidy when they favour specific enterprises or industries. Arrangements contingent upon exporting or using domestic content are also prohibited. Such arrangements can be challenged and countervailing duties can be imposed on a case-by-case basis subject to certain conditions set out in the WTO Agreement on Subsidies and Countervailing Measures if an importing country can demonstrate that they cause injury to its domestic industry.[39]

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

We have no comment on the effect the Government's industrial strategy will have on state aid.

Similarly, it is impossible to state with any certainty which interventions the UK Government might have pursued had the UK not been a member of the EU.

[38] In the WTO all cases are brought against the EU collectively, not against individual Member States.

[39] See further: http://researchbriefings.files.parliament.uk/documents/SN06775/SN06775.pdf

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

The absence of any state aid framework could result in distortions in the market and have a negative impact on opportunities, particularly for smaller or newer market entrants and the UK economy more generally.

We would welcome dialogue with the devolved institutions to ensure that any future UK State aid policy takes account of the likely impact on all parts of the UK and does not result in a particular advantage or disadvantage to any individual nation or its relevant market.

Again the size of the Scottish market in comparison with the UK market as a whole may be a relevant consideration. This should be taken into account not only in determining the rules but also in relation to compliance. On the one hand a subsidy granted by a local authority outside Scotland, which might not affect the UK market as a whole, could have a negative impact on the Scottish market or a particular Scottish company (or companies). Similarly a subsidy for a local business in a rural part of Scotland where the advantage could be evident on a local level in discouraging competition but the impact on the UK market as a whole would be negligible. The localised nature of the issue might mean it was more likely to be discovered and investigated by an authority operating at the Scottish level.

One option which could be considered is a transparency mechanism which could help prevent distortion of the market caused by aiding certain companies or industries, regardless of whether the subsidy was granted at a national, devolved or local level. At the same time monitoring of the Scottish markets could be improved by increasing allocation of resources to the Scottish division of the CMA (or a new state aid authority) to allow it to deal with such cases more effectively.

The Scottish Government has its own specialist state aid unit, which is part of the Directorate for Economic Development, European Structural Funds Division. This unit currently offers advice to the Scottish public sector on proposed funding and assistance with compliance with the current EU state aid rules. Any policy approach would need to take into account the ability of the devolved administrations to grant state aid (as permitted by law).

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

It will be necessary for the UK and the EU to agree a transitional arrangement for state aid matters especially in respect of ongoing cases, investigations, infringement decisions and relevant courts of appeal; the nature of this agreement will depend on any future trade relationship negotiated between the UK and the EU.

ANNEX I: Specific recommendations for a UK anti-trust regime following Brexit

Further to our response to question 2, we suggest that the following alterations to the existing anti-trust regime should both improve efficiency for regulators and make processes more business-friendly. At the same time they should avoid creating additional costs or generating uncertainty, which would be detrimental to businesses operating within the UK domestic anti-trust regime. Our suggestions are as follows:

- The UK should reincorporate a notification system into the regime which allows undertakings to make a voluntary submission to the CMA to check the legality of vertical and other arrangements, for a set fee to receive a comfort letter in return - this will provide the undertakings with legal certainty and assurance. At the same time this will act as radar for the CMA, and should pay for itself in view of the fees accrued by the process, while not adding any further pressure to the regulator's potential staff shortage.[40]

- The UK could establish itself as a global leader in cartel enforcement, armed with its criminal regime, and potentially consider increasing its fine calculation mechanism (limited only to the basic calculation mechanism, and not affecting the 10% cap) - which could render the UK anti-trust regime as being particularly deterrent in the long run on the global stage.

- The UK already takes a different view of compliance programmes from the EU, in that companies may be eligible for a reduction in their infringement fine where they commit to implementing and upholding a compliance programme (this mechanism is being further developed as part of the CMA's consultation on determining the amount of fine, which is currently establishing the relevant steps involved).[41] The extent to which that this reduction is awarded, and perhaps even further developed post-Brexit could give the CMA good exposure for its global reputation, as an innovative and fair regulator towards businesses.

- The UK may wish to review its enforcement priorities in Article 102/Chapter 2 cases, which could recognise differing enforcement priorities from DG Competition's current Article 102 Guidance Paper,[42] and could incorporate a more economic approach to enforcement than is currently adopted.

- Finally, the UK may also wish to adopt a different approach to competition law and online commerce from the EU, as has been recently set out in DG Competition's E-Commerce Sector

[40] See e.g. *"Making the most of an antitrust Brexit"*, Competition Law Insight Volume 16 Issue 5, Alan Riley

[41] https://www.gov.uk/government/consultations/ca98-penalties-guidance

[42] http://ec.europa.eu/competition/antitrust/art82/

Inquiry and further explored in the EU *Coty* Opinion.[43] As a point of note, the current UK appeal of the CMA decision against Ping[44] for banning two retailers from selling its clubs online could potentially open avenues by which the UK provides a more detailed interpretation of the e-commerce rules prior to the EU, potentially diverging from the ultimate position adopted by the EU as the UK approaches Brexit.

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[43] http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html and http://curia.europa.eu/juris/document/document.jsf?text=&docid=193231&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=586984

[44] https://www.gov.uk/government/news/cma-fines-ping-145m-for-online-sales-ban-on-golf-clubs