Executive summary

1. We consider that the key elements of the current UK competition regime – the application of the Competition Act 1998 and Enterprise Act 2002 by the CMA and concurrent regulators, with strong safeguards including a right of appeal to the Competition Appeal Tribunal – should continue to facilitate effective UK antitrust enforcement and merger review post-EU Exit. Over the last 18 months the CMA has stepped up its antitrust enforcement activity and streamlined and clarified aspects of its mergers and markets work, which we think will enable the UK regime to meet the challenges and make the most of the opportunities Exit will bring – benefiting consumers, businesses and the economy.

2. Nonetheless, evidently there will need to be some changes to the legal framework to reflect Exit. We note that the CMA has been working closely with the Government on Exit work to provide independent and expert advice on competition matters. It is important to minimise uncertainty as to the substance of any new competition regulation as well as transitional arrangements, and to avoid any unnecessary additional regulatory burdens.

3. In order to best ensure the continued effective operation of the UK’s post-Exit competition policy and framework, we think the following will be imperative:
   - Arrangements for continued UK participation in the global regulatory community
   - Appropriate information sharing and cooperation arrangements between the UK and other jurisdictions
     - For both merger and antitrust cases, it will be important to ensure that there are legal bases for the CMA, and EU and non-EU1 competition authorities to share confidential and other information and coordinate and support their investigative and enforcement measures appropriately2
   - An ability for UK courts and authorities to be able to take appropriate account of EU antitrust law in applying the UK’s national antitrust law
     - It will be important to be clear what the post-Exit relationship will be between UK and EU competition law, including whether UK courts should have regard to EU competition law when taking decisions under the competition law prohibitions in the UK’s Competition Act 1998 (whose terms in most respects mirror those of the EU prohibitions)
   - Sufficient resources for the CMA to enable it to deal with the expected increased mergers and antitrust caseload post-Exit, without 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.

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1 The position with EFTA (i.e. non-EU European Economic Area (EEA)) states will also need to be considered. Currently, under the EEA Agreement and associated protocols, NCAs, the Commission, EFTA states and the EFTA Surveillance Authority may participate in ECN meetings for the purpose of general policy discussions and may exchange information for such purposes, but not for enforcement. EFTA states and the EFTA Surveillance Authority may also attend, but not vote at, Commission Advisory Committee hearings under Article 14 of Regulation 1/2003.
2 At present, Regulation 1/2003 allows EU Member States to share such information for the enforcement of EU antitrust law (and domestic antitrust law applied in parallel). As regards non-Member States, the EU has a number of bilateral information exchange agreements for example with the US, Canada and Japan, though unlike the arrangements within the EU these tend to allow the sharing of non-confidential information only. See also paragraphs 23 and 24 below.
I. Introduction

4. The Competition and Markets Authority (CMA) has produced this response\(^3\) to assist the Committee’s inquiry into the implications of the UK’s withdrawal from the European Union (‘Exit’) for UK competition policy.

5. The CMA is an independent government agency. It is the UK’s lead competition and consumer authority, 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\(^4\).

6. The CMA works to promote competition for the benefit of consumers, both within and outside the UK.\(^5\) The CMA strives for competitive, efficient and innovative markets where consumers are empowered and confident about making choices, and where businesses comply with competition and consumer laws without being overburdened by regulation.

7. Our response addresses the questions in the Call for Evidence where the CMA has particular experience or knowledge. We note that our answers are predicated on the assumption that the current systems of case allocation for mergers and antitrust cases\(^6\) will not continue post-Exit, although their precise replacements are unclear at present.

II. Responses to Questions

General

Question 1\(^7\): 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?

8. We consider that Exit does not necessarily require a change of UK competition policy. While it is for government to determine the overall framework of UK competition law and policy, we note that retaining the current approach would provide a degree of stability and predictability for business. We note also that an effective competition policy is widely recognised as having a number of benefits for consumers, businesses, and the economy, through improved economic efficiency that delivers economic growth and development and long-term consumer welfare. For these reasons, a broadly similar approach to competition policy is evident internationally across many jurisdictions. We note also that there are some inherent risks arising from the changes that Exit will bring, and it will be important to retain a legally robust competition policy,

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\(^3\) CMA representatives are also giving oral evidence to the Committee on 14 September 2017
\(^4\) Further information about the CMA is available at [www.gov.uk/cma](http://www.gov.uk/cma)
\(^5\) In accordance with its primary duty under section 25(3) of the Enterprise and Regulatory Reform Act 2013.
\(^6\) See paragraphs 18 and 34 below.
\(^7\) Question numbers in this document refer to the ordering of questions in the Committee’s Call for Evidence
including ensuring Exit does not give rise to policy or enforcement gaps and that unnecessary legal uncertainty and litigation are avoided.

9. Competition and consumer law, policy, and enforcement help promote and create a 'virtuous circle' in which businesses innovate and compete hard to meet consumer needs. Engaged, informed consumers then distinguish between good and bad products and services and switch away from poor providers, reinforcing businesses’ incentives to innovate and compete, and so on.

10. We think that the key elements of the competition framework – the Competition Act 1998 for 'antitrust' (i.e. the prohibitions on cartels and other anti-competitive agreements between businesses, and on unilateral abuses of market dominance) and the merger control and market investigations provisions in (respectively) Parts 3 and 4 of the Enterprise Act 2002 – should enable these aims to be pursued effectively post-Exit.

11. There are a number of elements to this. First, fostering and promoting a culture of compliance through strong enforcement is in our view essential to an effective competition regime. It is crucial that enforcers have the right tools for the job, and post-Exit it is of particular importance that UK enforcers are able to cooperate effectively with authorities in other jurisdictions given the increasingly global nature of modern markets.

12. Other elements include continuing to ensure that public policies and legislation (including merger control) seek to promote competition – or at least minimise adverse impacts on competition – to the extent possible when balancing competition policy against other public interests, and that those who are harmed by breaches of competition law are able to obtain redress. The UK (and CMA) will need to continue to work internationally, maintaining existing – and forging new, strong, mutually beneficial and co-operative – relationships with other jurisdictions (including through fora such as the Organisation for Economic Cooperation and Development (OECD) and others – see further below), with a view to promoting effective and consistent competition law and policy overseas, for the benefit of UK consumers and businesses transacting or doing business both within and outside the UK.

**Antitrust**

**Question 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?**

13. We consider that there would be practical benefits to retaining a connection between domestic antitrust law (the Competition Act 1998 (CA98)) and EU competition law given that the CA98 prohibitions are modelled on the EU competition law prohibitions, albeit a looser connection than at present.

14. Currently section 60 CA98, broadly speaking, requires UK courts and competition authorities, in dealing with issues under the CA98, to ensure as little as possible divergence from the way those issues are dealt with under EU law. Section 60 in its current form will not be required post-Exit. However, recognising that key CA98 concepts / elements are modelled on EU provisions, there are potential pros and cons to retaining some connection with EU law.

On the one hand, an obligation on UK competition authorities and courts to consider both existing and future EU law would minimise the risk of UK case law in future departing from existing case law without clear reasoning, and would give UK courts
and competition authorities a body of precedent on which they could choose to rely (i.e. the case law of the EU Courts). It would also promote the ability for the UK competition authorities to conduct investigations in parallel with European Commission investigations as well as those in other EU Member States. Finally, over time, we anticipate that such an approach might encourage a degree of mutual respect and recognition between UK and EU courts in developing the law, which would improve legal certainty for those operating in both jurisdictions (given in particular that they will be subject to both UK and EU law).

15. Equally, the freedom to depart from existing (or future) EU case law in appropriate circumstances may well be beneficial. For example, some decisions of the EU courts have been criticised by economic and legal commentators and there may be merit in their concerns being considered and the law developed in future if necessary by the UK courts and competition authorities.

16. Overall, we consider that the current obligation on UK courts and authorities to act with a view to securing no inconsistency with European Court judgments should be replaced with a softer duty, for example a statutory obligation to ‘have regard’ to EU law and precedent. We consider that such a duty would allow UK courts and authorities to depart from EU law where they considered it appropriate, retaining a useful procedural discipline to consider relevant EU law on antitrust questions and to provide rational reasons for departures. There may also be additional benefits in terms of reducing the risk of frivolous litigation, as well as for business in being sure of a consistency of approach.

**Question 3: Will Brexit impact the UK’s status as a jurisdiction of choice for antitrust private damages actions?**

17. We don’t consider the CMA, as a public enforcer, is best placed to comment on this question. However, we do consider that going forward private damages actions should continue to be an important complement to public enforcement in an optimal competition regime. While public enforcement focuses on investigating, punishing and deterring competition breaches and private actions focus on redress, the two also contribute to each other’s objectives:

- It is important that those who suffer harm from antitrust infringements can obtain redress. Public enforcement can facilitate this, for example through formally establishing that there has been an infringement and clarifying the law, which can stimulate follow-on and standalone private damages actions.
- Equally, private actions can increase the total cost of infringing behaviour compared to public fines alone, so should in principle increase deterrence indirectly.
- Also, given finite public resources, competition authorities will not investigate every possible instance of anti-competitive activity. Private actions can therefore play a role in addressing anti-competitive activity where there is no public enforcement.

**Question 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?**

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8 We note that ‘have regard’ to is a term used in other areas of the law and with which judges will be familiar. For example, under the Civil Procedure Rules the High Court ‘has regard’ to various matters when considering litigation costs orders, and courts regularly adjudicate on public authorities’ duties to have regard to certain guidance and policies.

9 The CMA (and one of its predecessors, the Office of Fair Trading) worked closely with both the UK government and the EU as the current UK and EU private actions frameworks were developed.
18. The CMA\textsuperscript{10} can currently investigate issues in parallel with other EU national competition authorities (NCAs)\textsuperscript{11} under the current case allocation system established by EU Regulation 1/2003\textsuperscript{12} (Regulation 1 also provides for the sharing of confidential information between EU NCAs and support for each other’s investigative measures). The possibility for such parallel investigations alongside EU NCAs will continue Post-Exit. However, as this would be outside the Regulation 1/2003 framework, in order to retain the existing investigative and information sharing benefits of that Regulation, new bilateral or multilateral arrangements will be required. The CMA will need to maintain close cooperation and relationships with the European Commission and EU NCAs to ensure such new arrangements are mutually beneficial and work well in practice.

19. A more fundamental change will occur in relation to investigations currently carried out by the European Commission, where it currently has exclusive jurisdiction (under Regulation 1/2003) to investigate breaches of antitrust law. Based on the Government’s stated negotiating objectives, post-Exit the CMA will be able to open antitrust investigations in relation to the UK impact of anti-competitive activity caught by the CA98 in parallel with the European Commission investigating any EU impact of such activity.\textsuperscript{13}

20. In any given case, the likelihood in practice of the CMA opening an investigation in parallel with the European Commission or one or more EU NCAs will depend on the facts of the case and the degree of UK impact.\textsuperscript{14} The CMA would also continue, as it does now, to apply its prioritisation criteria in deciding whether to open a case, including assessing, for example, potential difficulties in obtaining evidence located outside the jurisdiction and the likely impact of any parallel EU investigation.

21. It is evident, however, that the new ability to conduct investigations in parallel with the European Commission will likely mean a greater CMA antitrust caseload: the CMA would need to take some cases with a UK impact over which previously the European Commission would have had exclusive jurisdiction, in order to avoid an enforcement gap and the consequent potential adverse effects for UK consumers and businesses (which could include greater difficulties in practice in obtaining redress). Given the type of cases often investigated by the European Commission, the result of taking such cases may increase the number of CMA antitrust cases that are large and complex and / or which require significant international cooperation. This would require additional resources for the CMA. More broadly, given the increasingly international and cross-border nature of markets (in particular those in the digital economy), it is reasonable to expect the number of cases of conduct and agreements having effects on competition, and competition investigations, in more than one country to continue to increase in future.

\textsuperscript{10} The views expressed in this submission are those of the CMA alone. However, in relation to references to competition enforcement powers, ‘CMA’ in this response should be taken to refer also to sector regulators with concurrent powers under the CA98.

\textsuperscript{11} One example is the hotel online booking investigation, as part of which the CMA looked at Booking.com’s European-wide contracts with UK hotels and in the meantime Germany, France, Italy, Sweden and others investigated the same contracts in their respective jurisdictions.

\textsuperscript{12} Broadly speaking, the system provides that either the Commission or Member States will apply the EU antitrust provisions depending on who is best placed to do so. If the Commission applies EU antitrust law, Member States are precluded from applying either EU or domestic antitrust law in relation to the same infringement.

\textsuperscript{13} As noted above, this submission assumes, for present purposes, that the system of case allocation and cooperation established by Regulation 1/2003 will no longer apply in the UK after Exit.

\textsuperscript{14} We note the recent European Commission case in relation to Google shopping as the kind of case with potentially material UK impact which the CMA would likely have prioritised.
22. Parallel investigations would put some additional burden on businesses having to deal with the CMA in addition to the European Commission, as compared with the current, pre-Exit position. However, the CMA would seek to ensure clarity about the interface between parallel investigations and any such burdens may, too, be minimised by the degree of similarity in practices and procedures between the UK and the EU (providing that the practices and procedures in the UK and EU remain similar). Retaining a degree of connection between substantive UK and EU law as discussed at paragraphs 13 to 16 above may also help to minimise additional burdens on businesses.

**Question 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?**

23. We consider that post-Exit cooperation in respect of cases is strongly in the mutual interest of both the EU and the UK, both for mutual support and to prevent duplication of enforcement efforts. The anti-competitive effects of behaviour or agreements may occur in both the UK and the EU, or may be directed from one jurisdiction at another; also, relevant witnesses and evidence may be held in each other’s jurisdiction. Such case cooperation would also facilitate effective discussion and development of law and policy in the two jurisdictions. For example, the UK has in recent times investigated a number of excessive pricing cases and UK-EU law and policy discussions on those kinds of matters could be mutually beneficial. Cooperation on broader policy development may also be mutually beneficial, for example the UK and EU consulting one another before block exemptions are introduced or amended.

24. We consider that current cooperation arrangements under Regulation 1/2003 – together with certain proposals under the proposed directive to make NCAs more effective enforcers\(^\text{15}\) – provide a sufficient range of powers and would need to be replicated for effective EU-UK cooperation in the competition field. In particular, we think there will need to be a specific legal basis in both UK and EU law (and potentially in the laws of EU Member States) to enable cooperation between the UK and the European Commission and the UK and NCAs in the following areas:

- Notification and coordination of investigative measures
- Bilateral and multilateral evidence sharing (including confidential information) to facilitate civil and criminal enforcement by overseas agencies\(^\text{16}\)
- Obtaining evidence to assist overseas enforcers
- Enforcement of investigative measures and remedies.

\(^{15}\) See [http://ec.europa.eu/competition/antitrust/nca.html](http://ec.europa.eu/competition/antitrust/nca.html). Notwithstanding that this directive is not expected to be finalised and adopted in EU Member States before Exit and thus will not take effect in the UK, the CMA [and Government] support significant aspects of the proposed reforms and their objective of enhancing competition enforcement across the EEA.

\(^{16}\) We note that this is of particular importance. Without the EU having entered an express agreement to share information with the UK and / or a change to internal EU law, the effect of Exit (and the professional secrecy provisions in EU legislation) will be that the EU cannot share confidential information with the UK. While the UK will have a gateway (section 243 of the EA02) through which it can consider sharing confidential information case by case, without action on the part of the EU, there will be no reciprocal provisions. It would be very inefficient if the CMA and the EU / EU Member State were investigating the same or overlapping conduct and were unable to share confidential information about it.
Question 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?

25. The CMA can already cooperate with non-EU authorities in cases the European Commission is not investigating, and it has done so in practice (for example cooperating with the US Department of Justice in a recent case involving the sale of online posters).¹⁷

26. Post-Exit, the number of cases in which the CMA is required to cooperate with non-EU authorities is likely to increase. As noted above, the additional cases which we expect the CMA will need to undertake that would previously have been undertaken by the European Commission post-Exit will commonly be large, international cases affecting a number of countries. Therefore it will not be uncommon for there to be a parallel investigation in at least one other non-EU country in those cases. The EU currently has a number of agreements with non-EU authorities (though with few exceptions these do not provide for the sharing of confidential information) and the UK may wish to conclude appropriate cooperation agreements with relevant non-EU jurisdictions to ensure effective cooperation.

27. It is possible that greater practical case cooperation with non-EU authorities will deepen relationships with them and positively impact the UK’s influence in developing global competition policy. The CMA and its predecessor organisations have had a strong track record of effective engagement in developing international competition policies, procedures and approaches, through multilateral networks such as the International Competition Network (ICN) and the OECD, as well as by developing strong bilateral relationships with EU and non-EU competition authorities. The CMA would expect to maintain and develop these relationships following Exit as the UK develops its new trade relationships. While it is possible the CMA will no longer be a member of the European Competition Network, or at least not in the same way, the CMA would expect to maintain strong and effective relationships with European competition authorities through new bilateral or multilateral arrangements with the European Commission and EU Member States. The CMA will work with government with a view to ensuring these types of arrangements can be put in place as soon as possible after Exit.

Question 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?

28. There are likely to be a number of suspected infringements committed pre-Exit (including a number where investigations have commenced under the current framework for application of domestic and EU antitrust law established by Regulation 1/2003) where investigations have not concluded at the point of Exit. We consider that sensible transitional arrangements to agree how such infringements should be investigated and resolved are highly desirable – to provide appropriate clarity and certainty to businesses under investigation and to minimise disruption and inefficiency in relation to existing authority investigations and enforcement activities.

29. We consider that the key issues addressed by ideal transitional arrangements would include the following:

¹⁷ As there is no precise equivalent to Regulation 1/2003 in respect of non-EU countries, however, the extent of possible cooperation is more limited: the CMA is often not able, for example, to obtain confidential case information from its counterparts in those non-EEA countries.
Who has jurisdiction over the UK aspects\(^\text{18}\) of antitrust investigations under EU law opened pre- and post-Exit?

Who enforces UK aspects of EU antitrust directions or commitments made pre-Exit that require monitoring or review post-Exit?

What are the appeal routes for these transitional cases and for decisions that have been taken or appealed to the European Courts before Exit?

30. Similar issues will need to be addressed in relation to mergers (see below).

**Mergers**

**Question 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?**

31. Predictions about merger numbers need to be approached with great caution, as they are affected by many factors, including, most significantly, the level of activity in the economy; moreover, the number that raise competition concerns itself varies over time. However, on the assumption that the current UK jurisdictional merger thresholds remain the same, the CMA estimates (based on cases notified to the European Commission that have a UK aspect) that it might need to consider in the region of an additional 30 to 50 phase 1\(^\text{19}\) mergers per year – cases that under the current system the European Commission would have considered. This might reasonably be expected to result in half a dozen or so additional phase 2 cases. The transactions currently reviewed by the European Commission are typically of a greater size and – given that size and the inherently cross-border nature of the transaction or the markets involved – greater complexity and/or involve greater international cooperation than many of the transactions currently reviewed by the CMA. As such, the additional cases over which the CMA will gain jurisdiction post-Exit may also require more resources per case than current CMA cases typically do.

32. We do not think that the anticipated increase in the CMA merger caseload necessarily requires significant changes to the current allocations of responsibilities for UK merger control. We consider that the current system has many benefits – for example in terms of consistency, clarity, expertise and efficiency arising from mergers being assessed by a single agency – and that it is unnecessary and undesirable to change it at this point. Further, the CMA has acquired merger assessment expertise in regulated sectors through reviewing mergers in regulated sectors in the past, and works closely with sectoral regulators in reviewing mergers in their sectors.

33. The CMA would however need additional resources to handle the increased caseload without a diminution in the quality of merger scrutiny, to ensure that (i) it can continue to perform its merger function to an appropriate standard and (ii) it does not find that the increase in merger work it has to consider reduces the allocation of resources to its other important antitrust, markets and consumer work.

\(^{18}\) By UK aspect we mean the UK impact or dimension of an infringement, for example where there is actual or potential UK harm or where the UK is the centre of gravity of the infringement. This might be the case whether or not the harmful event took place in the UK, for example closure of a plant in France contrary to an EU commitment that harmed UK businesses.

\(^{19}\) The EU and UK domestic merger regimes both operate a two phase merger control system in which, broadly speaking, relatively clear cut / straightforward cases are dealt with quickly (at phase 1) with only more complex cases being referred for more in-depth investigation (phase 2).
Question 10: How burdensome would dual CMA/European Commission merger notifications be for companies?

34. Where dual merger notifications occur, companies may have to make an additional filing and submit to an additional investigation compared to the current ‘one stop shop’ for most EU case allocation including the UK. As noted above, we consider that approximately an additional 30 to 50 phase 1 cases per year might be expected to reach the UK merger notification threshold post-Exit. However, businesses are unlikely to need to make dual filings in all these new cases, since in some the result of UK turnover not being taken into account will be that the EU jurisdictional thresholds are not met (though evidently it is difficult to predict the number of such cases with accuracy). Also, there may be transactions which appear unlikely to have significant overlaps with / competitive effects in the UK such that parties choose not to notify them to the UK. Finally, we note that many large companies already have to file mergers in multiple jurisdictions, and so having to do so additionally in the UK might not necessarily be a significant additional burden.

35. Where there will be dual notifications post-Exit, we note that the many practical similarities and synergies between the EU and UK merger review processes may mitigate the extent to which businesses must carry out significantly different work for the two investigations. The legal tests for intervention are similar, as are significant elements of the information requested by the CMA and European Commission (and therefore the legal and economic analysis likely to be undertaken by merging parties). Businesses could also potentially streamline the review processes by agreeing to waivers allowing the European Commission and the CMA to share and discuss information submitted to each. Moreover, the CMA has recently introduced measures to make its merger review process as efficient as possible, including revised de minimis guidance and improved notification and template forms, and will continue to work on procedural efficiencies that minimise the burden of notification. Finally, the CMA would aim to establish cooperation mechanisms with the European Commission (as well as other jurisdictions) to mitigate the increased burden.

Question 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?

36. There is already some potential for divergent outcomes under the present system – in relation to parallel merger investigations between the CMA and other competition authorities other than the European Commission, including EU NCAs. A merger’s impact in the UK may differ from its impact in other countries, including other EU Member States. This will be case dependent but it might in some cases lead to divergent outcomes in relation to whether the respective authorities’ substantive tests for intervention in a merger are met in a given case or in relation to whether certain remedies might be considered suitable to address the concerns identified.

37. For the same reason, the possibility of divergence between the UK and the European Commission cannot be excluded going forward. However, as noted above, there are many similarities between the CMA and European Commission approaches – for example both systems are broadly economics-based, apply similar analytical approaches and have similar legal tests for intervening in a merger. As such, it is not

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20 Broadly speaking, the European Commission has exclusive jurisdiction over mergers that meet certain turnover thresholds. It examines the impact of those mergers on competition throughout the EU and EEA, and national competition authorities are prevented from applying national rules.

21 See new de minimis guidance and consultations on the merger notice template and initial enforcement orders and derogations in merger investigations.
clear that significant divergences will occur often. Moreover, proactive cooperation and 
dialogue between the two jurisdictions can be expected to reduce further the overall 
likelihood of divergence. This will be particularly important given the voluntary nature 
of the UK merger system. If parties chose not to notify mergers proactively in the UK, 
or did so significantly later than to the European Commission, the possible differences 
between the timing of the UK and European Commission investigations would increase 
the likelihood of divergence (in particular because the UK investigation might not be 
sufficiently advanced to enable the CMA to participate in discussions on remedies 
proposed within the European Commission’s investigation).

38. We note also that given the close trading relationship enjoyed between EU Member 
States and the UK, the likelihood of a merger affecting competition in both 
jurisdictions is heightened. However, it is also evidently the case that, as a result, 
there is also likely to be a greater incentive on the parties to cooperate in identifying 
and implementing remedies that satisfy both jurisdictions’ regulators.

39. In the relatively rare circumstances where divergent outcomes might occur, the 
implications will vary according to the facts of the case: in some cases, the difference 
may have limited effect; in other, more extreme cases, however, it could lead to the 
imposition of inconsistent requirements on businesses, potentially frustrating different 
jurisdictions' remedies, and even causing the abandonment of the merger. As already 
noted, divergence can already occur under the current regime. What is important is to 
minimise the risk of different jurisdictions reaching different outcomes on the basis of 
the same evidence.

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

40. Both the CMA and European Commission regularly cooperate with non-EU competition 
authorities on merger reviews, for example the US Federal Trade Commission and 
Department of Justice, the Australian Competition and Consumer Commission, the 
New Zealand Commerce Commission and the Canadian Competition Bureau, 
recognising the benefits of appropriate coordination and cooperation in terms of 
minimising the risk of significant timing or practical issues and reducing the likelihood 
of divergent outcomes.

41. The terms and scope of cooperation between different jurisdictions can sometimes be 
reflected in bilateral arrangements, for example a memorandum of understanding 
(although such arrangements are not required, at least for cooperation with 
jurisdictions with which there is already a strong and cooperative working 
relationship). Where there are bilateral arrangements, these typically codify and 
record formally what signatories can do under their domestic legal regimes and what 
can be expected in terms of good practice by the signatory authorities (as opposed to 
creating a specific legal basis to facilitate cooperation).

42. A good example is the EU-US 'Best Practices on Cooperation in Merger Cases'. It 
should be noted, however, that the extent of cooperation in practice will rely on 
parties granting authorities waivers to share and discuss confidential information, 
since under UK law confidential merger information can only be shared with parties’ 
consent (albeit that parties in merger cases will typically have incentives to do so); 
this may need to be revisited at some point. In any case, post Exit, the UK will no 
longer benefit (indirectly) from the existing EU-US arrangement, nor from those the 
EU has with, for example, Canada, Japan, South Korea and Switzerland.
43. The CMA is already able to cooperate with other authorities without formal cooperation arrangements, as illustrated, for example, by the GTCR/PR Newswire case in which the CMA and the Department of Justice cooperated closely throughout the course of their investigations. In practice, therefore, the CMA would expect to consider on an individual basis whether such agreements would be beneficial with a particular jurisdiction. Nonetheless, if post-Exit the CMA needs to cooperate with such jurisdictions in increasing numbers of cases (as seems to be the case for the European Commission) it may well consider similar, more formal bilateral arrangements with at least some of these jurisdictions.

**Question 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?**

44. For essentially the same reasons as for antitrust cases (see paragraphs 28 to 30 above), we think that sensible arrangements for completing merger cases relating to pre-Exit anticipated or completed transactions are highly desirable from a UK and EU perspective. We think such arrangements will need to cover essentially the same issues as for antitrust cases, i.e.:

- Who has jurisdiction over merger cases that are live at the point of Exit?
- Who enforces the UK aspects of EU merger remedies and commitments made pre-Exit that require monitoring or review post-Exit?
- What are the appeal routes and mechanisms for references to the European Courts for these transitional cases?

45. Ideally such arrangements would be concluded as soon as possible to maximise certainty for businesses and their advisors. For example, businesses may already be considering transactions now for which they would, in the ordinary course of events, submit competition authority filings in 2018 (and where investigations could, in some cases, extend into 2019). An understanding of any transitional arrangements would assist them in forming a view on when and where such filings are likely to be necessary or advisable (and therefore how this should be reflected in any transaction agreements currently under negotiation between them).

5 September 2017