Professor Michael Waterson – Written evidence (CMP0003)

1. I write in response to your Call for Evidence in respect of the impact of Brexit on UK Competition Policy. I am a Professor of Economics at the University of Warwick, where my research interests range widely across the area of industrial economics. I am also a recently-appointed Member of the Competition Appeal Tribunal and was, for the years 2005-2014, a Member of the Competition Commission. However, I wish to make it clear that this submission is made in an individual capacity and should not be construed as representing any of the views of those institutions.

2. My response is confined to issues raised under the headings Antitrust and Mergers and I will not cover the questions here exhaustively.

3. One feature of UK antitrust is market investigations. In my opinion, this is an area (one of the few) in which there will be no need for change, because these tend to focus on issues and institutions that are somewhat idiosyncratic and where the market is clearly confined to the UK (or a part of the UK) and there is no directly parallel legislation.

4. In respect of antitrust more generally, it must be recognised that whilst some cases relate purely to domestic companies (or companies whose prime interests are in the UK), many other cases arise where companies have substantial operations in other countries.

5. For this and other reasons, there is a history of collaboration between the CMA and its predecessors with sister authorities in the EU and in the United States and on occasion elsewhere. Antitrust is a global issue, and when dealing with global companies there is substantial sense in which cooperation is both useful and necessary.

6. Collaboration is important both in relation to cartels and mergers. I discuss mergers in the section below.

7. As a result of global trading patterns, cartels often take on a multinational nature. Evidence received from one country can assist investigation in another. For example, the famous vitamin cartel involved companies based in many countries. Competition agencies across the world collaborated in pursuit of cartel members with the US taking a lead role as many of those involved in the cartel had operations in the US. Significant fines were imposed by US and EU authorities. Executives were jailed and private actions for damages followed.

8. Generally, then, some degree of collaboration between antitrust authorities is both common and desirable. I see no particular reason why this should not continue, and indeed in my opinion it is important that it does so. It can on occasion be problematic, and agencies tend to have their own “territories” and ways of doing things. Moreover, in the course of an investigation, much of the material is commercially sensitive, so cannot be shared across agencies but must be supplied and considered separately.

9. Justice is also about timely solutions to problems. This points to the desirability of clear transitional arrangements, particularly of cases “in flight” at the appointed time for separation, but also for legal certainty more generally.

10. Moving to mergers more specifically, merger cases arise in two distinct situations. One is where the economic market is essentially (for one of any number of reasons) domestic and is traditionally dealt with under domestic regulation. Clearly, this tranche of merger cases is unaffected,
since they would have been dealt with under existing domestic legislation. Often, by their nature, they are relatively small (examples include mergers between water undertakings, bus operators and the BOC/Ineos Chlor case).

11. Many of the most significant merger proposals involve companies with operations in several countries and most of these will have qualified for consideration by the European Commission, and still will in most cases.

12. EC involvement is not inevitable; the Pan Fish/Marine Harvest case was an interesting example where two companies, one Norwegian the other Dutch in origin, wished to merge their Scottish salmon businesses. Marketing of the product was significant in Britain and France, but not elsewhere, and the two competition authorities in fact came to different conclusions (related to different perceived tastes amongst consumers). Collaboration in that case was limited. There may be broader lessons that can be drawn from this example; remedies were an issue here.

13. Large cross-country merger cases already give rise to problems in some circumstances. One early landmark example is the blocking of the merger between de Havilland and European competitors. Different countries put forward different positions on this case.

14. In the UK there is no formal notification requirement for mergers. In fact, in some cases it appears to come as something of a surprise when companies first hear that their merger is being investigated. This presents a contrast with mergers which have a “European Dimension”, where notification is obligatory. Post-Brexit, the issue will likely become more vexed, because a merger might be notified to the European Commission but not to the CMA, despite there being a potential impact in the UK.

15. Collaboration on merger investigations has routinely been required within the EU, since the principle is that whichever authority is chosen to investigate acts as a “one-stop shop”.

16. I have been struck by the large amount of resource put into merger cases, most specifically by the intending merging parties. Clearly in the situation where a merger is to be investigated by both UK and European agencies post-Brexit, this adds to the burden on business, as well as the burden on agencies. Spending into the millions is routine, even before account is taken of executives’ time.

17. I have performed a very rough evaluation of the extent to which mergers considered more than routinely by the European Commission in 2016 are cases with a significant British impact. On my guesstimate, around one half have such an impact, 15 cases in total. (The most well-known example is probably the Hutchinson (Three)-O2 merger, which was blocked.)

18. Transferring these to the CMA, or concurrent investigation by the CMA, would clearly add a very significant burden to their work, possibly as much as doubling the stage-2 investigations they undertake. Of course it is possible that divergent conclusions would be reached, but I am not competent to judge what the outcome would be if this were to happen. I suspect the CMA does not have the capacity to increase its workload proportionately in response. There may well be additional appeals to the CAT as a result of the increased investigations.

19. National interest as a criterion in merger investigations in the UK is confined to a very narrow set of circumstances. So far as I am aware, this was a voluntary decision of Parliament to limit the scope for Ministers to
determine which mergers would be referred. It is in line with the CMA being independent, as a non-Ministerial agency.

20. Again, transitional arrangements would need to be in place to ensure continuity of treatment for merger cases “in flight”, although unlike cartel investigations, the time scale would be relatively short.

8 September 2017