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?

1. UK competition policy should seek to ensure the fair and efficient operation of markets to the benefit of businesses, consumers and wider society. Competition policy ought to aim for the creation a level playing field upon which businesses can compete fairly and without unfair advantage, alongside an effective and efficient private antitrust enforcement regime. That system for private enforcement should provide a deterrent against wrongdoing and for proper and adequate redress, for consumers and businesses, as and when infringements of competition law occur.

2. The UK has for many years been at the forefront of the development of competition law and policy globally and indeed has played a leading role in the development of antitrust policy at EU level, particularly in relation to private actions. The UK, and specifically London, is a global centre for antitrust claims and harbours very significant expertise in competition law matters, including in the legal, economic and technical spheres.

3. Post-Brexit, the UK’s approach to competition policy should be characterised by a determination that the UK will continue to be recognised as a leading jurisdiction when it comes to the competition law, policy and enforcement. It is vital, for the wider economy, business and consumers, that the UK does not slip behind our European counterparts in terms of the capacity to investigate infringements, ensure rigorous enforcement and facilitate opportunities for redress. Providing the right action is taken by Government and the appropriate agreements sought, particularly in relation to jurisdiction (as we detail below), there is no reason why the UK should not remain regarded as a desirable forum in which to litigate antitrust claims and continue to boast one of the most respected competition law regimes in the world, to the benefit of consumers and businesses alike.

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?

4. It is worth setting out upfront that the type and extent of the UK’s future relationship with the EU, including any required transitional arrangement, is instrumental in determining the shape and effectiveness of the UK’s competition law regime post-Brexit. Whilst we appreciate that the UK’s future relationship with the EU is yet to be determined, our answers for these purposes presuppose that the UK will not remain a member of the European Economic Area (the “EEA”).

5. Post-Brexit, the key EU rules which prohibit cartels and abuse of dominance, Articles 101 and 102 of the Treaty for the Functioning of the European Union (“Article 101” and “Article 102”, respectively) will cease to apply in the UK. Domestic legislation,
Chapter I and II of the Competition Act 1998 (the “Act”), mirrors these EU provisions so the most likely statutory position immediately post-Brexit is ‘no change’.

6. However, it is worth noting two points here. Firstly, section 60 of the Act requires that UK courts and authorities interpret UK competition law consistently with EU law and decisions of the EU Courts and the European Commission (the “Commission”). Therefore, even absent the continuing application of Articles 101 and 102, the UK would still have to comply with EU competition law unless section 60 of the Act is amended. Secondly, providing section 60 of the Act is amended, it would be open to Parliament to further amend domestic legislation; evidently any changes to Chapter I or Chapter II of the Act would mean an immediate lack of consistency between UK and EU provisions.

7. Divergence over time, in the medium to long-term, would be probable, not least because it appears that the UK authorities and courts may no longer have to ensure there is consistency between their actions and the approach of the Court of Justice of the European Union (the “CJEU”).

8. Even if the UK’s substantive antitrust laws were to remain largely the same, there would be changes to the related procedural rules directly post-Brexit. At present, there are EU rules (namely Council Regulation 1/2003/EC (“Regulation 1/2003”) and our ‘duty of sincere cooperation’ in Article 4(3) EU Treaty) which prevent the CMA (or indeed other Member States’ regulators) initiating proceedings against businesses or individuals if those same entities are also facing proceedings from the Commission.

9. If no agreement is reached to the contrary, upon Brexit, UK companies could be subject to parallel EU and UK investigations about the same conduct, at the same time. In fact, parallel investigations would be likely given the volume of businesses which operate on a pan-European basis. Dual investigations would increase the administrative burden on those businesses involved and also on the UK’s domestic regulators – for example, parallel investigations would likely mean parallel dawn raids, leniency applications, and information requests (not to mention multiple fines). Parallel investigations would also likely mean a risk of conflicting decisions, which, coupled with any divergence in the substantive rules, could well create a degree of inconsistency and uncertainty for would-be defendants and claimants.

10. There are therefore reasons to advocate a good degree of consistency between UK and EU antitrust rules in the short and medium-term, if not over a longer period. That

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1 Whether or not the UK remains within the CJEU’s jurisdiction will be determined by the approach which governs the UK’s relationship with the EU post-Brexit, as further elaborated upon below. It is noted that it appears at present that the UK Government intend for the UK to exit the jurisdiction of the CJEU, as stated in the Government’s paper ‘Enforcement and dispute resolution: A future partnership paper’, issued on 23 August 2017:
2 Ibid, paragraph 45
consistency would be required across the procedural framework, as well as in relation to substantive law, and would be beneficial to claimants and defendants alike. Jurisdictional issues will be key to this, as further detailed below. To provide for a greater degree of consistency, section 60 of the Act could be amended to provide that the UK will “take account” of EU rules and decisions (including of the CJEU) and that these would have significant persuasive value, rather than these rules being binding (as currently).

11. Insofar as consistency in certain areas is not thought desirable and indeed as inconsistencies arise naturally in the medium to longer-term, there may be some aspects of antitrust enforcement in which the UK could utilise its newfound status to attempt to forge ahead of our European neighbours, including in relation to improving the UK’s desirability as a jurisdiction of choice for litigating antitrust claims. These opportunities will involve building on the existing successes of the UK’s private enforcement regime, such as by continuing to make the Competition Appeal Tribunal (the “CAT”) a more attractive and user-friendly venue to litigate claims and encouraging the development of the collective redress regime.

12. From a procedural point of view, as the UK may not have to abide by CJEU judgments, and could theoretically depart from the legislation implementing the recent Damages Directive, the UK courts could decree that a greater degree of leniency material ought to be made available to claimants in antitrust actions before the UK courts. Such an approach would certainly ameliorate the position for UK claimants and may make the UK a more attractive location for claims as above EU Member States. By way of further example, this time going to the substantive legislation, in theory the UK could take a more restrictive approach to an issue such as abuse of dominance, such that a company may be considered dominant with reference to a lower market share threshold, or perhaps adopt a different stance on the application of block exemptions.

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

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3 There is also likely a need for cooperation between the CMA and the Commission post-Brexit, as described in more detail later. In short, upon Brexit, the UK’s membership of the European Competition Network (“ECN”), the mechanism facilitating cooperation between national competition agencies and the Commission, will come to an end. As the ECN is the vehicle by which the UK and the Commission share information about investigations, this has the potential to be a significant hurdle to good enforcement post-Brexit.

4 The Consumer Rights Act 2015 (the “CRA”) introduced reforms to encourage access to justice for victims of competition law infringements, such as with a new ‘fast-track’ procedure for CAT cases and capped costs.

5 The UK already excels (indeed ahead of our European neighbours) in relation to collective redress, having recently introduced the potential for opt-out, collective claims via the CRA (although no claim has yet been allowed to proceed to trial). The UK could further improve its attractiveness as a forum for collective redress with amendments to the procedural rules governing these actions (found in Rule 119 of the CAT Rules 2015), which would enable more claims to be brought.

6 Directive 2014/104/EU
13. The UK is currently very much a jurisdiction of choice for antitrust litigants – this is for a variety of reasons, including respect for our independent and established judicial system and our rules relating to disclosure, limitation and funding. The UK economy has benefitted very significantly from the country’s status as an attractive forum for the litigation of competition law disputes and the related expertise which has been built up is of considerable economic value.

14. In the field of private enforcement, claims are either brought on a ‘follow-on’ or a ‘stand alone’ basis. The former refers to a type of action for damages which follows a regulatory decision establishing liability for an infringement of competition law. Follow-on claims can be brought in the UK courts which put to use decisions from the Commission and from the UK competition and sector regulators.

15. The foundation for follow-on actions relating to Commission decisions is Regulation 1/2003 and the relevant provisions of the Act (sections 47A and 58A), pursuant to which Commission decisions are binding on UK courts. Where the Commission has found an infringement of competition law, a victim of that infringement can bring their action for damages in the courts of a Member State, including the UK. When they do so, they do not have to prove the underlying infringement of competition law as this has already been established by the Commission, but rather only causation and loss. Stand alone claims, by contrast, are not based on prior infringement decisions, such that claimants have to prove the underlying infringement of competition law, as well as causation and their losses.

16. Post-Brexit, and on the assumption that the UK does not stay within the EEA, Regulation 1/2003 would no longer apply in the UK. The effect of this would be to mean that Commission decisions would no longer be binding on UK courts. As a consequence, claimants seeking to bring their claim in the UK, following on from a Commission decision, would not be able to do so on a follow-on basis. Instead they would be required to prove the underlying infringement of competition law (in the existing Commission decision), in addition to causation and loss. The burden of so-doing may mean that some claimants seek to bring their follow-on claims elsewhere and the UK would no longer be the pre-eminent jurisdiction for this type of antitrust claim.

17. This position may therefore be more complex than currently for UK victims of pre-Brexit competition law infringements which are formally identified by the Commission post-Brexit, as those specific Commission infringement decisions (covering conduct in the UK) would not be enforceable in the UK courts. However, a stand alone action would remain possible in this scenario, as would a follow-on action based on a corresponding CMA decision. Indeed, in this scenario (where Commission decisions are not binding on UK courts post-Brexit), the CMA (and other UK regulators’) decisions will still be able to be put to use by claimants in UK courts by virtue of the Act.

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7 That is not to say that follow-on claims are simple, as they are often anything but.
8 Evidently, the above relates only to follow-on, as opposed to standalone claims.
9 It is vital that transitional arrangements take account of these issues, as further detailed later.
the likelihood of parallel investigations, we could expect a greater number of decisions from the CMA and the UK’s other domestic regulators.

18. On the basis of the above, there may be good reasons for the UK seeking to put itself in a situation where Commission decisions can be utilised by UK claimants to establish the liability of infringers immediately post-Brexit for a transitional period (as further detailed later). Following that transition, providing section 60 of the Act is amended appropriately, Commission decisions could be of significant persuasive value for the UK courts and therefore whilst a UK claimant would have to establish liability, this would not be such an onerous task as to discourage the claim, particularly given the procedural and other advantages of the UK regime. Such an approach would sit well alongside a cooperation agreement between the EU and the UK as to antitrust investigations and procedure.

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?

19. As above, in the absence of the application of Regulation 1/2003 and our ‘duty of sincere cooperation’ post-Brexit, parallel EU and UK investigations are possible and highly probable. This is because at present these rules prevent the CMA (or indeed other Member States’ regulators) initiating proceedings against alleged infringers of competition law if those entities are also facing proceedings from the Commission. Absent these rules, UK companies could be subject to parallel EU and UK investigations about the same conduct, at the same time.\footnote{For the avoidance of doubt, although EU competition law would no longer apply in the UK post-Brexit, UK companies would continue to be subject to EU laws insofar as they affect trade between EU member states. This would occur in the same way that, for example, American, Chinese and Japanese companies are subject to Commission investigations and fines.}

20. The implications of parallel investigations would be numerous. First, the regulatory, investigatory and associated financial burden which would fall upon the CMA and the UK’s other sector regulators would be significant. The CMA is currently not equipped, in terms of volume of personnel or resources, to take up a considerable number of additional antitrust investigations, let alone large-scale investigations. This would of course be alongside the additional capacity which will be required for the purposes of merger approvals and scrutiny. If parallel investigations are rendered necessary, the CMA would have to see a significant increase in resources to enable it to cope with this post-Brexit burden of additional antitrust enforcement.

21. Parallel investigations would also bring about an increased burden upon UK businesses. In theory, UK businesses could face two sets of all investigatory steps (including dawn raids and information requests) which would lead to an increased spend in terms of internal and external resource. Businesses could also of course face two sets of fines.\footnote{It would be important that transitional arrangements address the question as to at which point dual fines would become possible, and to what extent UK turnover would be taken into account.} Thirdly, parallel investigations would also mean a risk of conflicting decisions. For
example, UK-based Company B could be investigated by both the Commission and the CMA in relation to a cartel which allegedly affected trade in the UK and the EU. The CMA may absolve Company B of participation, but the Commission may find the opposite. In addition to the likelihood of appeals of both decisions, the end result may be that Company B would be jointly and severally liable for damages arising from the cartel under EU law (and indeed able to be sued by prospective claimants on the back of that Commission decision) insofar as their conduct affected EU trade, despite having been cleared by their domestic authority.

22. The position for claimants in this scenario may also be less straightforward than currently. For example, a claimant may justifiably take the view that they have likely suffered losses in the UK as a result of the cartel, based on the Commission’s (rather than the CMA’s) findings, but that Commission decision may not be enforceable in the UK so they would have to bring a standalone action or, if they had standing to do so, damages via the court of another Member State.

**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. A post-Brexit cooperation agreement between the UK and the EU would be strongly in the UK’s national interest. The UK is currently a member of the ECN. This is the network which facilitates cooperation between national competition agencies (including the CMA) and the Commission. That cooperation includes information-sharing about all aspects of investigations and potential infringements. Upon Brexit, our membership of the ECN will come to an end and it is presupposed that it would not be possible for the UK to continue to be a member of the ECN.

24. It will always be in the UK’s interests to receive information and details about potential infringements. Absent this information flow from the Commission and other national regulators, UK enforcement authorities would require this information from elsewhere else the quality of UK enforcement would very likely deteriorate. For the CMA and other sector regulators to undertake all additional information-gathering and monitoring themselves would require a significant increase in resource. It would therefore be ideal, even if the UK’s regulators were to expand (as referred to above), for the UK to be able to strike up a cooperation agreement with the Commission.

25. Such a cooperation agreement could cover information-sharing, monitoring and the sharing of experience and best-practice (as the ECN does currently). There may also be the potential to increase the scope of the intended cooperation to, for example, incorporate an understanding of each institution’s role from a procedural point of view.

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12 We are interpreting ‘cooperation’ here as short of formal agreements going to issues such as jurisdiction and the enforceability of judgments but rather going to more informal assistance such as information-sharing, monitoring and the sharing of experience and best-practice. That said, there may be scope for cooperation to take place on a broader basis, including in relation to procedural issues, as we note later.

13 This is not least because one of the aims of the ECN is to ensure the effective and consistent application of EU competition law across the EU – the UK would not be a member of the EU and European competition law would not apply to it.
in relation to envisaged enforcement activity and the coordination of investigations. For example, where parallel investigations between the CMA and the Commission are taking place, both bodies could share relevant evidence with one another (in line with the terms of any agreement) and likely conclusions.

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?

26. At present, the EU has bilateral cooperation agreements in place with a number of non-EU countries, such as the USA, Canada, Japan and Korea. In the case of other countries, competition provisions are included as part of wider general agreements such as free trade agreements. Presumably, post-Brexit, in order to continue to cooperate with the US and other authorities in the same vein as currently, the CMA would need to enter into separate cooperation agreements with these third countries unless it could somehow arrange for continued cooperation pursuant to the existing agreements.

27. Brexit will inevitably mean that the UK has less influence over the development of EU competition law and policy. This is because the UK simply will not be at the table when it comes to influencing EU legislation and caselaw, nor at more informal forums, such as ECN meetings. Evidently the EU has a significant voice in terms of global competition policy and the UK’s ability to influence global policy via the EU would be much reduced (likely completely). However, the UK would presumably continue to be a member of global forums, such as the International Competition Network, and should seek to influence global policy via such networks.

28. A post-Brexit, transitional arrangement between the EU and the UK will be necessary to take account of the series of legal and practical issues which Brexit is likely to give rise to. A key area to be resolved will be that of jurisdiction, including in relation to when precisely the Commission will cease to have any jurisdiction in the UK for the purposes of investigations and infringement decisions. If Commission decisions are not enforceable in the UK, ideally this would not happen immediately on Brexit in order to account for existing Commission investigations which are yet to be concluded. Any infringement decisions could remain binding on the UK courts and likely be appealable to the CJEU.15

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14 http://ec.europa.eu/competition/international/legislation/agreements.html
15 On a wider basis, there are a number of jurisdictional models open to the UK post-Brexit, upon which the Brussels I Recast Regulation (the "Recast Regulation") will cease to apply. The UK could do as Denmark has done and enter into an agreement with the EU (and with the EFTA countries) which tracks the provisions of the Recast Regulation. This would mean that the English courts could continue to benefit from being specified as the venue of choice for litigation by parties in EU Member States. It would also mean the continued use of "anchor defendants", whereby one cartelist is identified in a certain jurisdiction and this is used as a jurisdictional hook to bring in
29. Nor would it necessarily be desirable for the CMA to be able to launch parallel proceedings where the Commission already has proceedings ongoing. There will therefore need to be arrangements delineating when it will be possible for the CMA to begin investigations: this could be only in situations where the Commission has not formally opened an investigation, or perhaps where the Commission has not issued a Statement of Objections.

30. A transitional arrangement for antitrust enforcement would also usefully cover at least the following issues:

- The continuing applicability of commitments given to the Commission pursuant to Article 9 of Regulation 1/2003. It would not be in the interests of UK businesses nor consumers if such commitments became unenforceable in the UK courts.
- The rights of UK parties before the EU Courts, particularly in relation to procedural issues which may be governed by non-competition areas of law such as, for example, legal professional privilege.
- The continuing application of the UK’s parallel block exemptions. Block exemptions effectively render certain commercial agreements between certain categories of undertakings exempt from the usual scrutiny of competition rules (such as those agreements which further research and development for example). The UK currently effectively imports the EU’s block exemptions into UK law by way of section 10 of the Act. There will be thousands of exempt agreements currently in operation in the UK and it would be iniquitous for these to be rendered anti-competitive immediately upon the inapplicability of block exemptions.
- The intended scope of cooperation between the EU and UK (as described above), particularly in relation to existing Commission investigations and until a final agreement on these issues is reached.

15 September 2017

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other defendants domiciled outside of the jurisdiction. Alternatively, the UK could ratify the much more limited Hague Convention, or fall back to the common law position. Whilst the Denmark option would likely require negotiation with the EU and EFTA countries (not least regarding the influence of the CJEU), it would provide considerably more consistency and certainty than the other models and is therefore vastly preferable.

16 The Commission can accept commitments from undertakings following an investigation, rather than making an infringement decision and issuing a fine, pursuant to Article 9 of Regulation 1/2003.