1. We are barristers specialising in UK and EU competition law practising at Matrix, Griffin Building, Gray’s Inn, London WC1R 5LN. We are also editors and contributors to a recent work on UK competition law, *UK Competition Law – the New Framework*, OUP, 2015, ed. Brown, Kellaway and Thompson.

2. We have limited our comments to the general issues, antitrust and State aid.

3. We would be happy to provide any details of the points made below or to attend to provide oral evidence if that would be of assistance.

**General**

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

4. Particularly since the reforms to UK competition law undertaken in 2013 and 2015, UK law has been structured to promote not only administrative but also civil and criminal enforcement. Some of those reforms were ambitious, and are still settling down, but the balance between these three elements needs to be kept under review to ensure that they are mutually reinforcing and, in particular, that the civil and criminal regimes do not undermine the incentives of firms to cooperate with administrative investigations.

5. In addition, the structure of sectoral enforcement of competition law remains work in progress, and there is still a perceived general weakness in UK enforcement in respect of unilateral market power – the EU Commission has been bolder in its case load in this respect and the CMA will need to consider whether it should take on a greater responsibility for investigating abusive conduct by firms with unilateral or joint dominance, including in the regulated sectors.

6. Thirdly, the politicisation of competition law is a permanent risk, and there has been some tendency towards increased political interference by the UK Government in regulatory decisions by expert regulators (for example, in the energy, financial and telecoms sectors). It is at least possible that such risks will be aggravated where the EU Commission no longer exercises a supervisory role independent of the UK Government, particularly in respect of State subsidies and companies in public ownership. We do think that this would be a regressive step in the reform process started with the adoption of the Competition Act 1998 and the Enterprise Act 2002.

**Antitrust**

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

7. The UK already has a distinctive regime for competition law, in particular its market investigation regime, its system of criminal enforcement and its well-
developed regime for private enforcement. However, when it comes to the substance of the domestic antitrust prohibitions, there is very good reason for them to remain aligned with those found in EU law, to maintain legal certainty and to minimise the regulatory burden on business.

8. The EU competition rules set out in Articles 101 and 102 constitute a coherent statutory regime that has been applied by the UK as the basis for antitrust regulation since 2000 (and, in industries with impact on cross-border trade, since 1973). Businesses are (or should be) well used to complying with the present rules, which, in our view, generally work very well, and there is no sense in businesses having to comply with a different set of rules solely as regard the effect of their conduct in the UK.

9. Whilst we understand that section 60 of the Competition Act 1998 might be amended so as not to oblige the UK courts and authorities to follow the CJEU’s interpretation of equivalent EU law when applying the domestic prohibitions, we are of the strong view that those courts and authorities should still be required at least to have regard to such interpretation in future. We note that this is a view shared by the Brexit Competition Law Working Group (BCLWG).¹

10. In so far as trade between remaining Member States is affected by their conduct or agreements, international businesses will remain exposed to the application of the EU competition rules in any event. To the extent that such businesses remain subject to EU competition (or merger) rules, it would be pointless for the UK Courts to seek to develop a distinctive interpretation of these rules.

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

11. This is an area where Parliament needs to act very carefully. At present, much antitrust litigation concerning multi-jurisdictional cartel (and other anti-competitive) conduct is brought in London: litigants appreciate the quality and predictability of our legal system, and we have a mature private litigation regime so far as competition law disputes are concerned. However, London’s leading status could easily be threatened by Brexit, and there is an obvious risk that other jurisdictions, notably the Netherlands and Germany, will seek to attract major commercial cases currently litigated in the UK.²

12. We would draw the Committee’s attention to the excellent report on Brexit prepared by the Competition Law Sub-Group of the Commercial Bar Association (COMBAR), which discusses in some detail the salient issues.

- 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?

¹ See the BCLWG’s Conclusions and Recommendations, para 2.8.
² The Master of the Rolls recently gave a speech in which he warned of this threat to commercial litigation more generally: see para 5.
13. There will inevitably be a degree of duplication and inefficiency if conduct takes place in the United Kingdom that would previously have been investigated by the EU Commission as part of an EU-wide investigation. The CMA will therefore need to decide whether to investigate such conduct for itself. This will inevitably have resource implications for the CMA and will make it all the more important to put in place effective cooperation mechanisms post-Brexit (see below).

- 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?

14. In short, yes. There are already extensive arrangements in place for cooperation between the national competition authorities of EU Member States within the European Competition Network. The CMA is likely to wish to replicate, so far as possible, the present arrangement, if indeed it cannot retain membership of that network, and we see it as being in the UK’s interests to facilitate this (and cooperation arrangements with other enforcement agencies around the world): such cooperation has historically been effective in bringing international cartels to an end.

- 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?

15. As in other respects, there will be a balance between a gain in ‘control’ for the UK, in that it will have a distinctive voice from the EU, and a loss in ‘influence’ given the fact that the EU is one of the principal global actors in competition law enforcement and policy, whereas the UK will be, relatively speaking, a minor player with a specific national remit. In so far as there is a difference of emphasis between EU and US antitrust policy, the CMA will need to consider whether it wishes to align itself more closely to the US approach than has historically been the case.

16. Overall, we would expect the CMA to continue to play a significant role in international fora such as the International Competition Network, and we also see potential opportunities in terms of international cooperation, such as the ability to conclude extradition agreements with other countries that criminalise cartel conduct.

- 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?

17. Competition law investigations and subsequent litigation frequently take years to resolve, so that there will be a need for detailed consideration of cases that are ongoing when the UK ceases to be a Member State. This could have significant resource implications for the CMA if the EU Commission ceases to investigate on the basis that the UK element in an individual case no longer has a material EU interest.
18. Transitional arrangements are considered in detail in both the COMBAR report and the BCLWG’s Conclusions and Recommendations. We would commend both documents to the Committee.

State Aid

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

19. The issue of State aid policy will be a significant element in any future trading arrangement between the UK and the EU – it is an obvious source of potential disagreement between the parties if there is a material divergence by the UK from the established EU State aid rules, which will continue to bind the other EU Member States. As such, the EU will be very likely to require stringent guarantees that the UK does not intend to distort competition between UK and EU companies by granting selective subsidies to UK businesses.

20. If there were ‘no deal’ on this or any other significant commercial element, either on a transitional or a temporary basis, we would expect that to have significant consequences for the ongoing UK-EU trading arrangement – in practice, the EU is very unlikely to agree any deal with the UK unless this issue is carefully addressed.

21. Indeed, given that the UK has always been a strong supporter of the State aid regime, the EU is bound to insist on this issue being addressed as a priority – we think that any equivocation by the UK on this issue would inevitably raise questions as to the *bona fides* of the UK in the negotiations.

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

22. On the assumption that the UK will not accept an ongoing role for the EU Commission in any future trading arrangement between the UK and the EU, it seems likely that there will need to be a specialist and independent tribunal to enforce whatever State aid rules are ultimately adopted by the UK at a domestic level – the most obvious candidates would be the CMA or the Competition Appeal Tribunal, depending on the nature of the regime that was created.

23. Under the EU regime, jurisdiction is shared between the national courts and the EU Commission, with the EU Commission having exclusive jurisdiction to permit State aid to be granted on a narrow range of grounds, with the national courts enforcing the obligation to notify State aid. That approach could be replicated by a division of jurisdiction between the CAT (or UK Courts) and the CMA.

- 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?

24. This seems very unlikely to arise for the reasons already given. We think that the cost to the UK of embarking on such a strategy would be unacceptably high.

- 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?

25. Again, this seems to us unlikely to arise, as this issue will have to be addressed in any UK-EU trading arrangement. It would be a serious obstacle to any favourable trading arrangement with the EU if the UK ‘threatened’ to use selective subsidies to distort competition in favour of UK as against EU firms.

- 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?

26. Again, this is likely to be addressed between the UK and EU at the national level.

- 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?

27. If there were to be a material change in policy, which we think is unlikely, then the EU would wish to address any transitional arrangements in detail.

28. If the policy is essentially the same, then the main issues will be jurisdictional, with an equivalent UK regime replacing the EU regime either on UK withdrawal or at the end of an agreed transitional regime. The transitional issues should be more straightforward than for antitrust, reflecting the fact that, in general, State aid interventions and notifications relate to discrete decisions and transactions, not to ongoing infringements lasting months or years.

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