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?

1.1 We believe that UK competition policy should aim to ensure that markets in the UK are effectively competitive and that the benefits of competition— in terms of price, quality and choice of all kinds of products — are available to customers and consumers.

1.2 In looking to achieve this aim, we believe that the UK government, courts and authorities should act

- in a way which ensures consistency of competition law enforcement with the UK’s main foreign trading partners — particularly (but not only) the EU. It will be important both for UK companies trading abroad and foreign investors in the UK not to face a significantly different competition regime from those in other major trading economies. The UK should continue to play an active role in international work to converge competition law and procedure;
- within the scope allowed by international trade law, to ensure free competition in both imports and exports between the UK and other countries wherever those trade flows may affect competition in the UK;
- to ensure that effective competition applies across the whole of the UK ‘single market’ — in particular including the devolved countries of the UK. We suggest that it follows that there should be a single UK competition authority applying a uniform set of rules across the whole UK. Competition enforcement should not become a devolved matter. From this, we suggest that it also follows that:
  - the UK CMA will need to be properly resourced to undertake a potentially wider range of tasks than at present — particularly internationally;
  - the CMA should be permitted to begin work (including public consultation) to ensure that appropriate arrangements are in place for it to co-operate with other competition authorities after March 2019;
  - guidance and other arrangements need to be put in place to inform business as to how competition law will be applied in good time before changes to the regime come into force;
  - UK courts should continue to be allowed to apply UK competition law in full in all disputes which arise before them.

ANTI-TRUST

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

2.1 Consistency with the substance of EU competition law will be important both for UK companies and foreign investors in the UK after the UK leaves the EU.
2.2 However, even now when the UK is an EU Member State, there is no requirement for convergence of enforcement procedure and we believe that there is significant scope for improving the procedural efficiency of competition enforcement after March 2019:

- the use of the UK’s criminal enforcement powers for ‘hardcore’ competition infringements by individuals will no longer need to be so closely co-ordinated with EU administrative proceedings. Clearer legislative provision on how criminal and other types of competition enforcement will work together would be an advantage;
- if the CMA moves more towards becoming a prosecuting authority for criminal cases, there may be substantial advantage in also moving to a ‘prosecutorial’ model for civil enforcement of UK competition law. The CMA’s provisional finding would be put to the Competition Appeal Tribunal which would make (or not) an infringement decision. We see this as having at least three advantages over the current administrative procedure borrowed from the EU:
  - economy: the written representations stage of the current administrative procedure would become unnecessary as the CAT would hear the defendant’s cases directly. Since the majority of competition infringement cases are in any event appealed to the CAT, this step is not necessary in most cases;
  - transparency: the CAT will hear the evidence in public and will be able to hear oral evidence — from third parties as well as the parties under investigation — under oath if necessary;
  - finality: since the CAT should continue to be the final instance for findings of fact, with appeal on points of law to the Court of Appeal, finality and speed of decision making should be improved.

- The procedure for market investigations could be improved as the requirement not to run counter to possible European Commission competition infringement findings will fall away. The scope for CMA investigation panels to look at all of the anti-competitive features of a UK market will therefore be improved.

3 **Will Brexit impact the UK’s status as a jurisdiction of choice for anti-trust private damages actions?**

3.1 The impact of Brexit on private competition damages actions in the UK will primarily depend on the broader arrangements for jurisdiction and enforcement of civil law judgments applying after Brexit. If the UK accedes to the 2007 Lugano Convention in this area, we believe that the impact of Brexit should be reduced.

3.2 The attractiveness of the UK as a jurisdiction will also depend on continuing to have an expert CAT, with wide powers of evidence gathering. The relative cost of proceeding in UK courts and the CAT compared with other countries is also a significant consideration.

3.3 However, we think that there should be express legislative provision that decisions of non-UK competition authorities may be used as evidence in the CAT or courts and, where the cases are similar, the CAT should be able to accept a (final) European Commission decision without the need for a claimant or defendant to re-prove the content of the decision.
4 What is the likelihood of the UK authorities conducting parallel [anti-trust] proceedings with the European Commission or the NCAs of EU Member States? What would the implications of this be?

4.1 We believe that this likelihood depends on the type of proceedings being conducted.

4.2 Where the EU is investigating a Europe-wide cartel, we think it will be quite likely that the CMA will need to conduct a parallel investigation. It would have more choice than now as to whether to use its civil (administrative) or criminal powers. But reaching an outcome which differed markedly from that reached by an authority in Europe would be unfortunate and leave the CMA procedure open to serious challenge.

4.3 For vertical agreements and regional cartels, we think it is less likely that parallel investigations will be needed. However, bundles of vertical agreements which restrict trade to and from the UK should not be outside the CMAs investigation remit simply because the European Commission is investigating them. In particular, the CMA will need to be able to take action against vertical agreements which seek to discriminate between EU and UK retail markets unjustifiably, by charging UK consumers higher prices than those available in the EU.

4.4 We think it is unlikely that abuse of dominance cases will need to be investigated in parallel with the European Commission. There are relatively few dominant positions which extend over the whole EU (these appear limited to various internet related services etc). Even in cases where a wide ranging abuse affecting the UK is being investigated by the European Commission, there would be no necessity for the CMA to conduct a parallel investigation unless the dominant undertaking is domiciled in the UK. In other cases, the European Commission’s finding will require the abuse to cease and victims will have the option of suing for damages in the UK courts if they are affected.

4.5 It is possible that joint abuse investigations may be needed between the CMA and the NCAs in neighbouring countries. For example, a (hypothetical) allegation of abuse of a dominant position in cross-Channel (Dover-Calais) freight traffic may need to be carried out by both the CMA and the French Conseil de la Concurrence.

5 Is a post-Brexit co-operation agreement in the mutual interests of the EU and the UK? Will transitional arrangements be necessary? If so what should they address?

5.1 Co-operation with the European Commission will be vital for the CMA to be able to function effectively even post-Brexit. At the least, provisions allowing the exchange of information in Europe-wide cartel (and merger control) investigations will be required. There will also be an ongoing need to co-ordinate on leniency applications and outcomes (both in administrative and in criminal cases).

5.2 The scope of any further transitional arrangements will depend significantly on the wider transitional arrangements with the EU (if any). In particular, any arrangements for exiting the Single Market and (to a
lesser extent) the common customs union may need to be mirrored in any transitional arrangement for competition law.

6 How will Brexit affect the UK’s ability to co-operate with non-EU competition authorities? What impact might there be (if any) on the UK’s influence in developing global competition policy?

6.1 The UK’s ability to co-operate with non-EU competition authorities is already considerable: there are in depth relations between the CMA and the US Department of Justice and Federal Trade Commission, for example.

6.2 We doubt that this degree of co-operation will reduce post-Brexit. Whether it will increase will probably depend significantly on the free trade arrangements the UK may be able to negotiate with third countries. ‘Last-generation’ free trade agreements — for example that between the EU and Canada — contain provisions allowing, and even requiring, close cooperation in competition enforcement matters.

6.3 Brexit is unlikely to have a material adverse impact on the UK’s influence on the development of global competition policy. That influence depends to a significant degree on the quality of the policy arguments made in international fora, and on the CMA’s visible enforcement track record. The government should ensure that resources are available to the CMA after Brexit — including where necessary the use of expert non-UK citizens to assist the CMA in its work — to allow the CMA’s international standing to be maintained and even to improve.

MERGERS

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

7.1 The scope for introducing alternative tests to the current ‘significant lessening of competition’ test into UK merger control after Brexit appears fairly limited in practice:

- any changes to the test may be seen by potential foreign investors in the UK economy as a protectionist step, which could adversely affect their investment decisions;
- outside the very narrow exceptions of national security and media plurality, the ‘direction of travel’ for merger control tests internationally over the last two decades has been towards using only a competition based test;
- even under the pre-2003 ‘public interest’ Fair Trading Act test, the effect on competition was the only consideration in the vast majority of mergers examined;
- any free trade agreements entered into by the UK are likely to (indirectly) require the use of a competition based merger control test since they will have significant international investor protection provisions in them, with ADR protection against discrimination, for “nationals” from the contracting states;
- the definition of the ‘national interest’ criteria — for example the protection of employment — will be difficult and likely lead to numerous appeals.
8 Does the CMA have the capacity to manage an expected increase in UK merger notifications post-Brexit? Could regulators with concurrent powers play a greater role?

It will be important to ensure adequate resources for the CMA’s merger control function after Brexit. We do not favour amending the merger legislation to give concurrent regulators a greater formal role – this would dilute the ‘one-stop-shop’ in the UK — but appropriate arrangements for staff secondment etc. may be able to ease the bottlenecks which we suspect will inevitably occur.

9 How burdensome would dual CMA European Commission merger notifications be for companies? How likely is it that parallel merger reviews by the CMA and the European Commission would lead to different outcomes? What would be the likely implications of this scenario?

9.1 Clearly there will be an increase in regulatory burden for larger mergers (those having an EU dimension) after the UK leaves the EU. It is difficult to say how great this increase will be as it will probably vary from case to case and depends primarily on how far the CMA will be willing to accept a copy of a notification (including supporting documents) to the European Commission also as a notification to the CMA itself.

9.2 The likelihood of different outcomes from a CMA and European Commission review of the same merger transaction will depend on the merger test used. If — as at present — the EU test and the UK test remain broadly aligned, then the risk of divergence should be minimal. However, in 'national interest' cases there is clearly a far greater risk of divergence — a risk which is increased if the national interest categories for prohibiting a merger are extended.

9.3 Where outcomes diverge — in the most extreme case, where the CMA prohibits a merger approved by the European Commission — the CMA may not always be in a position to enforce its prohibition order. For example, where a foreign conglomerate sells a business which includes UK activity to another foreign company, it may be difficult to prevent the buyer and the seller from completing their merger outside the UK. In these circumstances, the UK business may have to be divested subsequently — if an alternative buyer can be found — which may itself have a negative effect on UK competition.

10 Do either the CMA or the European Commission currently co-operate with other non-EU national competition authorities on concurrent merger reviews?

We have limited information on this question.

11 Will the UK and the EU need to agree transitional measures for merger control after the UK’s departure from the EU? If so, what transitional issues need to be addressed?

11.1 Transitional agreement will be needed on how to deal with mergers which are notified under the EU regime, but where no decision is yet made on the date when the UK leaves the EU and which would fall under the CMA’s powers after Brexit. Agreement will also be needed to allow the CMA to enforce commitments given in EU merger cases where the business giving
them is established in the UK and no longer within the Commission’s administrative jurisdiction.

11.2 Whether deeper transition arrangements will be needed for mergers will depend — as for anti-trust matters — on what wider transitional agreement is reached between the UK and the EU.

STATE AID

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

12.1 We suggest that it is likely that the EU will insist on state aid rules in any UK-EU free trade agreement (UKFTA). The scope of those rules and their enforcement will necessarily depend on the degree of access to the EU single market the UKFTA gives to UK based business — the greater the access, the more stringent the state aid rules will need to be. The UK national interest would, we suggest, best be served by ensuring exact reciprocity of these rules, so that UK business can be sure that EU Member State subsidies are subject to at least the same level of control as UK subsidies.

12.2 A minimum set of rules are those in Chapter 7 of the EU-Canada free trade agreement (CETA). This commits the contracting states to good faith inter-state discussion to eliminate the negative effects of state subsidies on the industry of other contracting states. In practice, subsidy controls in any UKFTA will probably need to go further and are likely to require the introduction of an effective means of domestic enforcement of state aid rules.

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

13.1 The need for — and powers of — a domestic state aid authority will depend on the scope of UK state aid rules. Assuming that some form of enforcement mechanism is required by UKFTA, an independent body to (at least) monitor and report on state aids — possibly by way of a registration requirement, in the interests of transparency — will be needed.

13.2 Again on the assumption that the control of state aid will be based on the actual or likely effect of the aid on competition, it would be sensible to give this work to the CMA.

13.3 A complement (or even alternative) to administrative control of state aid would be to permit businesses who have been harmed by the use of an unlawful state aid to bring court action requiring the aid to be repaid. Where the defendant in such an action is the public sector grantor of the aid, we believe that the review of the decision granting it (and therefore the triggering of the obligation to repay) should be set at the (fairly high) ‘Wednesbury’ standard for setting aside a decision by judicial review.

13.4 The WTO Subsidies and Countervailing Measures Agreement (SCM) — which will apply to UK EU trade in the absence of any other agreement — requires contracting states to ensure that the proper application of countervailing measures imposed under WTO rules is subject to review by
an independent tribunal. There is no reason of principle why such review should not be extended by domestic law to state subsidies as well.

14 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 affect the UK’s ability to support industries or companies through favourable tax arrangements?

14.1 Since the UK will remain a member of the WTO after it leaves the EU, the SCM will apply to the UK. These will limit (but not eliminate) the ability to support individual UK industries or companies through state funds. It is unlikely that the WTO rules would affect the UK’s current ability to subsidise industry — which is subject to the stricter rules enforced by the EU — but the UK does not have a wholly free hand in framing any post-Brexit industrial policy.

14.2 An important step in ensuring that industrial and fiscal policy is compliant with relevant international laws will be transparency. We suggest that the Chancellor’s annual Budget statement might usefully contain a section demonstrating the UK’s compliance with international industrial subsidy rules.

15 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 UK government interventions?

We have no comment on these questions.

16 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?

16.1 The use of public funds by devolved (and indeed local) institutions will clearly need to be subject to the same state aid rules as the use of funds by UK government bodies post Brexit. The UK will not be able to comply properly with its likely post-Brexit international obligations if differing rules are applied in countries with devolved government.

16.2 In addition, differing subsidies for industry in devolved countries is likely to distort competition in the UK single market — possibly substantially. For this reason, state aid rules and controls should not be a devolved matter.

17 Will it be necessary for the UK and EU to agree a transitional arrangement for state aids after Brexit? If so, what issues would it need to address?

The need for any transitional arrangements will depend on the content of any UKFTA and the state aid rules contained in it. If there is no UKFTA, there does not appear to be any need for transitional arrangements for state aids. Existing aids will already comply with EU state aid rules and future subsidies will need to comply with the UK’s WTO obligations under the SCM Agreement, which will govern state aids related matters as between the UK and the EU.

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