1. **Introduction and Executive Summary**

1.1 Eversheds Sutherland (International) LLP (“Eversheds”) welcomes the opportunity to provide evidence on the EU Internal Market Sub-Committee’s call for written evidence on the impact of Brexit on UK competition policy (21 July 2017).

1.2 Eversheds is an international law firm which operates and provides legal services across the European Economic Area (“EEA”). We have teams of specialist competition law experts located in over 20 countries throughout the UK, US, Europe, Asia and Africa. Many of our lawyers are recognised by Chambers and Legal 500 as leaders in the field. We advise on all areas of competition law including cartels, anti-competitive agreements, abuse of dominance, mergers and State aid. Furthermore, Ros Kellaway, the Head of Eversheds’ Competition team, has spoken extensively on Brexit and the impact it could have on competition law.

1.3 The comments and observations set out in this letter are ours alone and should not be attributed to any of our clients.

1.4 Our view is that:

1.4.1 Brexit could lead to an enforcement gap in UK competition policy unless the Competition and Markets Authority (“CMA”) becomes adequately resourced to be able to investigate the anti-competitive conduct and transactions which have a potential effect on competition in the UK, which are currently under the jurisdiction of the European Commission (“Commission”).

1.4.2 UK competition law should remain consistent with EU competition law.

1.4.3 Post-Brexit, the UK is likely to be a less attractive forum to bring follow-on damages claims once Commission decisions are no longer binding in the UK courts.

1.4.4 It is in the best interest of businesses, consumers and the UK economy at large to ensure that the CMA can continue to coordinate and share information on anti-competitive conduct, as well as on mergers with the Commission and the competition authorities in the EU Member States.

1.4.5 There are a number of transitional issues which will need to be addressed including: case allocation both in relation to competition investigations and merger cases; the status of leniency applications made to the Commission relating to anti-competitive conduct in the UK; the status of remedies imposed relating to the UK and the allocation of fines imposed by the
Commission post-Brexit in relation to anti-competitive conduct in the UK pre-Brexit.

1.4.6 As regards State aid, we consider that it would be in the best interest of businesses, consumers and the UK economy at large for the UK to adopt an EU State aid-type regime. This will limit the State’s ability to distort competition on the market and ensure that competition regulation post-Brexit is no less robust than pre-Brexit. An EU State aid-type regime will also limit the risk of a “race to the bottom” where devolved administrations compete with each other to attract investment, using taxpayers’ money with no due consideration on distortions of competition and the longer-term effects on the competitiveness of the economy.

1.4.7 An EU State aid-type of regulation would require a State aid regulator whose powers should be modelled on the powers which the Commission enjoys as EU State aid regulator. For reasons which we explain, it is our view that an enlarged and strengthened CMA should have that role.

1.4.8 Finally, a number of EU State aid transitional issues arise as a result of Brexit. These are detailed in the main body of our submission.

1.5 We would be happy to provide oral evidence.

General

2. 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?

2.1 The purpose of UK competition policy is to ensure that businesses compete fairly with each other to the benefit of consumers, businesses and the economy as a whole. UK competition policy should continue to achieve this, with no weakening or lessening of enforcement as a consequence of Brexit.

2.2 The Commission currently has jurisdiction to investigate anti-competitive conduct in the UK including cartels, abuse of dominance and State aid. Large transactions which have an effect in both the UK and other EU Member States benefit from the Commission’s “one-stop” merger control regime, relieving the CMA from having to spend time and resource considering the same transaction as the Commission. After Brexit, the Commission will no longer have jurisdiction to investigate EEA-wide anti-competitive conduct or transactions which have an effect in the UK. It will be essential, therefore, to ensure that this enforcement gap is filled so that:

2.2.1 anti-competitive conduct continues to be investigated effectively in the UK;
2.2.2 the CMA is adequately resourced so that all mergers which should be scrutinised, are; and

2.2.3 UK merger control operates seamlessly alongside EU merger control.

**Antitrust**

3. 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?

3.1 The purpose of EU competition law is to ensure a level playing field in the Single Market. Indeed, according to Article 3 of the Treaty on the Functioning of the European Union (“TFEU”), EU competition rules are imposed to the extent “necessary for the functioning of the internal market”. Once the UK leaves the Single Market, the UK will not be obliged to impose EU competition law in the UK. The UK will, therefore, be released, for example, from its parallel trade obligation, meaning that UK competition law could allow restrictions on active and/or passive sales of goods from the UK into the EU and vice-versa. However, in order to ensure a level playing field with the EU, from which UK businesses will benefit, we would recommend that the UK maintains a consistent approach with the EU.

3.2 Furthermore, for businesses operating in both the UK and the rest of the EU, it would be more efficient for UK competition law to remain consistent with EU competition law principles and concepts.

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

4.1 Currently, claimants can rely on Commission decisions to prove a breach of EU competition law before the UK courts. If Commission decisions taken post-Brexit are not binding on UK courts, our view is that Brexit will adversely impact the UK’s status as a jurisdiction of choice for antitrust private follow-on damages actions, as establishing the infringement is likely to be considerably more complex unless there is legislation to the contrary.

4.2 In particular, in our opinion, the reduction in legal certainty resulting from this change will be a disincentive to litigation insurers who play an important role in funding proceedings.

4.3 Over time Commission investigations will no longer relate to conduct in the UK to the same extent that they do now. The Commission will no longer be able to exercise its investigatory powers in the UK. Even if Commission infringement decisions taken post-Brexit continue to be binding on UK courts (which seems unlikely to be Government policy, as it would entail accepting continuing ultimate jurisdiction of the Court of Justice of the EU) courts in other EU jurisdictions will have none of the
disadvantages and uncertainties of UK courts post-Brexit. They will, therefore, be more attractive to claimants than UK courts.

5. **Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the Commission or national competition authorities of EU Member States? What would the implications of this be?**

5.1 In our view the likelihood of UK authorities conducting parallel investigations with the Commission or national competition authorities of EU Member States will depend on:

5.1.1 the extent of cooperation between the authorities including the availability of information to UK authorities in order that a parallel investigation can be undertaken successfully and, contemporaneously, without the target businesses being tipped off and evidence destroyed; and

5.1.2 the availability of adequate resources as these investigations are resource intensive. However, these additional resources could over time be paid for through the fines imposed on businesses which breach competition law.

5.2 The implications are:

5.2.1 the need for exceptionally close cooperation protocols with the Commission and, at the very least, the CMA continuing to obtain the information it currently obtains from the Commission and the national competition authorities of the other EU Member States through the European Competition Network ("ECN"); and

5.2.2 a risk that separate investigations could lead to divergent outcomes.

6. **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?**

6.1 For the reasons set out above, our view is that a competition cooperation agreement is in the mutual interest of both the EU and the UK. The key provisions of any such arrangement will relate to the secure, secret and timely exchange of the information necessary to launch an investigation.

7. **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?**

7.1 The Commission has a number of bilateral agreements with non-EU competition authorities. The terms in these agreements vary depending

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1 A full list of bilateral agreements between the UK and non-EU countries is available from: [http://ec.europa.eu/competition/international/bilateral/index.html](http://ec.europa.eu/competition/international/bilateral/index.html)
on the country, but few provide for the exchange of confidential information and documents obtained during the course of investigations. Furthermore, once the UK leaves the EU, it will no longer benefit from the EU’s bilateral agreements with non-EU competition authorities. The UK will, however, continue to be part of the International Competition Network (“ICN”).

8. **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?**

8.1 It is imperative that the UK and the EU agree a transitional arrangement for antitrust enforcement post-Brexit in order to provide certainty for the CMA, competition lawyers, businesses and consumers. The transitional issues that would need to be addressed are listed below:

8.1.1 How Commission investigations, commenced pre-Brexit, which affect the UK will be handled – will the Commission continue to have jurisdiction to investigate or will the investigation relating to the UK be handed over to the relevant UK competition authority? In the interests of certainty and efficiency, it seems sensible to us that the Commission should complete all competition investigations that it has started and that decisions taken post-Brexit in relation to those investigations for pre-Brexit conduct have full legal effect and are binding in the UK.

8.1.2 How will any fines received by the Commission be dealt with?

8.1.3 At the very least, clear case allocation procedures between the Commission and the CMA.

8.1.4 Urgent guidance is needed on whether an EU leniency application (which makes no admission of liability unlike under the UK leniency procedure) will be accepted as a leniency application by the CMA or whether a separate application to the CMA will need to be made with retrospective effect.

8.1.5 Privilege is a major concern to UK qualified competition lawyers. Pre-Brexit advice needs clearly to remain privileged under EU law to protect the rights of defence. UK qualified lawyers’ advice on competition law is currently recognised as being privileged by EU enforcement bodies. This will cease once the UK leaves the EU in the absence of an agreement to the contrary. According to the “Joint technical note on EU-UK positions on citizens’ rights after third round of negotiations”2, the UK Government and the Commission have agreed that professional qualifications obtained in the EU pre-Brexit will continue to be recognised post-Brexit. Clarification is needed on whether this will mean that the competition advice given by UK qualified lawyers post-

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Brexit will continue to be recognised as being privileged by the Commission.

Mergers

9. **What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?**

9.1 Our view is that a national interest criteria for mergers and acquisitions in the UK would be a real step backwards in terms of competition policy in the UK, as it contravenes the fundamental purpose of competition law which is to ensure a level playing-field and promote a competitive economy. The UK should not, therefore, champion national businesses.

10. **Does the 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?**

10.1 We do not consider that the CMA currently has the capacity to manage an anticipated increase of 30 to 50 additional UK merger cases post-Brexit, alongside whatever additional resource will be needed to pursue additional cartel enforcement. The CMA is already selective in terms of the transactions that it chooses to investigate. Unless there is an increase in the CMA’s resources, it is possible that transactions which potentially raise competition law concerns are not investigated effectively.

10.2 We are of the view that in the circumstances of Brexit with increased pressure on resources and the availability of additional resource in the sectoral regulators that there are strong arguments for building one unitary UK competition authority, rather than having numerous authorities with concurrent competition powers. In our opinion, this would strengthen the CMA, and make competition enforcement in the UK more effective and efficient.

11. **How burdensome would dual CMA/Commission merger notifications be for companies?**

11.1 Whilst dual CMA/Commission merger notifications could be said to increase the regulatory burden and lead to uncertainty for businesses, the impact should not be overplayed. The position would be no different from a transaction which is currently notifiable under the EU Merger Regulation (“EUMR”) and any other third country (e.g. the US). Furthermore, the CMA would remain a member of the ICN and would likely liaise with the Commission in major mergers to coordinate interventions where appropriate.

12. **How likely is it that parallel merger reviews by the Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?**
12.1 We consider that the risk of divergent outcomes is low, but possible. However, this risk could potentially be avoided if the CMA and the Commission agree to coordinate or if the parties to the transaction agree to confidentiality waivers to facilitate cross-jurisdiction coordination.

13. **Do either the CMA or the Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews?**

13.1 Yes, for example, the EU and the US have “Best Practices on Cooperation in Merger Cases” which provides for coordination between authorities to avoid conflicting or diverging outcomes. Therefore, such cooperation is possible, and on withdrawal will be even more desirable.

14. **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?**

14.1 In our view, it will be necessary for the UK and EU to agree a transitional arrangement for merger control post-Brexit. Such an arrangement would need to address the following transitional issues:

14.1.1 ongoing Commission investigations – should merger notifications regarding transactions which have a potential effect on competition in the UK, which are submitted under the EUMR pre-Brexit, continue to be dealt with by the Commission, or should they be passed to the CMA once the UK leaves the EU?

14.1.2 allocation of cases - should a deal which is signed pre-Brexit, but which the parties intend to close post-Brexit, be filed with the Commission or the CMA where it meets both the jurisdictional tests under the EUMR and under UK merger control? What is the cut-off date for when the parties’ UK turnover stops counting towards the EUMR jurisdictional tests?

14.1.3 remedies - will remedies agreed with the Commission pre-Brexit still be enforceable in the UK post-Brexit?

**State Aid**

15. **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?**

15.1 Yes, it is very likely that this will be a redline requirement for the EU. Indeed, the EU27 have made it clear that any free trade agreement with the UK "must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantage..." [emphasis added]
15.2 In terms of existing EU trade agreements with third countries, these can, in general, be divided between agreements with non-European countries where in recent years, the approach on subsidies has been one of “WTO plus” and agreements with European countries where recent examples suggest a strong trend towards a requirement for the trading partner to “approximate” EU State aid legislation.

15.3 As argued below, we would expect the EU27 to seek an arrangement with the UK which involves the UK maintaining an EU State aid-type of regulation at a domestic level, following the UK’s exit from the EU.

**WTO plus approach**

15.4 Examples in this context, include the trade agreements with Canada, Singapore and South Korea. These agreements incorporate provisions under which the parties agree to keep each other informed regularly about the total amount, types of, and legal basis for subsidies that each party has granted.

15.5 These types of agreements may also contain non-binding consultation provisions allowing each party to seek further information from the other in relation to subsidies that affect, or might affect, negatively that party.

15.6 Ultimately, these provisions are without prejudice to the dispute resolution and remedies available under the WTO Agreement on Subsidies and Countervailing Measures (the “WTO anti-subsidy rules”).

15.7 It should be noted that, even in the context of trade agreements which contain “WTO plus” provisions on subsidies, the scope of such provisions varies, reflecting the depth, and scope of each agreement as well as, ultimately, the political will of the parties to bind themselves bilaterally in a way which goes substantively beyond WTO requirements.

**Approximation of EU State aid rules**

15.8 The situation is different in relation to trade agreements with European countries where increasingly, the EU is requiring trade partners to approximate its State aid rules (and in fact, its competition laws more generally).

15.9 For example, Turkey’s (1995) customs union arrangements with the EU (which provide for the free trade of most goods and the application of a common tariff vis-à-vis third parties) also incorporate requirements for the “approximation” of certain EU laws - essentially requiring Turkey to implement laws in specific fields, which are consistent with EU legislation. In this context, the Turkey-EU agreement provides that the EU can raise objections against aid granted by Turkey which the EU "would have deemed unlawful under [EU] law had it been granted by a Member State."

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3 European Council Guidelines, following the United Kingdom’s notification under Article 50, 29 April 2016 (EUCO XT 20004/17), at paragraph 20.
More recent EU association agreements with European countries, incorporate approximation of EU law requirements which are even more specific, including as regards State aid regulation. For example, the EU agreements with the former Yugoslav Republic of Macedonia (2004), Serbia (2013) and the Ukraine (2014), incorporate detailed State aid requirements, based on the EU State aid rules.

In this context, it is a requirement of each of these agreements that national State aid provisions are interpreted in a way which is consistent with the interpretation of EU State aid rules. Separately, the more recent agreements with Serbia and the Ukraine also require, among other things, the introduction of an independent regulator with the necessary powers to ensure compliance with State aid rules, including the power to recover unlawful aid.

It might be argued that such requirements in EU association agreements with these and other European countries are not surprising given that, ultimately, these countries are interested in achieving full EU membership (indeed, the former Yugoslav Republic of Macedonia and Serbia are accession candidate countries). On that basis, therefore, some might take the view that the EU should not insist on imposing similar obligations on the UK.

However, it would seem unlikely that the EU would adopt a different approach vis-à-vis the UK merely on the basis that the UK is exiting, rather than seeking to join, the EU. If anything, that in itself might provide sufficient reasons for the EU to seek to ensure that any access to its internal market, is conditional on approximation of various EU competition law requirements including in relation to State aid legislation so as to safeguard against the UK retaining an "unfair competitive advantage" vis-à-vis the EU27.

In this way, the EU may limit the risk of the UK subsidising its own companies or seeking to attract investment, at the expense of the EU. Insisting on approximation of EU State aid rules in the context of a future UK-EU agreement would also make it easier for the EU to seek a remedy against the UK in the event of a dispute over subsidies rather than having to rely on the more complex, time-consuming and ultimately, less effective, WTO anti-subsidy rules.

Will the UK require a domestic State aid authority after Brexit?

This will depend on whether the UK agrees (or in any event is minded) to maintain an EU State aid-type of regulatory regime post-Brexit or whether it does away with State aid regulation and merely seeks to comply with the simpler (indeed, lesser) requirements of the WTO anti-subsidy rules.

Of key relevance here is that, unlike the EU State aid rules, the WTO anti-subsidy rules do not require the prior authorisation of aid.

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Accordingly, a system which is merely based on WTO subsidy rules is unlikely to require a State aid regulator.

16.3 The situation is obviously different in circumstances where the UK adopts an EU-type of State aid regulation. In such a case, an independent regulator should be put in place and be granted the powers which the Commission currently enjoys in relation to EU State aid. For example, such regulator should be in a position to investigate proposed aid and decide whether such aid would be compatible with UK State aid rules. Separately, such regulator should have the power to consider complaints and investigate State measures which have not been notified, but which might involve State aid which distorts or threatens to distort competition.

16.4 An obvious candidate for the role of regulator would be the CMA. In this regard, we are aware that concerns have been expressed as to the ability of the CMA to take on such a role given limited resources and the likely increase of its workload following Brexit. However, there is an argument that the creation of a separate State aid authority would involve the duplication of resources. Separately, it might also create the risk of State aid regulation being implemented in isolation from other aspects of competition regulation, leading to inconsistencies of approach, as regards for example, market definitions.

16.5 Accordingly, our current view is that if there is a need or a requirement for a State aid regulator, it would be preferable for the CMA to be granted additional resources to enable it to carry out such role rather than create a separate regulatory body.

17. 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?

17.1 Absent any requirements under a future agreement with the EU for the UK to introduce domestically rules which are substantively similar to the EU State aid rules, the UK could choose to introduce a simpler regulatory anti-subsidies regime which is only concerned with ensuring the UK’s compliance with the less strict WTO anti-subsidy rules. As discussed, above, these do not require, for example, the clearance of aid before implementation or the introduction of a national State aid regulator. Separately, the scope of WTO anti-subsidy rules is more limited given that it only applies to goods (and not services).

17.2 However, it would seem to us that relying on WTO anti-subsidy rules alone is unlikely to be sufficient for the purposes of providing the markets with the assurances which the Government is quite rightly keen to provide that, post-Brexit, the UK will remain "open for business".

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5 It is worth noting that, unlike mergers and anti-competitive conduct, which are already regulated in the UK, there is currently no UK legislation on the regulation of State aid as this is regulated solely at an EU level.
17.3 Consistent with that message is the idea that businesses can compete on the UK markets on the basis of a level-playing field underpinned by a world-class competition regulatory regime, which would include strict limits on the State’s ability to distort competition through State aid interventions. At the same time, complaint procedures and the introduction of an independent State aid regulator, with the power to seek the recovery of unlawful State aid, would ensure the fair implementation of the regulatory regime. Such a system would also have the benefit of limiting the risk of devolved governments or local authorities competing with each other to attract investment, taking independent decisions as to how to use taxpayers’ money in ways which distorts competition in the UK but also between the UK’s constituent parts.

17.4 Ultimately, a robust competition regulatory regime which provides for a level-playing field and fair competition, and in that context seeks to do away with any distortions of competition, including as a result of State aid measures, is more likely to encourage innovation, economic efficiencies, and long-term economic development.

18. **How will the Government’s industrial strategy shape its approach to State aid after Brexit? To what extent has the Commission’s State aid policy limited interventions that the UK Government may have otherwise pursued?**

18.1 The comment and issues we raise in our response to question 17 above are also relevant here. Separately, we note that absent EU State aid regulation, it is possible that successive UK Governments could have taken decisions to support ailing businesses in certain sectors in a way which is currently prohibited under EU State aid rules (because, for example, there is no evidence that State aid support would have led to such companies being able to restructure themselves and become profitable without continuing State aid support).

18.2 Similarly, EU State aid rules have limited the extent to which the UK was in a position to support financial institutions, following the financial crisis. In other words, absent the discipline which EU State aid rules provide, we cannot exclude the possibility of the Government at the time seeking to use taxpayers’ money to support financial institutions to an extent which is greater than what was permissible under EU State aid rules.

18.3 Ultimately, the risk of central Government or indeed, devolved authorities, being tempted to use taxpayers’ money in ways which might be politically popular in the short-term, but unsustainable and harmful to the economy in the longer-term, is of concern. In that regard, the role of an independent regulator capable of implementing, and monitoring compliance with, post-Brexit State aid rules is paramount. In that context, useful parallels may be drawn with the ability of the Bank of England to set the UK’s monetary policy free of any political influence.
19. **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?**

19.1 Our views on these issues are set out in our responses to questions 17 and 18 above.

20. **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?**

20.1 We would expect this to be the case. For example, consideration would need to be given to issues such as the interim regulation of:

20.1.1 UK State aid measures which the Commission is in the process of investigating pre-Brexit;

20.1.2 UK State aid measures which should have been notified to the Commission for authorisation, but which were not and which are otherwise within the 10-year limitation period within which the Commission may investigate such measures (including as regards the right for the Commission to require the recovery of State aid which would have been deemed to have been unlawful under EU State aid rules);

20.1.3 the right of EU27 individuals or businesses to complain to the Commission in relation to State aid measures taken by the UK pre-Brexit;

20.1.4 the right of UK individuals or businesses to complain to the Commission in relation to State aid measures taken by the UK or any one of the EU27 pre-Brexit;

20.1.5 the right of EU27 individuals or businesses to seek damages in the UK domestic courts in relation to breaches of EU State aid rules by the UK pre-Brexit. (We expect that the separate right of UK individuals or businesses to seek damages in the domestic courts in this regard would be a matter for the UK Government to decide); and

20.1.6 decisions of the Commission which relate to UK State aid measures and which are currently on appeal to the EU courts (whether by the UK or other Member States).

20.2 Please note that, to the extent that there is an agreement with the EU for an interim arrangement which enables the UK to maintain full or partial access to the EU’s Single Market, we would expect that such arrangement would involve, among other things, a requirement for continued compliance with EU State aid rules. If so, the above issues should not be relevant during that period (as EU State aid rules would continue to apply to the UK). However, such issues will ultimately become relevant at the
expiry of that period, when we assume EU State aid rules will cease to be applicable to the UK.

15 September 2015