1 INTRODUCTION

1.1 Berwin Leighton Paisner LLP ("BLP") has been advising clients on Brexit since the prospect of a referendum was first raised in 2013. Since the referendum result, we have advised clients across a range of sectors (including financial services, infrastructure and utilities, retail, chemicals, and manufacturing), on the legal implications of Brexit and have worked with clients to identify the main risks and opportunities for their businesses.

1.2 BLP welcomes the opportunity provide written evidence to the House of Lords EU Internal Market Sub-Committee. We would be interested in participating in future public hearings or consultations.

1.3 The views expressed herein do not necessarily reflect the views of any of BLP’s clients.

2 SUMMARY

2.1.1 Brexit provides an opportunity for the UK carefully to consider its competition policy and whether it should be modified. Whilst we acknowledge that there may be benefits associated with such modifications, we consider that these are broadly outweighed by the benefits of continuity in the application of the competition law framework in the UK. As noted in our response below, it is crucial that the UK retains a strong, credible and independent competition and regulatory regime, which is adequately resourced and does not impose excessive burdens on international businesses (which will need to continue complying with EU law in addition to UK law).

2.1.2 As regards antitrust, we strongly advocate continued cooperation and consistency with the European Commission. Conducting parallel investigations will enable the UK authorities to maximise output, and ensure consistent enforcement across Europe. Finally, to the extent necessary, we consider that the UK should enter into transitional agreements to ensure that businesses do not face unnecessary uncertainty in the context of ongoing investigations at the point where Brexit takes effect.

2.1.3 In the area of merger control, we do not consider that the UK should review the existing national interest regime. Serious consideration should be given to the capacity of the CMA to manage the increase in merger notifications it is expected to receive post-Brexit and the burden that dual CMA/European Commission merger notifications would likely place on companies. Finally, we consider that some limited transitional arrangements in relation to merger control would reduce the risk of unnecessary parallel investigations being carried out by the CMA and the
European Commission into mergers that meet the UK thresholds and are under review by the European Commission at the moment of Brexit.

2.1.4 Regarding state aid, we expect state aid provisions to be an essential component of any future trade agreement between the UK and the EU, although the form of these provisions is unlikely to be as extensive as being part of the single market. It should not be assumed that the UK will require a domestic state aid authority after Brexit and, in our view, state aid control in a post-Brexit UK should be centralised through the courts rather than through a single independent authority, like the CMA. Post-Brexit, the government will have more flexibility to support businesses but it is important to note that any such support will still be subject to the WTO anti-subsidy rules. We consider that it will be necessary for the UK and the EU to agree a transitional arrangement for state aid matters in several areas to avoid significant legal uncertainty for businesses.

3 GENERAL

3.1 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?

3.1.1 We consider that competition policy in the UK should seek to: promote effective competition; promote efficiency in markets; and safeguard and promote consumers’ interests.

3.1.2 We do not consider that there needs to be any significant shift in the UK’s approach to competition policy after Brexit. Whilst there may inevitably be changes associated with the UK’s decision to leave the European Union (including the move away from the domestic implementation of EU law), this should not affect the UK’s broader policy objectives.

3.1.3 As is currently the case, the UK should continue to work with peer regulators and other stakeholders, including in Europe and worldwide, to ensure that (as far as possible) a consistent approach is taken to the creation and application of competition laws.

3.1.4 More particularly, a consistency of approach between the UK’s Competition and Markets Authority (“CMA”), the European Commission and other EU national authorities would reduce the burden on the significant number of businesses who are active in the UK and the EU.

3.1.5 Of particular importance is that the UK’s competition regime continues to be robust and politically neutral. A strong, credible and independent competition and regulatory regime will be essential to provide continuity during and after the Brexit process. In our view, such a regime will also drive investor and business confidence, to the ultimate benefit of UK consumers.
3.1.6 The CMA and concurrent regulators must retain the ability to determine how to prioritise the use of their scarce resources in order to achieve the most appropriate outcome for competition in the UK.

3.1.7 In doing so, it may be appropriate for the CMA and concurrent regulators to continue to seek, where possible, to apply competition and sector regulation law in a manner that is consistent with EU best-practice. Such an approach will promote consistency for businesses which operate across UK/EU borders. Where relevant (for example in the context of cross-border regulation of telecommunications or energy), broad consistency in the application of competition law and sector regulation will also encourage investor and operator confidence in the UK regulatory regime to the benefit of UK consumers.

4 ANTI TRUST

4.1 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?

4.1.1 As noted above, a consistency of approach between the CMA, the European Commission and EU national authorities would reduce the burden on the significant number of business who are active in the UK and the EU. To enable this consistency of approach, we consider that close cooperation between the CMA, the European Commission and EU national competition authorities should be maintained. However, we consider that it would be not appropriate (or politically desirable) for the UK to commit to absolute consistency with the approach of other jurisdictions post-Brexit. In some instances, for example as regards market investigations, there may be cases where the benefits of a different approach outweigh the increased burden for businesses in having to deal with potentially inconsistent regimes. In comparison, there are likely to be other areas where significant burdens are associated with an inconsistent approach, especially for example in relation to laws governing distribution agreements.

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

4.2.1 We consider there to be a risk that Brexit will impact the UK’s status as a jurisdiction of choice for antitrust private damages actions, not least due to the uncertainty of Brexit, which may be keenly felt by prospective claimants.

4.2.2 The UK currently remains a jurisdiction of choice for cases relating to breaches of EU competition law. This remains the case, notwithstanding the positive changes associated with the implementation of the Damages Directive by most Member States, which brings the laws and procedures of other jurisdictions closer to UK law.\(^1\) There are numerous reasons for

\(^1\) Directive on antitrust damages actions (Directive 2014/104/EU)
this position, including: the experience of UK judges, the speed at which
cases are heard, the choice of fora (with cases being heard in either the
High Court or the Competition Appeal Tribunal), the approach to
disclosure and the strength of the UK bar.

4.2.3 Currently, European Commission decisions made prior to Brexit are
binding in the UK (and will continue to be binding following Brexit).
However, post-Brexit European Commission infringement decisions
relating to anti-competitive behaviour may no longer be binding.
Subject to some transitional provisions, we consider it would be
appropriate for decisions of the European Commission (where the
gеographic scope of the infringement includes the UK market), whilst no
longer binding, to have persuasive effect. The absence of a binding
effect of European Commission decisions may have a detrimental effect
on the UK’s status as a jurisdiction of choice for private damages
actions.

4.2.4 Furthermore, Brexit may have a profound impact on the rules on
jurisdiction and governing law, with subsequent effects on service and
enforcement of judgments. Post-Brexit, various EU laws, including the
Recast Brussels Regulation\(^2\), the Rome I Regulation\(^3\) and the Rome II
Regulation\(^4\), may no longer apply. Even if the UK incorporated Recast
Brussels Regulation into national law, nothing would require the EU
Member States to return this favour – as such the EU courts may no
longer apply the jurisdiction rules to disputes involving a defendant
domiciled in the UK. This could lead to a risk of parallel proceedings,
which as well as being costly could result in conflicting judgments.

4.2.5 In practice, potential claimants may also find service of proceedings
more challenging, with additional applications required to the English
Courts. Furthermore, there may be detrimental impacts on enforcement
options – with a victory in the English courts potentially being hard to
enforce in overseas jurisdictions. There are various international
agreements on jurisdiction and enforcement that the UK could adopt,
including the Lugano Convention, which would alleviate such concerns.
However, absent these, we consider that there would be a real impact
on the UK as jurisdiction of choice.

4.2.6 Whilst Brexit may provide opportunities to diverge from the Damages
Directive, we consider there to be strong grounds to retain the status
quo. For example, although it may be possible to move away from
certain protections from the disclosure of leniency documents, we
consider that the UK should retain these. Whilst the removal of
protections may boost the UK as forum of choice, it would have a

\(^2\) Council Regulation (EC) No. 1215/2012 on Jurisdiction and Recognition and
Enforcement of Civil and Commercial Matters

\(^3\) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17
June 2008 on the law applicable to contractual obligations

July 2007 on the law applicable to non-contractual obligations
detrimental impact on the CMA’s leniency regime (and therefore on competition policy more broadly).

4.2.7 Finally, we note that one of the biggest risks to the UK’s status as a jurisdiction of choice is the uncertainty associated with Brexit. A lack of clarity, both during negotiations, as well as in the transition (if any) to a new position, results in significant uncertainty. In such a climate, claimants may be persuaded to consider other jurisdictions for antitrust private damages actions.

4.3 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?

4.3.1 We consider that the CMA should take into account European Commission investigations and those of other national competition authorities when considering its own priorities in investigations. However, rigid rules should not determine how a European Commission (or national competition authority) investigation in a given area affects the CMA’s assessment of its own priorities.

4.3.2 The CMA’s first priority must be to meet its statutory obligations. We consider that it should use its resources in a way which it considers will have the greatest beneficial impact on competition.

4.4 Is a post-Brexit competition cooperation agreement in the mutual interests of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?

4.4.1 As regards cooperation, we would expect the CMA, the European Commission and EU national authorities to continue to cooperate closely post-Brexit to reflect the general increase in international competition enforcement. Furthermore, from a policy perspective, such cooperation agreements may reduce the burden on the CMA, thereby increasing its ability to undertake a broad range of enforcement activities.

4.4.2 We consider that the CMA should seek to adopt cooperation mechanisms with the European Commission and EU national authorities that are similar to those it has with the authorities in the United States, South Korea and Japan.

4.4.3 In particular, we consider that the following provisions would be necessary for an arrangement to be effective:

(a) Notification – including notification of enforcement activities that may affect the interests of the other party to the agreement.

(b) Exchange of information – including an obligation to share information where it is in the parties’ common interests, including to facilitate the application of competition law (including any significant information, within its possession and that comes to its
attention, about anti-competitive activities that may be relevant to (or warrant) enforcement activities by the other party).

(c) Cooperation in enforcement activities – including the provision of assistance to a competition authority in its enforcement activities to the extent consistent with the national law and regulations, and with regard to the availability of resources.

(d) Coordination in enforcement activities – where the competition authorities of both parties are pursuing enforcement activities with regard to related matters, they should consider coordination of their enforcement activities as far as compatible with national law.

(e) Avoidance of conflicts – including a requirement to give consideration to the interests of the other party in all phases of enforcement activities.

(f) Consultation – including on the ongoing operation of the agreement and the information exchanged as a result of the agreement (including with regard to enforcement priorities).

(g) Confidentiality – including provisions restricting obligations to communicate information to the extent that it is prohibited by the laws and regulations of the party possessing the information or if it would be incompatible with its important interests.

4.5 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?

4.5.1 We consider that post-Brexit the CMA will be able to enhance its cooperation with many non-EU competition authorities. There are opportunities for a positive impact on the UK’s influence in developing global competition policy. However, we consider that such positive impacts may only be attainable if there is a significant increase in the budget of the CMA. Given that the CMA will no longer be relying on the enforcement activity of the European Commission, absent significant investment, the CMA may face challenges covering the increased workload associated with undertaking parallel investigations.

4.6 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?

4.6.1 We support calls for a transitional arrangement for antitrust enforcement post-Brexit. We note that the European Commission will retain jurisdiction to investigate and impose sanctions in relation to any potential infringements (or parts thereof) affecting the EEA market (including the UK) where the conduct takes place before the UK exits the EU. The CMA retains the right to investigate and impose sanctions in relation to the UK aspects of any EEA-wide infringements where the
conduct takes place before the UK exits the EU, if the European Commission has not opened a formal investigation and imposed sanctions in relation to the same conduct. The CMA should have exclusive jurisdiction to investigate and impose sanctions in relation to any potential infringements (or parts thereof) affecting the UK market where the conduct takes place after the UK’s exit from the UK.

4.6.2 We believe the above position is consistent with the principles set out in the European Court of Justice’s ruling in Case C-17/10 Toshiba et al. Whilst we agree with the principles set out in this judgment, we consider that this is not a matter which should be left to case law; rather, the position should be expressly set out in any withdrawal agreement. As regards transition arrangements, we consider that it is important to note that the European Commission’s discretion to investigate conduct taking place before the UK’s exit from the EU (even if it commences such an investigation following the UK’s exit from the EU) is not limited to conduct by British companies but relates to any conduct that may be relevant to the UK market regardless of the nationality of the company.

4.6.3 Notwithstanding the above, we believe it is important that only one authority investigates conduct potentially affecting the UK market where the conduct took place before the UK’s exit from the EU but which comes to light post-Brexit. Whilst investigations by both the European Commission and the CMA into infringements (in relation to different periods) may be unavoidable, a transitional agreement requiring a degree of cooperation would be preferable.

5 MERGERS

5.1 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?

5.1.1 There are currently limited circumstances in which a merger can be reviewed on non-competition or national interest grounds in the UK. In particular, the UK may review mergers which fall under either the Public Interest Mergers regime,\(^5\) or the Special Public Interest Mergers regime.\(^6\)

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\(^5\) The present regime allows the Secretary of State (the “SoS”) to assume responsibility for determining whether or not to refer a merger for Phase 2 review when certain defined public interest considerations are potentially relevant by issuing a public interest intervention notice (a “PIIN”). Where a PIIN is issued and a reference is made on public interest grounds, the SoS then takes the final decision on whether the merger operates or may be expected to operate against the public interest, and on any remedies for identified public interest concerns. Section 58 of the Enterprise Act 2002 ("EA02") details the public interest considerations on which the SoS may intervene. In addition to those specified considerations outlined in section 58 EA02, section 42(3) EA02 allows the SoS to intervene on the basis of a consideration which is not specified but which the SoS believes ought to be specified.

\(^6\) In order to intervene in a UK Special Public Interest Merger, the SoS must have reasonable grounds for suspecting that it is or may be the case that: (a) the transaction structure is of the type caught by the UK merger control rules; (b)
The UK is noted as having one of the least protectionist investment frameworks in the world, which has helped to deliver extensive investment in the UK economy.

5.1.2 While Brexit does present an opportunity to broaden the circumstances in which a merger can be reviewed on non-competition grounds, we consider that this would present a number of disadvantages, including:

(a) the cost to economic growth that could result from decreased foreign investment;

(b) the potential detriment to consumers that could result from potentially anti-competitive mergers being cleared on the basis of non-competition grounds or pro-competitive mergers being blocked on the basis of non-competition grounds; and

(c) the uncertainty for businesses that would result from more mergers being reviewed on the basis of less established and well-understood criteria, with the potential for politicised and less transparent decision-making.

5.1.3 We therefore do not consider that the UK should review the existing national interest regime at this time.

5.2 Does the Competition & Markets Authority (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?

5.2.1 We understand that the CMA may not have the capacity to manage the increase in merger notifications it is expected to receive (either as a result of a voluntary notification or following own-initiative enquiries on its own behalf) post-Brexit if the current merger control regime remains in place. Its resources are already stretched, with often lengthy pre-notification discussions required before a case team will start the clock on its formal review, and high expectations for senior staff involvement throughout the review. The additional merger notifications the CMA receives will, by definition, relate to large mergers (which pre-Brexit would have been notified to the European Commission), many of which will be complex and require resource-intensive assessment.

immediately before implementation of the transaction: (i) at least one of the enterprises concerned was carried on in the UK or by or under the control of a body corporate incorporated in the UK and a person carrying on one or more of the enterprises concerned was a relevant government contractor, i.e., a person who has been notified by the SoS that he or his employees hold information relating to defence and of a confidential nature; or (ii) the person(s) by whom one of the enterprises was carried on supplied at least 25 per cent of all newspapers of any description, or all broadcasting of any description, in the UK, or a substantial part of the UK; and (c) one or more public interest considerations is relevant to a consideration of the transaction. The Special Public Interest Merger regime can catch mergers which do not meet the UK merger control jurisdictional thresholds. The list of public interest considerations is the same as for Public Interest Mergers (under section 58 EA02).
5.2.2 The CMA has a dedicated merger control team which in 2016/17 issued 57 Phase I decisions. This helps to ensure a certain degree of expertise and consistency of approach in reviewing mergers, irrespective of the particular sector of the economy to which the merger relates. There may merit in sector regulators providing third party input into merger reviews in respect of technical or sector-specific issues. However, the introduction of a formal requirement in this regard risks introducing additional complexity and delay to merger reviews. Further, it would be resource-intensive to seek to create any form of sector-specific merger review to be administered by the relevant concurrent regulator. Any such additional expenditure may would be more effectively deployed by increasing the resources available to the CMA post-Brexit.

5.3 **How burdensome would dual CMA/European Commission merger notifications be for companies?**

5.3.1 Such regulatory duplication could be highly burdensome. The legal tests and approaches of the two authorities can differ significantly; the template documents for making a notification are materially different; and both authorities can make significant information requests both during pre-notification and in the course of their review.

5.4 **How likely is it that parallel merger reviews by the European Commission and the CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?**

5.4.1 In a parallel review, a number of factors give rise to a real risk of divergent outcomes by the two authorities, both in terms of the substantive assessment and the approach to any remedies. A deal may therefore be cleared by one authority but blocked by another.

5.4.2 Unlike in antitrust matters, the CMA is not required to take account of EU jurisprudence in deciding how to assess merger cases that fall within its jurisdiction. Therefore, although the substantive test applied by the European Commission (whether a merger would significantly impede effect competition) is in practice virtually the same as the test applied by the CMA (whether a merger would give rise to a substantial lessening of competition (an “SLC”)), the CMA has already developed its own approach to different aspects of merger control assessment which in many cases differs from the approach which the European Commission would adopt. This gives rise to a real risk of divergent outcomes by the two authorities in the case of a parallel review.

5.4.3 In a parallel review, it may also be the case that the market(s) under consideration by the European Commission differ from those being considered by the CMA. This is another factor which may lead to divergent outcomes by the two authorities.

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8 See, for example, the CMA’s Retail mergers commentary: CMA62.
Finally, the prospect of parallel reviews also has potential implications for deal timetables, given that the test for a Phase 2 reference is lower under the UK regime than under the EU regime. This gives rise to a risk that a transaction which is subject to parallel review would be cleared at Phase 1 under the EUMR, but referred to Phase 2 by the CMA (even if it is ultimately cleared). If a deal is notified to the two authorities at the same time, this would mean that the parties have to wait six months (or more) for the CMA’s Phase 2 decision once the deal has been cleared by the European Commission at Phase 1.

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

Both the CMA and the European Commission regularly request “waivers” from merging parties to allow them to exchange commercially sensitive information about the merger with a non-EU national competition authority. Details of the European Commission’s bilateral cooperation agreements with such authorities can be found on its website here.

Would it be necessary for the UK and EU to agree a transitional arrangement for merger control after the UK’s departure from the UK? If so, what transitional issues would such an arrangement need to address?

It would be advisable for the CMA to agree with the European Commission an approach to requests for “referral back” by the UK under Article 9 EUMR in the period running up to Brexit. This would reduce the risk of unnecessary parallel investigations being carried out by the CMA and the Commission into mergers that meet the UK thresholds and are under review by the Commission at the moment of Brexit.

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?

As a starting point, we note that the European Council’s guidelines following the UK’s notification under Article 50 TEU make explicit reference to any UK/EU free trade agreement ensuring that there is a level playing field in terms of competition and state aid, and that this must “encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices”. Therefore, from a negotiating perspective, it is clear that...
the European Council sees state aid provisions as an essential component of any future trade agreement between the UK and EU, and we would expect it to be likely that any UK/EU free trade agreement will contain some provisions in this respect.

6.1.2 However, there are various different models for the way in which and the extent to which state aid provisions are dealt with in the EU’s free trade agreements with third countries:

(a) At the bottom end of the spectrum, agreements such as the Comprehensive Economic & Trade Agreement between the EU and Canada (CETA) and the EU / South Korea Free Trade Agreement effectively do little more than reflect and reinforce the WTO provisions from the Agreement on Subsidies & Countervailing Measures (“SCM Agreement”). They provide for transparency and consultation between the participant states.

(b) An example of a free trade agreement in which there is a more comprehensive incorporation of state aid rules is the association agreement between the EU and Israel. That agreement expressly states that “any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods” is incompatible with the agreement. This language reflects more closely the definition of state aid in the TFEU. However, the agreement does not provide any mechanism for the enforcement of this provision. Despite the fact that the agreement stated that the EU / Israel Association Council would adopt implementing measures within three years of the entry into force of the agreement (i.e. by June 2003), no such implementing provisions have been adopted. In practice, this provision is therefore of little significance. A similar provision is contained in one of the bilateral agreements between the EU and Switzerland. Again, in practice, the provision has limited effect, as it has not been implemented in Swiss law and it has rarely been raised between the EU and Switzerland (we are aware of only one example of the European Commission having raised an issue in 2007 concerning Swiss company tax regimes).

(c) The EU’s association agreements with various countries such as Albania, Macedonia and Ukraine go further. They begin by stating (in a similar vein to the agreements with Switzerland and Israel) that state aid which distorts or threatens to distort competition is incompatible with the agreement. They then go further by requiring that any state aid (and indeed anti-competitive) practices are assessed on the basis of criteria arising from the EU rules and in accordance with the interpretation made by the EU institutions. They also require the countries in question to establish their own operationally independent authority. It is notable that the countries following this particular model are typically countries seeking to accede to the EU.
6.1.3 None of these agreements has a unified body policing the implementation of the state aid rules between the participant states (in the same way that the European Commission does for all EU states and the EFTA Surveillance Authority does in respect of EEA states). Furthermore, none of the agreements have “direct effect”, meaning that there is no means for businesses or individuals to enforce the rules.

6.1.4 We would anticipate that any UK / EU free trade agreement would most likely contain state aid provisions similar to either the Canadian / South Korean agreements or the Israeli / Swiss agreements.

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

6.2.1 It should not be assumed that the UK will necessarily require a domestic state aid authority after Brexit, nor that establishing such a body in the UK after Brexit will be straightforward.

6.2.2 Any such body must by necessity be independent, operationally and politically, as it would likely be required to review the actions of both central and local government, as well as the devolved administrations. The CMA would be the most obvious candidate for such a role. However, this would place the CMA in uncharted territory, as it has never previously had responsibility for enforcing state aid law, nor indeed does it have the resources or expertise to do so.

6.2.3 The primary responsibilities of the European Commission in its role as state aid authority are to:

(a) approve in advance state aid measures that have been notified to it; and

(b) investigate and make findings in relation to unlawful aid measures that have not been notified (e.g. following the receipt of complaints).

6.2.4 If the UK were to establish a domestic state aid authority, consideration would need to be given to whether the UK wished to implement a prior approval process whereby aid cannot be granted until it is approved unless it falls within certain exemptions (as is currently the case under EU rules). From a political perspective, we think it unlikely that the government would wish to subject itself to such a requirement to obtain prior approval for aid measures if it is no longer part of the single market. On that basis, the most likely function of a domestic state aid authority would be to investigate and adopt decisions concerning unlawful aid measures.

6.2.5 An alternative to establishing a domestic state aid authority would be to ensure that the UK’s post-Brexit state aid rules (to the extent indeed that the UK retains such rules post-Brexit) can be effectively enforced through the courts, either through judicial review procedures or through a bespoke review regime such as that which exists in the Public Contracts Regulations 2015. An advantage of the regime under the Public Contracts Regulations 2015 is that it provides for an automatic
suspension of measures if they are challenged before being implemented, and it allows for measures to be set aside if they have been entered into unlawfully.

6.2.6 In our view, placing the power to oversee the state aid rules in the hands of judges, rather than with the CMA, is to be preferred. As noted above, the CMA has neither the resources nor the expertise to carry out this role. What is important, in our view, is that, to the extent that the UK adopts its own post-Brexit state aid rules, the way in which those rules are applied is capable of judicial scrutiny.

6.3 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?

6.3.1 As a WTO member, the UK would continue to be bound by the SCM Agreement. This will place limitations on the UK’s ability to support industries or individual companies, including limitations on favourable tax arrangements or other fiscal incentives. However, it should be recognised that the SCM Agreement is far more limited in its application than the EU state aid rules.

6.3.2 First, the SCM Agreement applies only to subsidies in respect of goods.

6.3.3 Second, only certain subsidies are prohibited as of right under the WTO anti-subsidy rules, namely those conditional on export performance (known as “export subsidies”) and those contingent on the use of domestic content (known as “local content subsidies”). This would prohibit, for example, the government from compensating exporters for lost revenue as a result of tariffs paid on EU sales if there is no UK/EU trade agreement (or indeed on tariffs paid in other countries as a result of UK manufacturers losing the benefit of EU trade agreements with third countries). Other subsidies are only relevant if they can be shown to cause adverse effects to other WTO members.

6.3.4 Therefore, support measures granted by the UK government would only be affected by WTO anti-subsidy rules in certain circumstances.

6.4 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?

6.4.1 The UK Government has on a limited number of occasions been prevented from pursuing policies that it would otherwise have pursued as a result of the EU state aid rules. For example, the Government was embroiled in a long-running European Commission investigation into the exemptions it applied to the British Aggregates Levy.

6.4.2 However, we have also seen instances where UK Government Ministers have sought to hide behind the state aid rules as a reason for not
pursuing interventions in businesses, for example during the recent steel crisis.

6.4.3 Post-Brexit, the Government will have a freer hand in supporting businesses, although it must be mindful that it does not have a completely free hand given that it would still be subject to WTO anti-subsidy rules. For example, as stated above, the Government would still not be able to provide export subsidies to compensate businesses for the effect of tariffs post-Brexit.

6.5 **What, if any, role might the devolved institutions play in UK state aid control post-Brexit? Are the any potential implications for the UK internal market?**

6.5.1 The nature of the role played by the devolved institutions would very much depend on the design of the UK’s post-Brexit state aid rules. In our view, state aid control in a post-Brexit UK should be centralised either through the courts (our preference) or through a single independent authority. One of the advantages of the EU system is the centralised authority in the European Commission which helps to ensure a level playing field. If devolved institutions were involved in state aid control, this could encourage competition within the UK internal market and a “race to the bottom”.

6.6 **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?**

6.6.1 There are several transitional matters in respect of state aid which, if not addressed in the UK’s withdrawal agreement, would lead to considerable legal uncertainty for businesses. These issues include:

(a) The extent to which the European Commission can investigate state aid granted by the UK while it was still a member of the EU;

(b) The extent to which UK businesses and individuals (and indeed the UK government) have the right to complain to the European Commission about aid granted by other Member States prior to Brexit, as well as their rights to challenge decisions in the European courts (or to intervene in cases before the European courts); and

(c) The extent to which the UK is obliged to implement any state aid decisions addressed to it prior to Brexit, including where aid is to be recovered.

15 September 2017