SUMMARY

- A key principle should be to minimise burden on business and ensuring legal certainty for businesses in both the UK and EU post-Brexit. We do not see any reason for any immediate radical reform to the UK regime post-Brexit, though it is possible that in the future, the UK may decide it is in its interests to deviate from certain EU principles.

- It is important that the UK Government continues to encourage private actions for breaches of competition law, as effective enforcement benefits UK consumers. The UK's status as a forum of choice for private enforcement post-Brexit will depend on: (a) the status of European Commission decisions, notably whether they may be relied on to establish liability or have any probative value; and (b) the applicable rules concerning jurisdiction and enforcement of judgments.

- Post-Brexit there are likely to be a large number of parallel antitrust investigations by the European Commission and the CMA, resulting in increased costs and regulatory burden for companies, as well as the risk of dual fines (i.e. fines by each of the European Commission and CMA in respect of the same infringement). There will also be resource implications for the CMA. It will be necessary to clarify the position for conduct that occurred whilst the UK was part of the EU and to pending cases. The UK and EU will need to agree on transitional arrangements in order to confirm jurisdictional issues and case management. Decisions will also need to be made in respect of the approach to fine calculation and the status of immunity/leniency applications. The UK will also need to consider how it will continue to ensure effective international coordination and cooperation with the EU and the remaining EU Member States.

- In relation to merger control, the loss of the EU merger control "one stop shop" means that more mergers are likely to be notified to the CMA as well as the European Commission, resulting in increased regulatory burden as well as the possible risk of divergent outcomes in respect of the same merger. Cooperation between the CMA and the European Commission will be necessary to reduce the risk. Transitional provisions will be necessary in order to ensure legal certainty for deals that are undergoing an EU merger review at the moment of Brexit.

- We do not consider that there is any need to review national interest criteria for mergers, as the UK Government already has the ability to intervene in deals that raise public interest considerations. If new measures are introduced, these should be subject to clear guiding principles: transparency, competence, and minimising the burden on the merging parties.

- State aid provisions depend on the terms of any trade agreement with the EU. If the UK wants to gain access to the EU single market, it is likely that it will have to agree to some form of state aid control as a condition. If the UK leaves the EU without entering into any free trade agreement or
agreeing access to the single market, no state aid rules would apply in the post Brexit UK. The UK will be bound by the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). There are a number of key differences between the SCM Agreement and EU state aid rules.

**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 consider that post Brexit, it is essential that the UK continues to have an effective competition policy that protects the interests of consumers in the UK. The UK has a well-established competition law regime that is highly regarded internationally. There has been significant convergence of competition policy and enforcement across the EU and beyond in the last 20 years, and the UK Competition & Markets Authority ("CMA") and its predecessors (the Office of Fair Trading and the Competition Commission) have played a key role in achieving this. The CMA has an influential voice on the international stage, through its participation in groups such as the International Competition Network ("ICN") and the OECD, and we consider that it is important for the UK that this continues post Brexit.

   1.2 A key principle should be minimising burden on business and ensuring legal certainty for businesses in both the UK and EU post Brexit. At present, UK and EU competition laws are substantively the same. We do not see any reason for any radical reform to the UK regime immediately following Brexit, though it is possible that in the future, the UK may decide it is in its interests to deviate from certain EU principles.

   1.3 Transitional arrangements will need to be put in place in relation to antitrust enforcement and merger control cases (see further below). The UK will also need to consider how it will continue to ensure effective international coordination and cooperation with the EU and the remaining EU Member States, in the event that it is no longer able to continue its membership of the European Competition Network post Brexit.

**ANTITRUST**

2. **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?**

   2.1 The UK’s competition rules under the Competition Act 1998 ("CA98") effectively mirror the equivalent EU provisions (Article 101 and Article 102 of the Treaty on the Functioning of the European Union ("TFEU")). Section 60 CA98 requires UK courts and authorities to interpret competition law questions in a manner that is consistent with EU law. This provision, and the fact that judgments of the EU courts are binding in the UK, result in a consistency of approach for businesses operating in the UK and the EU when dealing with competition law issues.
2.2 Post Brexit, the EU competition law provisions will continue to apply to UK businesses which engage in activities that affect trade in the EU. There may therefore be considerable benefit to retaining consistency with the EU on the interpretation of antitrust law post Brexit, as this would reduce the burden on businesses who are active in the UK and the EU. It is unlikely to be politically acceptable for the UK to commit to absolute consistency with the EU but in our view, it would be helpful for the interpretation of UK competition law to continue to have regard to EU law, and for the judgments of the EU courts and decisions of the European Commission to be regarded as persuasive (but not binding). This would be a sensible approach given that the UK competition law provisions are drafted in similar language to Articles 101 and 102 TFEU and that EU judgments and decisions guide the approach of many antitrust authorities and courts around the world. Such an amendment could also reduce the possibility of different approaches under the UK and EU regimes in the immediate term, as UK courts and regulators would be able to rely on established EU principles where appropriate. This would provide legal certainty for businesses in the UK that are required to comply with both UK and EU competition laws.

2.3 Nonetheless, the UK Government will undoubtedly want to allow for the possibility of a divergent approach in the future because the priorities of the EU, such as single market integration, may not necessarily reflect those of the UK. For example, the UK may over time wish to adopt a less stringent approach to territorial restrictions in distribution agreements than currently permitted under EU law. This could be achieved if the wording of Section 60 CA98 is amended to allow the UK competition authorities and courts to have regard to (but not be bound by) EU law and EU judgments and decisions.

2.4 The EU antitrust regime includes a number of Block Exemption regulations that provide a safe harbour for certain categories of agreements. Under the current draft of the EU Withdrawal Bill, it is likely that these block exemption regulations will be imported into UK law at the point of Brexit. These regulations also currently exempt agreements from the UK prohibition on anti-competitive agreements, under section 10 CA98 ("parallel exemptions"). The Block Exemptions and parallel exemptions cover important commercial agreements such as distribution agreements and R&D agreements, and are heavily relied on by companies for legal certainty. Many agreements are drafted so as to fall within the scope of the exemptions. Given their importance and the role they play in reducing the compliance burden, we recommend that the UK retains the parallel exemptions post Brexit. This could be achieved by limiting the effect of section 10 CA98 to preserving the parallel exemptions that are in force as at the date of Brexit for the life of the relevant EU block exemption. Once the last EU block exemption expires, section 10 CA98 could be repealed. In addition, the CMA could consult on each block exemption as they come up to expiry and introduce new UK block exemptions under section 6 CA98, which could be modelled on EU block exemptions if appropriate.
3. **Will Brexit impact the UK’s status as a jurisdiction of choice for antitrust private damages actions?**

3.1 Actions for damages following on from European Commission decisions issued after the date of exit may be less likely to be brought in the UK - although England & Wales will remain attractive to claimants as a forum due to the experience of the courts, the breadth of disclosure rules, and a generous approach on jurisdiction. The UK’s status as a forum of choice post-Brexit will however depend on: (a) the status of European Commission decisions, notably whether they may be relied on to establish liability or have any probative value; and (b) the applicable rules concerning jurisdiction and enforcement of judgments.

3.2 We consider that it is important for the UK Government to continue to encourage private actions for breaches of competition law, as effective enforcement benefits UK consumers. This is particularly true of EU competition law, as many of the most significant restrictions on competition in the UK emanate from anti-competitive conduct operating across Europe contrary to EU competition law. The Government should therefore continue to facilitate damages actions in the UK for breaches of EU competition law. In our view, European Commission decisions issued pre-Brexit should remain binding in the UK after the UK leaves the EU, to enable damages actions to continue to be brought as they are today. European Commission decisions issued post-Brexit in relation to infringements post-Brexit should not be binding in the UK but should be persuasive. In circumstances where the European Commission issues a decision post-Brexit in relation to an infringement which took place in whole or part pre-Brexit, we consider that potential claimants in the UK should be able to rely on that EU decision in establishing liability for a pre-Brexit breach of Article 101 or 102 for the purpose of follow-on claims.

3.3 As regards the implementation of Directive 2014/104/EU (the "Damages Directive") by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, we consider that the majority of these provisions should remain unaltered to minimise the prospects of the UK becoming a less attractive forum than other EU Member States.

4. **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?**

4.1 Post Brexit, if an arrangement has an effect on trade within the UK and also between EEA Member States, it may be investigated by both the CMA/UK sectoral regulators and the European Commission at the same time (the CMA and UK sectoral regulators will no longer have the power to enforce EU competition law). EU competition law will continue to apply to conduct taking place in the UK which has an effect in the EU, and the CMA and UK sectoral regulators will be able to enforce UK competition law in relation to the UK aspects of a Europe-wide cartel that is being investigated by the European Commission.
4.2 In our view there are likely to be a large number of cases where both the EU and the UK could in parallel open an investigation, as UK markets and businesses are closely linked to those in the EU, such that both the European Commission and the CMA may have an interest in opening investigations. Whether or not investigations will be opened in parallel will, however, depend on the enforcement priorities of each regulator, which will to some extent be influenced by the degree of nexus, where the conduct occurred, level of UK vs EU affected trade and other wider public policy grounds.

4.3 The consequences of parallel investigations are significant, as each authority would run the investigation according to its own procedures, resources and timetable, and could impose fines and remedies for anti-competitive conduct. There is also the risk of divergent approaches to the conducting of investigations and adoption of decisions in respect of the same conduct. This will all lead to increased costs for companies under investigation.

4.4 The national competition authorities of the EU Member States will only be able to open national investigations where the EU has not already opened its own investigation, as is the case today. This will remain the position post Brexit.

5. 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?

5.1 At present, the CMA, European Commission and national competition authorities of the EU cooperate closely on antitrust and merger control investigations through the European Competition Network. Through this network the agencies are able to keep each other informed about their investigations, proposed decisions, and proposed remedies. They have the ability to share information and coordinate investigations. Such cooperation leads to greater efficiencies and consistency.

5.2 Post Brexit, it is unlikely that the CMA will remain a member of the ECN. We consider that it is important for the UK and EU to enter into a post Brexit competition cooperation agreement. The likelihood of parallel investigations in both the antitrust and merger control spheres creates the risk of duplication and less efficiency. These risks can be limited to a certain degree through cooperation between the CMA, the EU and the national competition authorities of the EU Member States. There are precedents for antitrust cooperation agreements which the CMA could seek to emulate, such as the cooperation agreements that the EU has with the US and Switzerland for example. For consistency, we would recommend that the CMA enters into a single cooperation agreement applicable to the EU and its Member States, rather than entering into 27 different cooperation agreements of different scope.

5.3 We consider that any post Brexit cooperation agreements should include the following:

(a) An obligation to inform each other about the opening of an investigation.
(b) Where there are parallel investigations, coordination on the timetable of the investigation.

(c) Mechanisms to share information and coordinate information requests, subject to waivers by the parties.

(d) Coordination on remedies to ensure consistency and ease of implementation.

5.4 Given the CMA’s criminal powers, we would recommend such an agreement to restrict the CMA from using information received from the European Commission or national competition authorities of the EU Member States to impose sanctions on individuals.

6. How will Brexit affect the CMA’s ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UKs influence in developing global competition policy?

6.1 The CMA is a leading member of the global antitrust enforcement community and an active participant in international organisations such as the ICN, OECD, UNCTAD. Post Brexit, the CMA will have to exert more influence on shaping international competition policy directly through these fora as it will no longer be part of the ECN. The ECN is a strong voice and the CMA will no longer operate within that group. However, we consider that the CMA can continue to be an influential agency in the development of global competition policy and there is no reason why Brexit should prevent it from continuing to participate in these international fora, provided it is allocated the budget to be able to do so.

6.2 Regarding cooperation with non-EU competition authorities in antitrust and merger control investigations, the CMA will no longer benefit from the existing cooperation agreements between the EU and third countries, including the US, Canada, Japan, South Korea and Switzerland. The CMA should therefore seek to enter into cooperation arrangements with the competition agencies in non-EU countries in order to facilitate efficient and effective enforcement action.

7. 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?

7.1 Post Brexit, it will be necessary to clarify the position for conduct that occurred whilst the UK was part of the EU and to pending cases. We consider that it will therefore be necessary for the UK and EU to agree on transitional arrangements in order to confirm jurisdictional issues and case management. A decision needs to be taken on the cut-off point for when the EU would cease to have exclusive jurisdiction under Article 11 Regulation 1/2003/ EC and the prospect of dual investigations by the EU and CMA in respect of the same conduct becomes a reality.

7.2 A sensible approach would be to agree that the European Commission continues to have jurisdiction over investigations that it has opened prior to Brexit and which affect UK markets. Given the significant amount of time it can take for the European Commission to either issue a formal
letter opening proceedings and/or a Statement of Objections, our view is that the allocation of a case number to an investigation should be sufficient for it to be considered "opened" by the European Commission. The CMA should not have the ability to open separate administrative/civil competition law proceedings in that case in respect of the relevant conduct, unless the European Commission closes its investigation without adopting a formal decision under Articles 7 - 10 of Regulation 1/2003. Such a cut off point should hopefully reduce the risk of duplication of review of antitrust cases by the EU and the CMA. We consider it important that for those cases over which the European Commission retains jurisdiction, the parties under investigation should continue to have the same procedural rights as while the UK was a member of the EU.

7.3 In addition, in order to ensure legal certainty, where an antitrust case has been concluded under the Article 9 Regulation 1/2003 EC commitments procedure, these commitments should continue to apply post Brexit and should be enforceable in the UK courts. It would also be appropriate to give the CMA the power to enforce those commitments.

7.4 The approach to calculating fines would also need to be considered in more detail, especially in respect of conduct occurring prior to Brexit but that is being investigated by both the European Commission and the CMA after Brexit. The European Commission typically uses the EEA turnover of cartelised products in the full year prior to the end of the infringement, which in these cases would capture UK turnover given that the conduct occurred prior to Brexit. The CMA would presumably also use the UK turnover in the cartelised products for the purposes of fining the relevant entities in an investigation occurring post Brexit, thus raising concerns regarding the application of non bis in idem.

7.5 The status of immunity/leniency applications raises issues. Applying for immunity/leniency within the EU is already complex, as an application to the European Commission alone does not preclude national competition authorities in Member States from opening their own investigations if they have not received an immunity/leniency application in relation to the same conduct. This is currently even more complicated where the European Commission takes jurisdiction over conduct which is also being investigated by the CMA using its criminal powers.

7.6 From a transition perspective, immunity/leniency order becomes a real concern where the application was filed by an undertaking prior to Brexit but the investigation is only opened by the European Commission after Brexit making it possible for the CMA to also open its own investigation. In our view, in these circumstances of a pre-Brexit application, provided the applicant has also filed a summary application to the CMA in addition to the application it has made with the European Commission, then the immunity/leniency order at the UK level should take that into account. This would respect the legitimate expectations of the leniency applicant. Presumably, the CMA would notify the relevant undertaking of the need to provide a full leniency application post Brexit supplementing the summary application filed prior to Brexit, but the immunity/leniency order applicable prior to Brexit will be maintained post Brexit.
7.7 As for immunity/leniency applications made after Brexit, those would have to be tailored to each jurisdiction, whether EU or UK given, respectively, the EC's focus on trade within the EU and the CMA's powers to enforce only Chapter I CA 98. Ultimately, however, the conduct investigated by the two authorities could in many cases be the same, so there is scope for close cooperation between the CMA and the European Commission to ensure a consistent approach.

MERGERS

8. 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?

8.1 There has been much debate about whether the UK Government should have the ability to intervene in foreign acquisitions of UK companies on public interest grounds. At the moment, there are no mandatory foreign investment approvals of general application to the acquisition of UK businesses (other than money laundering regulations). The CMA has jurisdiction over mergers which meet either a financial or share of supply threshold. In exceptional cases, there is a possible assessment of "public interest" considerations, which are currently limited to national security, media plurality and stability of the UK financial system (the Enterprise Act 2002 also establishes limitations on certain mergers between water companies). The Secretary of State may ask the CMA to examine a merger on any of these three public interest grounds in addition to looking at the competition law considerations. The Secretary of State also already has the ability to intervene in "special public interest" mergers that do not qualify under the Enterprise Act’s general merger control regime but where a specified consideration is relevant to the merger. These are mergers relating to the defence sector and where one of the parties is a relevant government contractor, and in cases where the merger involves a supplier or suppliers of at least 25% of newspapers or broadcasting in the UK.

8.2 The proposals announced in the Queen's Speech on 21 June 2017 confirm that the UK government intends to create a new regulatory regime for foreign investment in the UK which raises potential national security issues in the UK. For now at least, it appears that the proposed governmental intervention power will remain limited to deals that raise issues of national security. Previously, the UK government had indicated that it may introduce measures to intervene in deals such as Pfizer/AstraZeneca which was considered in May 2014, and in the run up to the Kraft/Cadbury deal in January 2010. This would require other public interest considerations to be taken into account such as protecting R&D, or preserving UK jobs.

8.3 In our view there is no need to increase the regulation of mergers and acquisitions. At present, UK merger control focuses on the impact on competition and deals that could harm consumers are blocked or cleared subject to remedies. The Government already has the ability to intervene on specific non-competition grounds (such as national security) in a way that does not detract from the competition review and which operates
independently from political considerations. The Government is able to expand the list of public interest considerations under the Enterprise Act 2002. We consider that it is appropriate for competition grounds to continue to be the focus of merger review and that broader national interest criteria should be addressed separately, for example, through regional policy. There is a risk that the introduction of broader public interest criteria could politicise merger review in the UK, creating uncertainty for investors, disincentivising inward investment and possibly triggering similar expansion of merger control rules in the EU and elsewhere, which will impact UK companies wishing to invest abroad.

8.4 If the Government decides to introduce a new regulatory regime for foreign investment in the UK, we consider that it should be subject to clear guiding principles:

(a) **Transparency and clarity**: it is important to clearly define any new public interest considerations. Overly broad, vague criteria as would create uncertainty for businesses.

(b) **Competence**: it is important that the appropriate people review any public interest considerations. This may mean setting up a new independent regulatory body.

(c) **Minimise the burden on business**: any new regime must not to stifle or disincentivise foreign investment, which would ultimately be detrimental to the UK economy. This is why it is important that any new public interest test is clearly defined and that the merger review and decision making process is transparent.

9. **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?**

9.1 The CMA has publicly stated that post Brexit it expects its merger workload to increase by 40-50%, which is significant. Our estimates on the basis of past mergers are very similar and both estimates are rather conservative in light of the recent high levels of review intensity by the CMA. Many mergers will be subject to both EU and UK merger control and will be large mergers, and some will raise complex issues. The CMA will require resources to review such deals, particularly because many of its staff will also need to be deployed to deal with a likely increase in antitrust investigations. We anticipate that the CMA will need to recruit a large number of experienced lawyers and economists to handle the predicted increase in merger notifications. If the CMA struggles with this increase, it is likely to focus on the largest, most difficult cases only, with a potential to see marginal cases going through unhindered. There is a query whether more cases will be prompted into Phase 2 in order to gain more time.

9.2 The concurrent regulators such as Ofcom and Ofgem will have an important role to play in providing input into merger reviews in their relevant sectors, but we consider that the CMA should continue to be exclusively responsible for merger review, as it has the expertise in this area. In any event the number of mergers relevant to the areas of
expertise of the sectoral regulators are very limited. The sole competence of the CMA also ensures a consistent approach to merger control, and means that merger decisions are made purely on competition grounds. If the sectoral regulators were to review mergers, there is a risk that their decisions could be influenced by regulatory, non-competition factors.

9.3 The UK merger notification process is complex and requires the parties to submit large volumes of data. In order to manage its increased workload, the CMA should consider simplifying the process, for example by creating a short-form merger notification process, such as that of the EU.

10. How burdensome would dual CMA/European Commission merger notifications be for companies?

10.1 Brexit will mean that the UK will no longer benefit from the "one stop shop" for merger control under the EU Merger Regulation ("EUMR"), such that deals that are notifiable to the European Commission may also be subject to a separate review by the CMA in the UK, if the relevant UK merger filing thresholds are met. This will create an extra regulatory hurdle for the parties especially in the most challenging cases which will be subject to extensive scrutiny by both regulators. The UK and the EU both take a heavy handed approach to merger review, which means increased costs for companies, and additional pressure on internal resources.

10.2 We note that merger filings are voluntary in the UK. However, if a merger that is being notified to the European Commission raises some substantive (though not problematic) issues (e.g. there is an appreciable overlap), it is very likely that the parties would elect to also file in the UK for legal certainty.

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

11.1 It is possible that parallel merger reviews could lead to divergent outcomes where, for example, the market conditions are slightly different in the UK compared with the rest of Europe, and where remedies are likely to be different in the UK. If market conditions are indeed different, divergence could be appropriate. It may well be the case that the two authorities take a different view on substantive issues however. Both situations have been observed in the way the US, EU and Chinese authorities, for example, review global transactions. The risk of divergent outcomes in the second situation will reduce legal certainty.

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

12.1 In our experience both the CMA and the European Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews.¹ This is important as it arguably makes the

¹ For example, the EU has a bilateral agreement with the United States, the US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations
whole merger review process more efficient and can avoid some duplication, where parties consent to waivers and allow the authorities to share information. Effective cooperation between competition authorities can reduce the burden and costs for stakeholders in multi-jurisdictional mergers, as well as the risk of potential inconsistent outcomes of merger review. The ICN Merger Working Group (MWG) Practical Guide to International Enforcement Cooperation was adopted at the ICN Annual Conference in Sydney in 2015. The Practical Guide provides guidance on multilateral merger enforcement cooperation for competition agencies seeking to engage in such cooperation, as well as for merging parties and third parties seeking to facilitate cooperation.\(^2\)

12.2 Such cooperation is particularly important where a cross-border deal raises competition issues of common concern and may be subject to (ideally identical) remedies. Cooperation between competition authorities in such cases in the design and implementation of remedies may avoid inconsistent or conflicting obligations being imposed on the merging parties.

12.3 We consider that it will be important for the CMA and EU to closely cooperate on parallel merger reviews for the reasons indicated above. In particular, in order to reduce the burden on both the merger parties and the CMA, we suggest that where appropriate and where the parties agree, the CMA could have access to the evidence gathered in preparing the EU merger filing. It would also be beneficial if the UK and EU merger control timetables could be coordinated.

13. 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?

13.1 Transitional provisions will be necessary to decide what the cut off point should be for establishing which authority has jurisdiction to review deals which are pending review by the European Commission at the moment of Brexit. In our view, a sensible approach would be to agree that pre-Brexit rules should apply to deals in respect of which pre-notification has begun and a case allocation form has already been submitted to the European Commission for review under the EUMR at the moment of Brexit.

13.2 For mergers that have already been formally notified to the European Commission and are pending review at the point of Brexit, it would make sense for the EUMR to continue to apply to those cases, including procedural rights, rights of defence and rights of appeal to the EU courts. This should be the position even if the European Commission concludes its merger investigation post Brexit. Given the amount of work and resources that the parties would have used for the EU merger notification, it would be excessively burdensome to require them to notify the UK aspects of the deal to the CMA under a separate merger control regime.

There is also the question of what to do about mergers that have been cleared under the EUMR subject to remedies - how will these remedies be enforced? The sensible approach would be to agree that EU law should continue to apply, and that the European Commission will continue to have jurisdiction to enforce and monitor those remedies.

Under the EUMR, it is possible for deals that fall within the jurisdiction of the European Commission to be referred back to the CMA for review under Article 9 EUMR. We consider that it would be appropriate to retain this mechanism as part of any transitional period to allow for more efficient case re-allocation. For mergers that have already been notified to the European Commission by the time of Brexit, the CMA should use Article 9 to request a referral back to the UK of any merger that is likely to have a significant effect on a UK market, and may require UK-specific remedies.

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?

This will depend on the terms of any trade agreement with the EU. If the UK wants to gain access to the EU single market, it is likely that it will have to agree to some form of state aid control as a condition. This will largely depend on the degree of integration sought - as the UK is leaving the EU, it is not legally required to have state aid provisions, but the remaining EU-27 will probably want these to be part of the agreed package, in order to ensure a level playing field/avoidance of a subsidy race. This will be a policy decision, as it would be difficult to imagine that the EU would accept that its businesses would potentially face competition from subsidised UK businesses when their EU businesses are unable to receive equivalent subsidies.

An example of a trade agreement between the EU and a third country is the Association Agreement between the EU and Ukraine. Article 262 of the this agreement sets out the state aid rules; Article 264 provides that they are to be applied “using as sources of interpretation the criteria arising from the application of [the EU state aid rules] including the relevant jurisprudence of the [CJEU], as well as [Commission frameworks and guidance].” Article 263 requires the EU and Ukraine to report to each other annually on the state aid granted on each side. Article 267 requires Ukraine to implement a domestic system of State aid control, with “an operationally independent authority ... entrusted with the powers necessary for the full application of [the state aid rules]”. A new UK-EU trade agreement could include similar provisions but it should be remembered that this agreement was agreed with the ultimate goal of accession of Ukraine to the EU.

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

Again, this depends on the scope of any trade agreement with the EU. Currently, there is no legal obligation for the UK to have a domestic state
aid authority. If such an authority is created, it would need to be clearly independent and immune from political pressure. One option could be for the CMA to take this responsibility, but it would need the resources and expertise to do this.

15.2 It may be sensible for the UK to consider having a central agency responsible for managing funding at a regional level. Post Brexit, there will be a need for an agency to manage aid to SMEs; regional support, investments in innovation and R&D etc. This will require coordination by ministries and local authorities in order to avoid subsidy races and waste of resources/funding.

16. 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 UKs ability to support industries, or individual companies, through favourable tax arrangements?

16.1 If the UK leaves the EU without entering into any free trade agreement or agreeing access to the single market, no state aid rules would apply in the post Brexit UK. The UK will be bound by the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). There are a number of key differences between the SCM Agreement and EU state aid rules.3

16.2 The state aid system is, in effect, the internalization of the SCM Agreement into a domestic scenario. So, for example, the US does not have an equivalent of EU state aid rules applicable to and binding upon its States. This means that the EU Member States have accepted much more detailed and onerous obligations vis-a-vis each other on subsidies, than they have in respect of their global trading partners.

16.3 The state aid system applies more clearly to a much wider range of measures covering a selective advantage, offered in any shape or form. So for example, recent decisions on tax rules undertaken by the European Commission against certain US companies would be unlikely to be brought or be successful under the SCM Agreement.

16.4 The state aid system also starts from a presumption of illegality (i.e. state aid is prohibited unless approved) and as a consequence, Member States cannot implement state aid without approval (standstill obligation). Neither feature is present in the WTO system.

16.5 The SCM Agreement provides a loose framework of rules, subject to adjudication through the WTO Dispute Settlement Agreement. The state aid system, meanwhile, has highly developed procedures and processes administered by a single body, the European Commission, and adjudicated upon by the European Courts of Justice. The state aid system also has many thousands of pages of guidance and regulations, much of it dealing

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with sectors or categories of subsidies that are permitted under EU rules, such as regional aid or aid for R&D.

16.6 The state aid system gives the European Commission a monopoly on the approval of aid provided by EU Member States, while the SCM Agreement does not have any system for approval of either prohibited or actionable subsidies.

16.7 The state aid system requires recovery of all the aid paid directly from the EU Member State, i.e. the payer. This obligation of recovery is enforced rigorously by the European and national courts. Under the SCM Agreement, the remedies are either (i) a Government to Government action against the paying Government, or recovery of the aid via a countervailing duty imposed on a trader importing the goods into a particular WTO member, but in that case, only to the extent that the subsidy has caused damage.

16.8 The state aid system permits third parties to bring private actions concerning use of state aids, including recovery. The rights and obligations under the SCM Agreement can only be enforced at the WTO level by Governments.

17. How will the Government's industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commissions state aid policy limited interventions that the UK Government may have otherwise pursued?

17.1 It would be logical for the Government to support the industries highlighted in its industrial strategy including the life sciences sector, low emission vehicles, industrial digitalisation, nuclear and the creative industries.

18. 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?

18.1 Increasing devolution means that a large number of public authorities with their own spending powers independent from the central Government. As indicated in the response to Question 15 above, it would be sensible for local authorities to coordinate on how aid and funding will be administered post Brexit and this also applies to the devolved institutions. These bodies will be taking decisions on granting subsidies to favoured firms - a coordinated approach would avoid the possibility of “subsidy races” between different parts of the United Kingdom to attract investment.

19. 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?

19.1 Again this will depend on the type of agreement that is entered into between the EU and UK. Transitional provisions would be needed to deal with:

- The status of existing state aid controls and frameworks for assessing aid (e.g. Commission Regulation (EU) N°651/2014 declaring certain
categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty).

- The status of any state aid involving the UK pending before the European Courts at the time of Brexit;
- The extent of the UK’s obligation post Brexit to annul (and usually recover) any unlawful aid implemented before Brexit;
- The extent to which the European Commission has the power post-Brexit to order the UK to recover unlawful aid granted pre-Brexit; and
- The extent to which the UK is required, post Brexit, to comply with the terms of any European Commission decisions addressed to it before Brexit.

15 September 2017