1. INTRODUCTION

1.1 Hogan Lovells' antitrust team has been involved in precedent setting cases in the UK and EU over the past four decades. We therefore welcome the fact that the Sub-Committee is considering the opportunities and challenges of Brexit for UK competition law and policy.

1.2 The Call for Evidence raises significant and complex issues that we have been considering in detail since the referendum result.

1.3 In the interests of brevity, we have highlighted in this response a number of key issues that we consider require particular attention. However, there remain a large number of significant and complex issues that are not addressed in this response. We are willing to assist the Sub-Committee in any way we can, and would of course be willing to provide the Sub-Committee with further material and detail if that would be helpful. We have also conducted a detailed review of the extent to which UK legislation may need to change following Brexit, and would be happy to share that analysis with the Sub-Committee.

2. ANTITRUST

Consistency

2.1 Consistency between EU and UK antitrust law is currently ensured by section 60 of the Competition Act 1998 ("CA98"), reflecting the fact that the prohibitions contained in CA98 were closely modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Since CA98 came into force in March 2000, consistency between EU and UK antitrust law has provided UK businesses with a greater level of clarity and certainty than would otherwise have been the case.

2.2 The benefits of consistency will extend beyond the date of Brexit. UK businesses will still be subject to EU antitrust law to the extent that they are active in the EU or their conduct has an effect on EU markets. The conduct of EU businesses will similarly be subject to UK antitrust law to the extent that such conduct has an impact on the UK market. Maintaining consistency between UK and EU antitrust law (where possible) will be advantageous to the extent that it reduces the compliance burden on businesses and limits the risk of conflicting rules.

2.3 Where the basic prohibitions of UK and EU antitrust law reflect each other, a degree of consistency will likely be maintained. UK antitrust agencies and courts will likely continue to look to past, current and future EU cases for guidance – just as agencies in Switzerland, South Africa and many other jurisdictions do – and it would be appropriate for this to be reflected
in UK legislation (at least in relation to case law prior to the date of Brexit).

2.4 However, following Brexit there may be issues where it would not be appropriate for UK antitrust law to slavishly follow EU antitrust law (particularly if either UK or EU antitrust policy develops in a new direction, or new EU Block Exemptions are adopted), and therefore a blanket requirement for UK antitrust law to be interpreted consistently with EU antitrust law may not be appropriate or workable.

2.5 In relation to enforcement, one important point is that the UK was not required to adopt the EU enforcement model, but chose to do so. The UK has always remained free to adopt a different model (including a move to a prosecutorial model, which was rejected following a consultation as recently as 2011).

Parallel investigations and transitional arrangements

2.6 One consequence of Brexit will be that UK antitrust agencies will no longer cede jurisdiction to the European Commission in relation to investigations involving the UK where the European Commission decides to investigate. This will inevitably result in the UK running parallel investigations to the European Commission in some cases, which will lead to additional complexity and burden for those under investigation, and give rise to a risk that the EU and UK antitrust agencies reach diverging views.

2.7 By way of illustration of the possible additional workload, of the 28 cartel decisions adopted by the European Commission in the four years before the referendum: 7 related to conduct expressly affecting the UK; 17 related to conduct stated to be EEA or worldwide in scope – so including the UK; and only 4 related to conduct which explicitly did not touch the UK. Therefore, in those four years alone, the European Commission reached a decision in 24 cartel cases that, post-Brexit, the CMA or one of the concurrent regulators would have jurisdiction to consider in whole or part.

2.8 Transitional arrangements will be essential to allow for smooth and consistent enforcement of antitrust rules, to maximise certainty in terms of case allocation, and to limit the risk of unnecessary multiple investigations. Those arrangements should at least cover cases involving conduct that took place before Brexit but where:

(a) a European Commission investigation has already concluded (in which case it would arguably be inappropriate for the UK authorities to begin separate investigations post-Brexit);

(b) a European Commission investigation has not completed before Brexit; and
(c) the European Commission has not already launched an investigation.

2.9 Any transitional arrangements should, to the extent possible, limit the risk of unnecessary parallel investigations covering the same conduct in the same geographic area. Transitional arrangements should also provide certainty as to the status of leniency applications made to the European Commission, prevent double-counting in relation to any financial penalties, and where relevant secure the fair allocation of such penalties between the EU and UK.

Co-operation

2.10 The existing European Competition Network framework has been beneficial to the UK, not only to the extent that it has provided intelligence to UK agencies but also because it has provided a valuable forum for the exchange of information and ideas. It has provided the UK with a means of influencing EU competition policy, as has the interaction of UK lawyers and economists with the European Commission and EU policy makers.

2.11 Following Brexit, it will be important for the UK antitrust agencies to maintain a cooperative relationship with the European Commission, and national antitrust agencies within the EU, to maintain a mutual flow of information about cases, and ensure that UK antitrust agencies continue to engage in and benefit from discussions between agencies. Such cooperation will need to be formalised through cooperation agreements or memoranda of understanding with the European Commission and the national competition authorities as soon as is practical after Brexit takes place. Given the multi-jurisdictional nature of many investigations, it is likely that an initial lack of a formal cooperation framework between the UK and the EU would have a negative impact on effective cross-border enforcement.

2.12 In terms of cooperation with non-EEA agencies, the CMA’s current relationships, its membership of the International Competition Network and the UK’s membership of the OECD will all remain intact following Brexit. The CMA is well respected and, provided that it continues to invest in its international relations, it is likely that following Brexit the CMA will continue to have good cooperative relationships with other agencies and command influence over global competition policy.

Damages litigation

2.13 The UK is currently the jurisdiction of choice for private damages actions, partly because of the rules on disclosure and the level of expertise among UK lawyers and the UK Courts. Neither of these factors will change following Brexit.
2.14 However, going forward, in addition to the wider arrangements necessary across all fields of litigation (including, for example, the recognition and enforcement of judgments) the UK will need to develop a private enforcement regime which allows for claims to be brought in the UK in relation to breaches of EU competition law. This will be essential to ensure that the UK remains the jurisdiction of choice for private damages litigation.

3. **MERGER CONTROL**

*Loss of the "one-stop-shop"*

3.1 In the context of merger control, the biggest practical impact facing businesses is likely to be the loss of the current "one-stop shop", as post-Brexit the arrangement whereby the national competition agencies of EU Member States do not review a transaction being reviewed by the European Commission in Brussels would no longer apply in the UK.

3.2 Also no longer applicable to the UK would be a number of mechanisms designed to ensure that the best-placed authority in the EU reviews mergers, including the ability of the European Commission to refer cases to the UK and vice versa, and the "two-thirds rule" which provides that in cases where all of the parties to the merger derive two-thirds or more of their EU-wide revenues from the same EU Member State the merger does not have to be notified to Brussels.

3.3 This is likely to have both immediate and long term practical consequences:

(a) Some mergers which are reviewable by the European Commission may also be reviewable, and reviewed, in the UK. It has been well reported that the CMA estimates it could receive up to 50 additional merger notifications per year as a result of the loss of the one-stop shop. Time may show that to be a conservative estimate, and that the increase in the number of cases it reviews will be much greater. In any event, it would seem inevitable that the CMA will need a significant increase to its resources.

(b) Some mergers involving UK parties or markets may fall below the EU thresholds for review and therefore not need to be reviewed in Brussels, given that UK turnover would not count towards the EU thresholds. This could result in more notifications in individual EU Member States, or maybe more references to Brussels by parties to mergers that are notifiable in three or more remaining EU Member States. In other words, there may be somewhat of a rebalancing of the national and supranational regimes across the EU. It could also trigger a reassessment of the thresholds under the EU Merger Regulation.
Conversely, some mergers that would not today be notified to the Commission because the parties’ UK revenues trigger the "two-thirds rule" may become reviewable in Brussels.

3.4 This may give rise to some practical difficulties. Pan-European (or global) deals could take longer and become more expensive for the parties involved, but also for the tax-payer. That said, global businesses are used to executing transactions that require engagement with multiple agencies to obtain necessary merger clearances. The UK, as an additional regime, should not add much additional burden provided that the UK regime is smooth, predictable and efficient.

3.5 It will be vital that the CMA is granted sufficient additional resources for it to deal efficiently with the inevitable extra workload it will face. This extra workload will result not only from the CMA reviewing mergers which would today be reviewed by the European Commission, but also because it will need to liaise closely with other antitrust agencies in Europe and around the world to ensure there is consistency of approach and where appropriate in outcome of parallel merger control reviews. The CMA already works closely with other agencies around the world, so has the requisite skills and experience. However, for counterpart agencies, it may take some time for them to become used to liaising with both the CMA and the European Commission on the same case.

3.6 Although providing additional resources to the CMA will inexorably involve additional costs for taxpayers, in the long run maintaining a well-functioning, efficient merger control regime would be expected to be of great benefit to the UK economy.

3.7 Of course, parallel merger reviews by the European Commission and the CMA would give rise to the potential for divergent outcomes. However, this is only likely to be of significance in the unlikely scenario where contradictory remedies are required. The antitrust authorities will need to deal with such scenarios as they do currently, by cooperating during the merger review process.

Role of concurrent regulators

3.8 We note that the Sub-Committee's call for evidence raises the question as to whether the concurrent regulators should play a greater role in reviewing mergers than is currently the case – ie, where they provide specialist input in certain circumstances but it is the CMA that is responsible for reviewing mergers and ultimately deciding whether or not to clear them.

3.9 In our view, it would be much preferable to maintain a system where there is a single agency – the CMA – responsible for UK merger control. This would ensure consistency and predictability for businesses going through the merger review process. In addition, the CMA has significant
experience using the relevant economic tools to evaluate mergers. The current system has worked well and there is no compelling reason to move away from it. Moreover, the concurrent regulators' antitrust enforcement records to date would suggest that it is premature to consider replicating that system in the context of UK merger control.

**National interest considerations**

3.10 As identified in the Sub-Committee's call for evidence, there has been some speculation that post-Brexit the UK may adopt a merger control regime where the national interest plays a greater role in merger review. This would, however, be a coincidental change rather than one caused by or contingent on Brexit. This would be a change that would be unlikely to be welcomed by businesses seeking to invest in the UK given its manifest potential disadvantages.

3.11 In this context, it is important to remember that the UK moved away from a public interest based substantive test for merger control with the reforms introduced by the Enterprise Act 2002 – and no case was made to reintroduce such a regime as part of the reforms introduced by the Enterprise and Regulatory Reform Act four years ago. Save for interventions that may be made on specified non-competition grounds (currently media plurality, national security and financial stability), in the UK mergers are cleared or blocked based on their impact on competition. Since the UK dropped its public interest-based merger control test, the application of competition criteria alone has become accepted wisdom and is well entrenched in merger control systems around the world.

3.12 If, however, the UK were to reintroduce such a regime, it would be important to ensure that there are adequate safeguards to ensure robust and accountable decision-making, in particular that there is sufficient access to the decision-maker – whether that is an individual within the CMA, the relevant Secretary of State, or someone else – so that the merging parties would be able properly to put their case. It would also be important that the decision-making would be subject to appropriate judicial oversight. Such safeguards would not only help give businesses the confidence to continue investing in the UK, but also ensure the continued good standing of the CMA as a respected competition agency.

**Transitional arrangements**

3.13 As with antitrust enforcement, a key area that needs to be addressed as a matter of some urgency is what happens to cases that are ongoing at the time of Brexit. There are many questions that will need to be addressed, for example: Will the CMA have jurisdiction to investigate a transaction that meets the UK jurisdictional thresholds but which is already being reviewed by the European Commission? What happens to cases where the EU Merger Regulation turnover thresholds were met only because the
parties' UK turnover was taken into account as part of their EU-wide turnover?

4. **STATE AID**

4.1 The European Council’s negotiating guidelines provide that any future trading agreement "must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices". It therefore appears likely that, in negotiating the future trading relationship between the UK and EU, the UK will be asked to commit to a form of state aid control. The form and nature of those controls will, of course, depend on the outcome of negotiations and the nature of the future trading relationship.

4.2 Unless a joint enforcement authority is agreed as part of any future trading relationship, the UK will require a domestic state aid authority. This will be important in terms of ensuring compliance with the terms of the trading relationship and, as set out below, coherence in relation to the UK’s industrial strategy. However, the exact role of a domestic state aid authority after Brexit will depend on the nature and scope of the state aid controls.

4.3 There are a number of existing arrangements between the EU and other countries that provide useful precedent for the UK’s relationship with the EU following Brexit and the enforcement mechanisms that may be required under a future trading arrangement. Two arrangements in particular provide a useful indication of the range of options available.

(a) **Switzerland**

The 1972 Fair Trade Agreement between the EU and Switzerland (the "FTA") prevents "public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods". The 1999 Agreement on Air Transport also contains a state aid prohibition that mirrors Article 107 TFEU. Neither agreement contains enforcement powers, and there is no requirement on Switzerland to establish a national enforcement authority to ensure compliance. The only course for redress in the event of a breach is a complaint to committees established under the agreements.

(b) **Ukraine**

The more recent Association Agreement between the EU and Ukraine goes much further than the Swiss arrangements, and
provide a closer example of what the EU is likely to seek than the Swiss example.

Under the Association Agreement, state aid rules are applied "using as sources of interpretation the criteria arising from the application of [EU State Aid rules] including the relevant jurisprudence of the [CJEU], as well as [Commission frameworks and guidance]". In essence, the Association Agreement aims to ensure harmonisation between EU and Ukrainian state aid rules.

Under the Association Agreement, the EU and Ukraine report annually to each other on the state aid granted. The Ukraine is also required 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.

4.4 The EU state aid rules have had an inevitable impact on the industrial strategies pursued by individual Member States, including the UK. Although it is difficult to judge the extent to which the industrial strategies of successive UK governments have been shaped or limited by those rules, any equivalent provisions in a future trade agreement will likely have a similar impact on UK industrial strategy.

4.5 One important consideration is the extent to which the EU state aid rules have ensured a degree of coherence of industrial strategy across the UK. As the EU state aid rules currently apply equally to the UK government and devolved administrations, the devolution settlements do not currently contain limitations on state aid. If there is no UK-wide state aid rules (either through the new trade agreement with the EU or national rules), there would be a risk of "subsidy races" between devolved administrations, introducing a lack of coherence in the UK's industrial strategy and potentially distorting the UK internal market.

4.6 Even if negotiations between the UK and EU do not result in an agreed trade deal containing state aid provisions, WTO rules would apply. Although the WTO agreements do not include state aid rules or enforcement mechanisms, the UK would be bound by the WTO Agreement on Subsidies and Countervailing Measures. As a result, state aid and related issues will continue to shape and limit the UK's industrial strategy irrespective of what (if anything) is contained in a future trade deal with the EU.

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