Dr Maria Ioannidou – Written evidence (CMP0028)

General

- **Question 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. According to the UK Competition and Markets Authority (CMA), their work focuses on promoting "competition for the benefit of consumers, both within and outside the UK. [The] aim is to make markets work well for consumers, businesses and the economy" (https://www.gov.uk/government/organisations/competition-and-markets-authority/about).


3. UK competition law and policy promotes competition and consumer welfare and is informed by economic analysis. As such, UK competition policy should adhere to its current focus on promoting competition and steer away from opportunistic calls to increase the role of public interest considerations. Public interest considerations should retain their existing role within competition law analysis.

4. The main principles that should shape UK competition policy post-Brexit is – what is herein termed - the principles of consistency and pragmatism.

5. The principle of consistency calls for the adherence as much as possible to the status quo, which will lead to the best outcomes for all stakeholders. First, it will achieve more certainty for businesses. Second, it will result in a better outcome for consumers and the economy as a whole. Third, it will assist the work of competition law enforcers and regulators as Brexit goes forward.

6. The principle of pragmatism encapsulates the simple observation of identifying the areas, where actions are immediately called for. These areas focus primarily on issues of enforcement and procedure rather than substantive issues.

7. Issues of enforcement and procedure that need to be immediately addressed include:
   a. An increase in the CMA’s workload;
8. Substantive competition law is largely modelled upon EU competition law. One issue to address is the future of section 60 CA98 post Brexit.

**Antitrust**

- **Question 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?

9. Domestic competition law (Chapter I and Chapter II CA98 – corresponding to Articles 101 and 102 TFEU) largely follows EU competition law. EU jurisprudence and the Commission decisional practice have clearly influenced and shaped domestic competition law and this is unlikely to change post Brexit, at least in the short term. The UK should seek to maintain consistency as much as possible (cf paragraph 6) – at least in the short term – in order to avoid hampering legal certainty amongst the legal and business community.

10. A potential area where change is more likely concerns cases involving internal market considerations, which is a distinct objective of EU competition law.

11. Section 60 CA98 in as much as it provides that UK competition law enforcement should be "consistent", "so far as is possible", with EU competition law as applied by the EU Court of Justice and the Commission, will require change in a post-Brexit world.

12. This submission agrees with the recommendations of the BCLWG, namely that section 60 should be amended in that UK courts and regulators should ‘have regard to’ relevant EU jurisprudence and the Commission decisional practice (BCLWG, Conclusions and Recommendations, July 2017 – BCLWG, para 2.8). This may seem somewhat irreconcilable with the Government’s preference towards a ‘hard’ Brexit, nonetheless, it presents the most beneficial solution for the UK economy. As the decisional practice gradually develops, the UK can careful plan its competition enforcement priorities in the medium term and establish a strategy that will allow it to maximise the benefits from the flexibility that Brexit gives it.

13. From a practical perspective, even if section 60 is repealed, it can be fairly assumed that this is the inevitable course that UK courts and regulators will take, namely have regard to the relevant EU law. Domestic competition law is more harmonised than other areas of law. As a result, it will be – not only undesirable, but also very - difficult to eradicate EU law influences. Certainly this will take a long time.
14. It should also be mentioned that efforts at internationalisation of competition law in various fora (e.g. ICN, OECD, UNCTAD) have promoted significant convergence of competition law regimes across the world. This, coupled with the fact that the UK has imbued EU competition policy with a free market rational (compared to other Member States – such as France), it would seem somewhat paradoxical for the UK to re-introduce an increased presence of public interest considerations.

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

15. The UK has emerged as one of the preferred EU Member States for bringing actions for damages. This is explained by the more permissive civil procedure rules in the UK, which culminated in the recent adoption of opt-out collective actions with the Consumer Rights Act 2015 (Cf M Ioannidou, Consumer Involvement in Private EU Competition Law Enforcement, p. 132-135).

16. The impact on the UK as the preferred jurisdictional choice for antitrust private damages actions ultimately depends on:
   a. the effect of Commission decisions in follow-on actions;
   b. the treatment of jurisdiction and enforcement of judgments post Brexit and the future of Brussels Regulation (recast Regulation (EU) No 1215/2012);
   c. the future of Rome II Regulation on the applicable law to non-contractual obligations.

- **Question 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?**

17. As with the impact of Brexit on substantive competition law, the likelihood of UK authorities conducting parallel investigations increases with time. Effectively, we need to distinguish between three types of cases:
   a. Cases started before Brexit; and
   b. Cases initiated after Brexit. In the latter category, there are three sub-categories, namely:
      i. Cases based on facts taking place pre-Brexit;
      ii. Cases based on facts taking place pre-Brexit and continuing post-Brexit; and
      iii. Cases based on facts post Brexit.

18. For the first category, i.e. cases started before Brexit, if there is an ongoing Commission investigation it would seem unlikely, from a resource
rationalisation point of view, that the CMA will open a separate investigation.

19. However, as the Commission investigation will not cover the effects in the UK market, we may experience instances of potential under-enforcement. The NAO Report on the UK Competition Regime compared the fines imposed by the CMA for competition law violations amounting to £65 million between 2012 and 2014 (in 2015 prices), compared to almost £1.4 billion of fines imposed by the German NCA (NAO 2016, para 15). The NAO commented that the UK competition regime, thus, faces a challenge to increase its enforcement record.

20. Whereas we do not suggest that the record of fines is the only indicator of successful enforcement activity and the important work of the CMA in the area of market investigations and mergers should not be overlooked, it is, nonetheless, true that post-Brexit the CMA would have to step up its enforcement record. This is the more so, given that it would not benefit from Commission investigations and fines covering the UK market.

21. For cases initiated after Brexit, and depending on the CMA resources, parallel investigations are expected, which makes it the more pertinent to put in place effective cooperation mechanisms between the CMA, the Commission and NCAs.

*Question 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?*

22. A post-Brexit cooperation agreement is of vital importance. The difficult question is the level and intensity of cooperation. From a systemic enforcement perspective, the best solution is to retain the status quo under Regulation 1/2003, the respective cooperation Notices and the ECN. However, from a political perspective, such a solution appears unacceptable.

23. As the possibility of a ‘soft Brexit’ where the UK retains EEA membership does not appear likely, we need to look at successful cooperation agreements, such as the EU/Swiss Cooperation Agreement.

24. Important provisions include sharing of evidence, confidential information and coordination of enforcement including dawn raids.

*Question 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 UK’s influence in developing global competition policy?

25. Post-Brexit the CMA will need to revisit cooperation with competition authorities, for which cooperation agreements with the EU already exist. In the short term, negotiating cooperation agreements presents a strain on CMA’s resources.

26. On an optimal note however, this may increase the CMA’s influence on global competition policy.

- **Question 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?

27. Consistent with the BCLWG para5.6, for cases falling under 18(b)(i) and (ii) there is a need for transitional arrangements encompassing enhanced information sharing and case allocation. In that regard, a possible option would be to retain the status quo for these cases.

**Mergers**

- **Question 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?

28. Post-Brexit, the UK will no longer be bound by Article 21(4) EUMR and will have the competence to add new national interest criteria. A return to treating merger control as an industrial policy tool is not advisable for a number of reasons, both from a domestic systemic perspective as well as from an EU and international cooperation perspective.

29. First of all, introducing new national interest criteria would be incompatible with the competition based test introduced with EA02. Effectively, it would amount to an unwelcome retreat to the previous regime; though even under the previous regime the Tebbit doctrine rendered the public interest test largely redundant.

30. Second, it would create uncertainty and make the UK an unattractive place for international investors.

- **Question 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?

31. Brexit will increase CMA’s workload as the EUMR ‘one-stop-shop’ system will no longer apply. As such, the increase on merger cases may adversely
impact on other areas of the CMA’s work and calls for an increase in CMA’s resources (Cf BCLWG).

32. Conferring a greater role to sectoral regulators will unduly complicate the current merger control system and adversely impact their respective work. Increasing CMA’s resources appears the preferable solution.

- **Question 10:** How burdensome would dual CMA/European Commission merger notifications be for companies?

33. Having to notify the transaction to both the CMA and the European Commission is burdensome both from a procedural as well as a substantive perspective.

34. From a procedural point of view, the notifying parties would have to adhere to different notification requirements, different procedures and different time limits.

35. Most importantly, from a substantive perspective, it will increase uncertainty for companies, as the reviews may lead to different outcomes or call for different remedies. However, as the two substantive tests are similar, substantive discrepancies should be limited.

- **Question 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?

36. In as much as the substantive tests (SIEC in the EU and SLC in the UK) are largely the same, parallel merger reviews should not lead to divergent outcomes in principle. This is not to say though that this does not remain a possibility.

37. The worst implication of such a scenario is the abandonment of the transaction altogether. Experience with international cooperation in merger cases will aid in keeping such situations to a minimum.

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

38. In globalised markets, competition authorities often cooperate with each other in merger deals affecting a number of jurisdictions. The respective cooperation is successful in the majority of cases and the situation keeps improving. Both the CMA and the Commission cooperate with competition authorities outside the EU.

- **Question 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?

40. Transitional arrangements are needed for mergers shortly before Brexit. In that regard, both the Commission as well as the CMA should make best use of existing instruments, for example referral mechanisms (cf BCLWG paras 6.6-6.8) as well as clarify issues in relation to the implementation of possible remedies.

**State Aid**

- **Question 14:** 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?

41. Leaving aside the possibility for the UK to remain part of the EEA, state aid provisions will likely form an important component of any future trade agreement between the UK and EU. Already a number of bilateral agreements between EU and third countries contain state aid provisions, such as the EU/Turkey Customs Union Agreement, EU/Switzerland Air Transport Agreement and EU/Ukraine Association Agreement.

42. The European Council “Draft guidelines following the United Kingdom’s notification under Article 50 TEU” (29 April 2017) mention State aid. This would suggest that the EU would expect the UK to adopt state aid rules (Cf P Nicolaides, A Postscript on Brexit and State Aid - http://stateaidhub.eu/blogs/stateaiduncovered/post/8502)

- **Question 15:** Will the UK require a domestic state aid authority after Brexit?

43. Ultimately, this will depend on the adopted state aid rules post-Brexit, but most likely the assessment would need to be entrusted to a domestic authority. The EU/Ukraine agreement can serve as an example here.

44. Such authority may also be given the power to scrutinise subsidies granted by public bodies in the devolved administrations.

- **Question 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 UK’s ability to support industries, or individual companies, through favourable tax arrangements?

45. The WTO Agreement on Subsidies and Countervailing Measures is binding upon the UK in relation to goods. Hence, even post-Brexit the UK is not free to subsidise national industries. However, EU state aid rules are stricter than WTO subsidies rules and entail a more pro-active enforcement approach. As such, and depending on the regime put in place post-Brexit, the UK will likely have more leeway to support industries through favourable tax measures.

- **Question 17:** 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?

46. Depending on the state aid rules post-Brexit the Government may have more leeway to support national industries. However, the UK Government should not engage in industrial policies that undermine competition in markets, which appears to be an anachronistic approach reminiscent of the 1960s and 1970s, for two main reasons.

47. First, such an approach will undermine trade relationships with other EU countries and will place the UK in a marginalised position.

48. Second, it may undermine UK’s trade relationships with other countries such as the US and increase the risks of facing retaliatory measures.

- **Question 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?

49. Post-Brexit, the UK government may need to consider devising a system of controlling the ability of public bodies in the devolved nations to grant subsidies. EU state aid rules served as a limitation to such powers and a similar system may need to be put in place.

- **Question 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?

50. Transitional arrangements need to be put in place after the UK’s withdrawal from the EU in relation to notified aid that has not yet been approved by the Commission or aid under Commission scrutiny. In addition, transitional arrangements need to cover possible UK obligations to recover unlawfully granted aid, monitor aid schemes and aid granted

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