1. INTRODUCTION

1.1 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates (Skadden) welcomes the opportunity to comment on the House of Lords EU Internal Market Sub-Committee (the Sub-Committee) inquiry into the impact of Brexit on the various elements of the UK competition regime and the consequent practical implications for enforcement of the competition rules.

1.2 As an international law firm, Skadden has substantial experience advising international businesses on the application of EU and UK competition rules and policy. The comments made in this response paper are those of Skadden and do not necessarily represent the views of any of our individual clients or of individual Skadden partners.

1.3 This response does not contain any confidential or sensitive information, and we are content for it to be published.

2. BACKGROUND

2.1 Currently, responsibility to apply and enforce the EU rules on antitrust and merger control is shared by the European Commission (Commission) and the national competition authorities of the EU Member States (NCAs), facilitated by cooperation agreements and the European Competition Network, which brings together the Commission and the NCAs.

2.2 The UK’s domestic rules on antitrust and merger control are, to some extent, modelled on the EU rules and are to be interpreted consistently with EU law and judgments of the EU courts. State aid rules are exclusively governed by the Treaty on the Functioning of the European Union and controlled by the European Commission, and there is no domestic equivalent in the UK.

2.3 The impact of Brexit on this model based on the supremacy of EU legislation over UK legislation and cooperation between the European Commission and the UK competition authorities will therefore be heavily dependent on the type of arrangements the EU and the UK secure.

2.4 A “hard Brexit”, where the UK would break existing legal ties with the single market, would have the most far-reaching implications for competition policy and enforcement. Implications would be less drastic were the UK to remain in the European Economic Area (EEA), given that most of the EU rules are replicated in the wider EEA. For the purposes of this response paper, we have considered the implications of a hard Brexit.

2.5 However, regardless of the final arrangements between the EU and the UK, Brexit will not change the fact that all businesses with activities across the EU and in the UK will continue to be subject to both the EU and UK competition rules. The aim of this response paper is therefore not to draw
a comprehensive list of each and every consequence of a hard-Brexit on the enforcement of the competition rules, but rather to bring to the Sub-Committee’s attention the antitrust and merger control issues that are likely to be most relevant to international businesses that will be subject to both systems. In our response, we emphasise the importance of legal certainty and a proportionate compliance burden.

3. ANTITRUST

3.1 Interpretation of UK Antitrust Law

3.2 UK companies continuing to do business capable of affecting interstate trade in the EU will still need to comply with EU competition law. It may be desirable to maintain consistency with the EU on interpretation of antitrust law so as to avoid presenting businesses with very different compliance landscapes in the UK and the EU.

3.3 That said, if the European court ceases to have jurisdiction over the UK, there will inevitably be some divergence over time. To help pave the way for a relatively smooth transition, UK courts and regulatory bodies could be required to have regard to EU court judgments and Commission decisions, meaning that a dramatic divergence in jurisprudence — in the short to medium term at least — would be avoided.

3.4 UK as a Forum of Choice for Antitrust Private Damages Actions

3.5 The ability to bring a follow-on action, removing the need to demonstrate the existence of an infringement, has been fundamental in developing the UK’s status as a leading forum for antitrust private damages actions. At present, Commission infringement decisions, as well as UK competition infringement decisions, can form the basis for such actions. In order for the UK to remain a jurisdiction of choice for antitrust private damages actions, and to aid potential claimants to pursue identified antitrust infringements, it should continue to be possible for claimants to bring follow-on claims that rely on Commission infringement decisions.
3.6 Risk of UK Competition Authorities Conducting Parallel Investigations and Importance of Cooperation Agreements

3.7 Assuming that the European Commission will have no involvement in investigating post-Brexit infringements of UK competition law, parallel EU/UK antitrust investigations are almost certain to occur, with the implication being multiple leniency applications, dawn raids, multiple information requests and an increased level of fines compared to present arrangements.

3.8 Given the often cross-border nature of infringement behaviour, continued cooperation between the UK competition authorities and the Commission, as well as other NCAs, will help facilitate enforcement of competition rules, such as in the case of conducting dawn raids where the current working arrangements between the Competition and Markets Authority (CMA) and the Commission would no longer apply.

4. MERGER CONTROL

4.1 National Interest Criteria

4.2 Under Section 42 of the Enterprise Act 2002, prior to the CMA making a decision on reference, transactions relevant to national security, the media or financial stability can be scrutinized on a public interest basis by the relevant secretary of state. These are the same areas of the economy set out in Article 21 of the EU Merger Regulation for legitimate intervention by Member States on noncompetition grounds. A Member State cannot intervene on other grounds unless the Commission assesses that such intervention would be compatible with EU law.

4.3 Freed from the limitations set out in the EU Merger Regulation, the UK government might consider expanding the basis on which foreign takeovers should be subject to a national interest test. However, expanding the scope of the test could send a chilling signal to both UK businesses and foreign investors. In this regard, we would emphasise the need to support the UK economy and investment into the UK in the period leading up to and immediately following Brexit.

4.4 CMA Resources to Manage Increase in Merger Control Activity

4.5 Post-Brexit, the CMA will undoubtedly face a significant increase in the number of mergers it is expected to review. The UK aspect of transactions that, by virtue of their size, currently fall under the jurisdiction of the Commission will fall under the CMA’s radar.

4.6 The CMA will presumably need to increase its staff if it is to manage the increased workload in a way that maintains its credibility as a leading and effective enforcement agency. The government also might revisit the basis on which the CMA has jurisdiction to review smaller mergers. Another alternative would be to streamline the Phase I review process, introducing a relatively light merger notice for transactions that do not present complex issues. Such a change could represent a real improvement to the UK’s competition regime by directing resources away from transactions
where there are no competition implications worthy of extensive investigation, as well as freeing up resources at the CMA.

4.7 Risk of Dual CMA/European Commission Merger Notifications

4.8 In the largest multijurisdictional transactions, one extra filing may not add significant additional cost. However, for those transactions currently subject to notification only in a small number of jurisdictions including the EU, a further notification requirement to the CMA will present a more noticeable burden. In particular, from a timing perspective, the additional filing could delay the closing of transactions given that the CMA’s 40-working-day review period at Phase I is relatively longer than the 25-working-day review at Phase I in the EU.

4.9 This suggests, again, that the CMA might want to review its current set-up for Phase I reviews — not only to alleviate potential resource constraints, but also to avoid adding extra burdens to the closing timetable of multijurisdictional transactions.

4.10 An additional concern is the risk that parallel merger reviews may lead to divergent outcomes. Unless there is a particular feature in the competitive landscape of the UK (compared to the EU), or the CMA and the European Commission start to take markedly different approaches, this is unlikely to happen. However, the scope for this to happen would be wider if, for example, the CMA adopted a much more aggressive stance toward merger reviews, or considerations of the public interest became much more widespread as part of reviews.

4.11 In such a scenario, the burden on notifying parties would undoubtedly be increased, as parties would need to juggle differing demands and potential remedies. This could jeopardise the rationale for a deal entirely.

5. TRANSITIONAL AND COOPERATION AGREEMENTS

5.1 Some level of procedural reforms, cooperation agreements between the UK competition authorities and the Commission (and NCAs) as well as transitional measures post-Brexit will be essential, not only to assist the authorities themselves in navigating the changeover but also to help promote legal certainty and minimise the burden of compliance on businesses.

5.2 For example, in relation to merger control, parties notifying the Commission of their transaction in the final year before Brexit will need to be guided on how the CMA intends to handle the UK aspects of their transaction post-Brexit, especially if the transaction is under review. Guidance also will need to be provided as to how remedies imposed by the Commission pre-Brexit will continue to apply in the UK post-Brexit.

5.3 Furthermore, the UK competition authorities, the Commission and the NCAs would be well advised to continue working together to minimise the risk of conflicting outcomes.
5.4 The Enterprise Act 2002 provides the CMA with a gateway to share information with other authorities, but there is no way to oblige information exchange. The EU, meanwhile, has cooperation agreements in place with a number of third countries.

5.5 Post-Brexit, such agreements between the EU and third countries will no longer apply to the UK. The UK will therefore want to arrange bilateral agreements with at least the same antitrust authorities as those with which the Commission currently has cooperation agreements: Brazil, Canada, China, India, Japan, South Korea, Russia, South Africa, Switzerland and the United States.

We hope that the House of Lords Internal Market Sub-Committee finds this contribution helpful. Please feel free to contact us if you would like to discuss any aspect of our response.

15 September 2017