This paper contains a summary response to the House of Lords’ call for evidence on competition law and Brexit, on behalf of the Commercial Bar Association ("COMBAR").

A more detailed analysis covering the same issues addressed below is contained in the COMBAR Brexit Report of the Competition Law Sub-Group ("the COMBAR Paper") which we understand has been circulated to Members of the EU Sub-Committee.

General – competition policy

The Competition and Markets Authority ("CMA") estimates that UK competition policy produced annual average consumer benefits of £745 million between 2012 and 2015. Those benefits have been generated as a result of a series of reforms to our domestic competition law over the last 20 years by successive Governments. In large part the regime is modelled on, and draws strength from, the EU system of competition law. EU competition law is itself also, at the present time, directly applicable in the UK. As a result, UK businesses and consumers enjoy the benefit of a dual system of protection, both in respect of anti-competitive action confined to the UK, and (for example) Europe-wide and international cartels. The valuable work of the CMA in the UK is complemented by the more far-reaching enforcement action of the European Commission.

The result has been a powerful system of deterrence. Where anticompetitive conduct has occurred, UK businesses and consumers that are the victims of such conduct have gained effective remedies and have claimed substantial awards of damages. The UK has emerged as an international centre of competition litigation, building upon the well-deserved high reputation of our courts.

There is a risk that Brexit (and particularly a “hard” Brexit) could serve to substantially undermine the effectiveness of this regime. The object of post-Brexit competition policy should be to preserve its effectiveness to the maximum extent possible.

Anti-trust

Consistency: the Competition Act 1998 ("the 1998 Act") introduced into domestic law prohibitions on anti-competitive agreements and abuse of dominant position that were modelled upon provisions of EU law. There is

---

1 It has been drafted by COMBAR’s Competition Law Brexit Sub-Group consisting of Daniel Jowell QC; Tim Ward QC; Kelyn Bacon QC; George Peretz QC; Derek Spitz; Anneli Howard; Tristan Jones; Miranda di Savorgnani; Daniel Piccinin; David Bailey


4 I.e: Chapter I and II of the 1998 Act, which correspond to Articles 101 and 102 of the Treaty on the Functioning of the European Union.
an obligation upon our courts to seek to ensure consistency with the EU approach. This has major benefits:

a. Clarity and consistency: businesses face only one set of regulatory rules to comply with; even after Brexit, the same conduct may be subject to both UK and EU regimes;

b. authority: UK competition authorities and courts gain the benefit of over 60 years of decisional and judicial practice in the EU in interpreting those rules.

6. It would be potentially confusing and burdensome on businesses if they had to comply with competition law provisions (UK and EU) framed in almost identical terms but interpreted and applied in significantly different ways. At the least, therefore, an obligation on English courts and competition authorities to take EU law into account should be retained.

At present, section 58A of the 1998 Act provides that findings by the CMA and the European Commission that an infringement of the prohibition on anti-competitive agreements and abuse of dominant position are binding in proceedings for damages. The effect is to allow “follow on” claims for damages based upon such findings. Such claims have proven to be an efficient and effective way in which to address the harm caused by anti-competitive activity. We consider repeal or amendment of section 58A would be undesirable, even though, for reasons further developed below, future Commission infringement decisions may no longer extend to conduct implemented in the territory of the UK following Brexit.

7. The effect of repeal of section 58A would be to create uncertainty as to whether future Commission decisions would be binding in follow-on damages actions brought in the UK. This would discourage such claims being brought in UK and encourage the bringing of such claims in other European states that remain members of the EU or EEA. It is unlikely to be in the interests of UK companies to be compelled to pursue or defend such actions before the courts and tribunals of such other states. Moreover, it is likely to be in the national interest that the UK should retain its pre-eminent role as a centre for international dispute resolution. It is, accordingly, desirable to maintain the status quo whereby such claims (even if they involve infringements of EU law and not UK law) are frequently litigated in the UK and determined by our impartial and experienced UK courts and tribunals. The UK courts are often called upon to apply foreign law – and EU law should, in the future, be no exception.

8. The COMBAR Paper discusses these issues in greater detail at paragraphs 33 – 99.

The UK as “Jurisdiction of choice”: competition litigation in the UK has experienced a substantial boom in the last 15 years as litigants have chosen to bring international cartel litigation in this jurisdiction, attracted by the reputation of our courts, the procedural protections available and professional expertise. A form of Brexit in which the EU competition provisions were no longer applicable in the UK would inevitably diminish the attractiveness of the UK for such litigation, even if, as a matter of formality, such claims could still

---

5 Section 60 of the Competition Act 1998.
There is already anecdotal evidence of some cartel damages work gravitating towards Ireland and other EU jurisdictions. There is also concern on the part of some potential litigants that English judgments might not, in the future, be enforceable in other EU jurisdictions.

9. **Parallel investigations:** the CMA\(^7\) and European Commission have broadly comparable investigatory powers, and apply substantially the same competition rules. The CMA’s jurisdiction is, however, confined to distortions of competition in UK markets, whereas the Commission investigates competition issues across the EU including the UK. In practice, however, the Commission’s investigative reach is far greater: it has proven itself able to take action against global cartels which have detrimentally affected markets within the EU, such as, for example, a cartel in the manufacture of LCD screens which originated in Asia. When the Commission makes a finding of such cartel activity, business and consumers in the UK can sue the cartelists to recover damage caused by that cartel within the EU.

10. The CMA’s activity is of necessity of much narrower scope: it has no track record of investigating such international activity, and to do so would have significant resource implications. If, following Brexit, the Commission no longer makes findings of cartel activity within the UK, there is risk of a substantial gap in protection for UK businesses and consumers – unless a mechanism can be found by which such EU enforcement activity can be extended to the UK or the CMA significantly extends the scope of its existing activities.

11. **Cooperation:** for the above reasons, there would be enormous benefit for the UK if a mechanism could be established whereby EU competition enforcement action could be extended to the UK.

12. As to cooperation more generally, at present the CMA is a member of the European Competition Network and the beneficiary of EU rules which provide for close cooperation between national competition authorities, and the possibility for exchange of information between those authorities and with the Commission.\(^8\) Given the international nature of much anti-competitive conduct which affects UK markets, it would be a considerable detriment to the UK to lose the benefit of these arrangements.

13. This issue is discussed in paragraphs 185 – 234 of the COMBAR Paper.

14. **Transitional arrangements:** it would be highly desirable for transitional arrangements to be in place following withdrawal from the EU that served to maintain the current EU competition rules, at least until an alternative and effective form of protection from anti-competitive conduct were to be put in place. At the very minimum, transitional provisions should preserve the

---

\(^6\) I.e.: in reliance upon foreign law which applied the EU rules. This raises complex conflicts of laws issues, discussed at paragraphs 76-92 of the COMBAR Paper.

\(^7\) Certain UK sectoral regulators also have “concurrent powers” to enforce competition law in the UK.

\(^8\) Regulation 1/2003/EC Chapter IV.
ability of UK courts and tribunals to apply EU law in full in respect of an infringement that occurred before the UK left the EU: see paragraph 102,103 of the COMBAR Paper. This seems to us to be necessary to avoid retroactively stripping parties of their rights and, accordingly, the preservation of the Rule of Law.

15. The EEA Agreement\(^9\) provides one model for such arrangements which contains a dispute resolution mechanism in the form of the EFTA Court\(^10\) and preserves the benefits of the EU competition regime, as further explained in the COMBAR Paper at paragraphs 63-68.

**Mergers**

16. Review of national interest criteria: the UK merger control regime was last revised by means of the Enterprise Act 2002. That legislation replaced a general “public interest” test for mergers with a specific “substantial lessening of competition” test, to be applied by the CMA, supplemented by other specific public interest criteria (eg: media plurality).

17. We consider that the question of the substantive test to be applied should not be revisited as part of the Brexit process. The UK has always been free to adopt a public interest test to mergers falling within its jurisdiction, and whilst we consider there were good reasons for abandoning the “public interest” approach, the arguments for or against such a test are independent of Brexit.

18. If the UK were to adopt a new test that differed significantly from that applied by the European Commission,\(^11\) that would amplify the difficulties that may arise from the loss of the “one stop shop” for large mergers further discussed below.

19. This issue is discussed in paragraphs 130-131 of the COMBAR Paper.

20. Capacity of the CMA: if the UK leaves both the EU and the EEA, the CMA’s work load would expand very substantially. It would have to address not only UK-centric mergers, but global mergers of a kind it has not previously been asked to consider. Whilst it is conceivable that concurrent regulators could play a role in merger control in their respective fields, they have no current expertise in that area and given the wide variety of merger activity, this would be likely to make at best a modest contribution to addressing the CMA’s increased work load.

21. This issue is addressed in paragraphs 104-105, 118 of the COMBAR Paper.

22. Parallel merger regimes: at present the EU offers a “one stop shop” for large mergers\(^12\) that have the potential to affect competition in several EU member

---

\(^9\) The EEA Agreement applies to the Member States of the EU, Iceland, Norway and Liechtenstein.

\(^10\) The EFTA Court has jurisdiction to determine questions of EEA law in respect of Iceland, Norway and Liechtenstein.

\(^11\) The test applied by the Commission is whether the concentration in question would “significantly impede competition within the Common Market or in a substantial part of it”: Regulation 139/2004/EC Art 2(2).
states. If the UK leaves the EU and the EEA, the UK would no longer participate in that “one stop shop” regime, barring a bespoke agreement to that effect. The result would be a very substantial increase in the CMA’s workload in cases of particularly high complexity. On the other hand, certain large mergers, which currently satisfy the thresholds for commission investigation may no longer do so, if the merged parties operate predominantly in UK markets.

23. The loss of the “one stop shop” would also increase the regulatory burden on businesses. At the moment, the procedural rules in the UK and EU regimes are different (para 124 of the COMBAR Paper) and the difficulties would be further exacerbated if the UK were to adopt a substantive test for merger clearance that differed significantly from the test applied by the Commission.

24. This issue is addressed in paragraphs 106-125 of the COMBAR Paper.

25. **Risk of divergent outcomes:** the loss of “one stop shop” clearance carries an evident risk of divergent outcomes, particularly if the substantive test for UK merger clearance was to be amended.

26. **Cooperation:** The UK currently participates in the EU Merger Working Group, which consists of representatives of the European Commission and the national authorities of the European Union who have responsibility for merger review (“NCAs”) together with observers from the NCAs of the EEA. The objective of the Working Group is to foster increased consistency, convergence and cooperation among EU merger jurisdictions. Following Brexit, it would be desirable if the UK remained inside the EU Merger Working Group or at least some other form of informal arrangement.

27. **Transitional arrangements:** if the UK leaves the one stop system, it will be necessary to have at least transitional measures for mergers that have already been notified to the European Commission prior to Brexit, in order that they may continue to benefit from that arrangement. Similarly, if a merger no longer qualifies for notification to the Commission once UK turnover is removed, the Commission should retain jurisdiction to complete its investigation. In addition, it would be highly desirable to extend the Commission’s enforcement powers to the UK (such as the ability to carry out ‘dawn raids’) in respect of mergers that fell within the Commission’s jurisdiction up to the date of the UK’s exit from the one stop shop, as well as an extension of UK legal representatives’ rights of audience before EU courts in respect of such mergers. See further paragraphs 132-134 of the COMBAR Paper.

**State aid**

28. **Future trade agreement:** we consider it likely that retention of State aid control will form an essential component of any comprehensive trade deal between the UK and the EU, whether in or outside the single market. Those rules serve to ensure that State subsidies that have an economically distortive effect should be given only where they are appropriate and proportionate to deal with market failure. In the context of a trade

---

12 Ie: those which satisfy certain turnover thresholds: see paras 108-110 of the COMBAR Paper.
agreement, State aid rules serve to ensure that domestic markets are not opened up to foreign competition which benefits from unfair subsidies.

29. With the exception of Switzerland, every other European country with which the EU has entered into comprehensive trade agreements has accepted that it will comply with State aid rules. Outside Europe, the EU has been prepared to negotiate agreements with Canada (CETA) and the United States (TTIP) which do not contain prohibitions on the grant of subsidies. However, Article 7 of CETA reflects and reinforces WTO anti-subsidy obligations by providing for notification to each other of subsidies granted and for a consultation procedure between Canada and the EU if either considers that the other is harming it by granting subsidies.

30. This issue is addressed in paragraphs 135-155 of the COMBAR Paper.

31. We further consider there are substantial considerations in favour of retaining the State aid rules irrespective of the desirability of concluding a comprehensive trade agreement with the EU: see paras 166-175 of the COMBAR Paper.

32. **Domestic State aid authority:** at present, the State aid rules are administered by the European Commission, with a limited role in State aid enforcement performed by domestic courts. If the UK were to leave the EU and EEA, it would require a domestic agency to administer those rules. If the UK remained in the EEA, the regime would be administered by the EFTA Surveillance Authority.

33. The obvious body to take on the role in the UK would be the CMA, but this would be a considerable expansion of its responsibilities into an area that it has not to date had to deal with, and it would have to be resourced accordingly. Another option would be a “judicial model” under which enforcement decisions would be taken by a court, on application by a specialist State aid monitoring body.

34. We consider that an arrangement which brought the UK into the EEA State aid regime would be the best way forward, if the present State aid regime is to be broadly maintained.

35. These issues are discussed at paragraphs 180-183 of the COMBAR Paper.

36. **Transitional arrangements:** uncertainty as to the transitional provision could well cause delay to infrastructure projects if it is not clear whether and how a new regime would apply. There are complex issues as to the treatment of pending cases identified in paragraph 184 of the COMBAR Paper.

10 October 2017