Summary

The Prime Minister has set out clearly her vision for a secure, prosperous and tolerant UK, which continues to attract international talent, investment and innovation. The Government’s ambition is for the EU and the UK to thrive side by side after the UK leaves the EU. As we move to a new relationship with the EU we want to provide certainty and clarity whilst ensuring an orderly exit, allowing UK consumers and businesses the benefits of a secure outcome.

The UK shares with the EU a fundamental belief in rigorous and fair competition, and remains a strong advocate of effective independent competition enforcement as a key part of a strong competition regime that delivers certainty for business and protects consumers. The UK will continue to play an active part in international competition networks after exit.

After the UK leaves the EU, the consideration of the competition impact within the UK in antitrust investigations will become the sole responsibility of the UK competition authorities (UKCAs). Arrangements for transitional cases are being considered as part of EU exit negotiations. International cooperation and information sharing on competition enforcement, including with the European Commission, will continue to be of fundamental importance. The Government hopes to negotiate a strong future cooperation agreement with the European Commission on all competition matters.

In merger cases the EU will no longer have jurisdiction over UK merger cases post-exit; they will become the responsibility of the Competition and Markets Authority (CMA). There are many practical similarities between the UK and European Commission merger review processes, and the Government hopes to minimise the burden of a dual process on businesses. Transitional arrangements for merger control are also within the scope of the current EU exit negotiations.

As a result of the UK regaining jurisdiction over UK aspects of antitrust and mergers cases, the workload of the CMA is expected to increase. Discussions are under way to ensure that the CMA is appropriately resourced for its post-exit caseload.

The EU negotiating mandate explicitly refers to State aid in the context of any future trade agreement between the EU and UK. The European Commission takes seriously the potentially harmful effects of subsidies on free trade and there is a trend towards increasingly extensive provisions on subsidies in EU Free Trade Agreements. One purpose of the EU (Withdrawal) Bill is to convert EU law, as it applies in the UK on the day of exit, into domestic law. This is to ensure a functioning statute book on the day of our departure from the European Union. The Bill’s powers allow us to preserve the EU State aid rules and to give a UK body the power to police these rules, to ensure the regime

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1 The Competition and Markets Authority and sector regulators with concurrent powers under the Competition Act 1998
works effectively in a domestic context. The longer term options for subsidy control after we leave the EU are subject to negotiation.

Without a domestic State aid regime, the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM) would act as the back stop. Under the ASCM, there are no State aid limits and apart from export and local content subsidies there are no outright bans on any form of State aid. However, under the WTO, members are able to challenge any aid where they believe there has been harm. In particular, it is likely that aid to industries (such as steel) where there are world surpluses, or aid to any highly competitive sector, such as the automotive sector, would be challenged. Furthermore, the ASCM does not apply domestically so there would be no State aid control within the UK.

**Responses to Questions**

**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 The Government remains a strong advocate of effective independent competition enforcement as a key part of a strong competition regime that delivers certainty for businesses and consumers. This will not change after the UK leaves the EU.

1.2 Competition creates strong incentives for business to deliver value, choice and innovation for consumers, in turn driving productivity and economic growth. Competitive markets encourage firms to achieve efficiencies and lower prices, to improve quality in the form of improved products, customer service and after-sales support, and to innovate to attract customers. Consumers benefit from lower prices, increased choice, better quality goods and services, and innovations.

1.3 We will ensure our markets remain open and competitive as we leave the EU, underpinned by strong competition law and proportionate independent regulation.

**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 After our exit, EU jurisdiction over UK aspects of competition cases will end, leaving two separate parallel competition regimes. Under the current EU ‘one stop shop’ arrangements, Member States are relieved of their competence to apply EU and parallel domestic competition law where the European Commission starts proceedings under EU competition law. Post-exit, the UK
should be free to determine its own competition policy and law to ensure effective competition in UK markets.

2.2 In future, the UKCAs and the European Commission would in many instances investigate the same suspected antitrust infringements in parallel. However, after our exit the European Commission would no longer consider the impact within the UK in its investigations. Investigation of the impact within the UK and enforcement of competition prohibitions in the UK would become the sole responsibility of the UKCAs.

2.3 There has been broad convergence over the past two decades on many of the key principles of competition law, policy and enforcement, not only across the EU, but worldwide. The Government is committed to ensuring that any future policy changes are made with reference to international best practice with the aim of maintaining our world-class competition regime and providing as much legal certainty to businesses as possible.

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

3.1 The UK has been at the forefront of promoting private enforcement of competition law, with acknowledged expertise in its judiciary, courts, legal profession and economic consultancies. The UK’s regime permits innovative funding and other mechanisms for competition litigation, enabling consumers and businesses to exercise their rights effectively. Private actions provide redress for UK consumers who have suffered harm as a result of anti-competitive behaviour or agreements. They are an important complement to public enforcement in preventing competition infringements as they increase the total cost to companies of breaching the law, further incentivising companies to ensure compliance.

3.2 Regardless of the outcome of EU exit negotiations, it will still be possible for UK consumers and businesses to bring follow-on actions from UKCA decisions. After EU exit, we anticipate that the UKCAs will be responsible for all aspects of UK antitrust enforcement, and therefore will undertake more investigations (whereas now the EU is responsible for enforcing competition law in the UK in some circumstances). As such, the number of UKCA decisions is likely to increase.

3.3 Other aspects of the UK private actions regime will be subject to changes the UK makes to the competition regime at the point of exit from the EU and negotiations on civil judicial cooperation. The Government is committed to providing as much certainty and clarity as soon as possible to businesses and consumers.
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?

4.1The UKCAs can already investigate issues in parallel with other EU national competition authorities (NCAs) under the current case allocation system established by EU Regulation 1/2003. This will continue to be possible after EU exit. The UK will be able to conclude bilateral or multilateral agreements to make provision as necessary for cooperation and information sharing with other countries.

4.2After our exit, the rules which currently give the European Commission exclusive jurisdiction to investigate civil cases involving anti-competitive activity affecting the EU (including the UK) in certain circumstances (under the framework established by Regulation 1/2003) will cease to apply. Consequently, the UKCAs will be able to open antitrust investigations focused exclusively on the interests of UK consumers and businesses under UK competition legislation, in parallel with the European Commission investigating under the EU rules in relation to the EU impact of such activity.

4.3The new ability to conduct investigations in parallel with the European Commission is likely to result in a greater CMA antitrust caseload. The CMA would need to take some cases with a UK impact that previously the European Commission would have had exclusive jurisdiction over, in order to avoid an enforcement gap and the consequent potential adverse effects for UK consumers and businesses. Discussions are under way to ensure that the CMA is appropriately resourced for its post-exit caseload. The Treasury has provided the CMA with additional funding in 2017/18, to begin preparations for leaving the EU. The Government will continue to work with the CMA on its future resource requirements, as the negotiations with the EU proceed.

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?

5.1We consider that international cooperation on competition enforcement is mutually beneficial, and there is currently close coordination between the UK and key international competition authorities, including the European Commission.

5.2The CMA’s ability to cooperate effectively with the European Commission (including mutual sharing of confidential information and cooperation on investigative and enforcement measures) will remain important after we leave the EU. The CMA will, in many cases, need to undertake large investigations in parallel and in collaboration with the European Commission where an investigation would previously have been undertaken by the European Commission alone.

5.3We will be considering as part of negotiations how cooperation can best be supported in the future.
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?

6.1 The CMA and its predecessor organisations have a strong track record of effective engagement in the development of global principles on competition policies, procedures and approaches, through participation in multilateral international networks such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD), as well as through strong bilateral relationships with EU and non-EU competition authorities. The CMA would expect to maintain such engagement and relationships as part of the global competition community, which could also help in handling the likely increased number of cases in which the CMA will need to cooperate with non-EU competition authorities.

6.2 On leaving the EU, the UK will no longer be part of the cooperation agreements concluded between the EU and other countries such as the US, Canada, Japan, South Korea and Switzerland. However, the CMA and UK Government will be able to agree arrangements for cooperation bilaterally as necessary.

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 There are likely to be cases applying European competition law (both European Commission and CMA cases) that have started but not concluded at the point of Exit. The question of appropriate arrangements for handling these cases, including the jurisdiction which will apply, is within scope of the negotiations concerning UK exit from the EU.

7.2 As with other areas of the EU exit negotiations, the Government aims to provide certainty wherever and whenever it can on matters subject to negotiation. We understand the importance of providing clarity to businesses under investigation and of minimising disruption to investigations and enforcement activities.

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 The Government has recently published proposals to ensure that foreign ownership of companies controlling important infrastructure does not undermine British security or essential services. These proposals will consolidate and strengthen the Government’s powers to protect national security. Until the UK leaves the European Union, the Government will continue to be bound by, and comply with, EU laws.
8.2 After our departure from the EU, we will continue to seek to maintain a clear, stable and open environment for trade and investment, underpinned by the recognition that the UK thrives on openness to trade.

8.3 The UK is, and will remain, a member of the WTO upon its exit from the European Union. The UK will continue to ensure it fully meets its obligations under its bilateral investment treaties, as well as the WTO General Agreement on Trade in Services which sets out WTO members’ rights and freedoms in relation to investing in the UK’s markets.

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 Based on the current UK jurisdictional merger thresholds, the CMA estimates that it could have an additional caseload of between 30 and 50 phase one mergers per year. This might reasonably be expected to result in a small number of extra phase two cases. It is possible that the size and complexity of the transactions currently reviewed at the European Commission is greater, on average, than the size and complexity of the transactions currently reviewed by the CMA. Therefore, the additional cases over which the CMA will gain jurisdiction post-exit may require more resources per case than the current CMA cases.

9.2 Discussions are currently under way to ensure that the CMA is appropriately resourced for its post-exit caseload.

9.3 The Government considers that the current allocation of competition responsibilities between the CMA and regulators has many benefits, in terms of consistency, clarity, expertise and efficiency arising from mergers being assessed by a single agency. We do not therefore anticipate a change to this approach at this point.

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

10.1 Notification of mergers to both the CMA and the European Commission could arise for cases which trigger the CMA’s and the European Commission’s jurisdiction thresholds. This will be only a proportion of the cases reviewed by each authority. Based on the current jurisdiction thresholds, some mergers that occur after the UK’s exit, may no longer be notifiable to the European Commission because the UK turnover will no longer be taken into account for the purposes of the EU turnover jurisdictional threshold.

10.2 The UK has a voluntary notification regime, so companies would not necessarily have to notify mergers in the UK. Where companies choose to notify the CMA of a merger and a European Commission merger notifications is required, companies may have to make an additional filing and undergo an additional investigation compared to the current ‘one stop shop’ for case allocation handled by the European Commission. Many deals already involve
multiple jurisdictions and merger filings with multiple authorities, meaning companies and their advisers are well placed to adapt to this change.

10.3. In practice, the additional burden on business of notifications to the CMA and the European Commission will be limited by the many practical similarities between the European Commission and UK merger review processes. Significant elements of the information requested by the CMA and the European Commission are likely to be similar in nature, as is the legal and economic analysis to be undertaken. Furthermore, the Government hopes to negotiate a close relationship of cooperation with the European Commission in future, which would also help mitigate any additional burden.

10.4. Finally, we will look to ensure the UK regulatory regime is as efficient and effective as it can be to minimise any burden. The CMA has introduced measures to make its merger review process as efficient as possible, including improved notification and template forms, which will help to reduce the burden of a dual process on businesses.

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 The possibility of divergent outcomes already exists under the present system, in relation to parallel merger investigations between the CMA and non-EU authorities, and in cases between the CMA and authorities in other Member States (where the European Commission has not opened a review). This is relatively normal in international merger control where the geographic scope of a market is national rather than global or EU-wide.

11.2 There are many similarities between the approaches of the European Commission and the CMA which mitigate this risk in future – for example both systems apply a similar competition test, and apply similar analytical approaches. As such, it is not clear that significant divergences will occur often.

11.3 In the relatively rare circumstances where divergent outcomes might occur, the implications will vary according to the facts of the case.

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

12.1 Both the CMA and European Commission regularly cooperate with non-EU competition authorities on merger reviews, including the US competition authorities (the US Federal Trade Commission and the Department of Justice), the Australian Competition Authority, New Zealand Commerce Commission and the Canadian Competition Bureau.

12.2 Appropriate cooperation and coordination has the benefit of minimising the risk of significant timing or practical issues, and reducing the likelihood of divergent outcomes.
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 An agreement on transitional arrangements for merger control would be desirable. An agreement would provide greater clarity to businesses and the relevant competent authorities on issues such as jurisdiction for cases under way at the point of exit. Responsibility for enforcement of UK aspects of EU merger remedies and commitments made pre-exit that require monitoring or review post-exit, and appropriate appeal routes, are within scope of the current EU exit negotiations.

State Aid

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?

14.1 The EU negotiating mandate explicitly refers to state aid in the context of any future trade agreement between the EU and UK. The Prime Minister also referred to state aid in her Florence Speech and specifically that “we share the same set of fundamental beliefs; a belief in free trade, rigorous and fair competition, strong consumer rights, and that trying to beat other countries’ industries by unfairly subsidising one’s own is a serious mistake.”

14.2 Free Trade Agreements (FTAs) which the EU has entered into with third countries include some reference to State aid or subsidy. These all go beyond the WTO Subsidies and Countervailing Measures Agreement (ASCM) and cover a spectrum from:
- those that cover services as well as goods (the WTO ASCM covers only goods); and
- those that cover goods and services, and include greater information sharing, such as in the Comprehensive Economic and Trade Agreement (CETA) with Canada; to
- the Association Agreements with potential Member States, such as the Ukraine, which take on the full rules.

14.3 The most recent FTA which the EU has agreed in principle - with Japan - includes State aid clauses. These prohibit unlimited state guarantees and propping up companies which have no hope of returning to viability. There are also information-sharing requirements which go beyond those of the WTO. The European Commission has also opened talks with China on subsidies and is keen to promote greater subsidy control and an international level playing field through both the WTO and OECD. Commissioner Vestager recently referred to this in her speech on 26 September in Brussels. This illustrates how seriously the European Commission takes the potentially harmful effects of unfair subsidy on free trade – and demonstrates a trend towards increasingly extensive provisions on subsidies in EU FTAs.
15. **Will the UK require a domestic state aid authority after Brexit?**

15.1 One purpose of the EU (Withdrawal) Bill is to convert EU law, as it applies in the UK on the day of exit, into domestic law. This is to ensure a functioning statute book on the day of our departure from the European Union. The Bill’s powers allow us to preserve the EU State aid rules and to give a UK body the power to police these rules, to ensure the regime works effectively in a domestic context. The longer term options for subsidy control after we leave the EU are subject to negotiation.

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?**

16.1 The WTO Agreement on Subsidies Countervailing Measures (ASCM), which applies currently to the UK, would act as the backstop on exit if the UK left the EU without a trade agreement. However, if the UK takes over the various trade deals which the EU has with third countries, there will be some form of subsidy control embedded in these – often going beyond the WTO rules. The definition of State aid is similar under both regimes, although the ASCM does not apply to services. The main difference is that State aid under the ASCM does not have to be notified in advance, and enforcement only happens ex-post.

16.2 In addition to there being no obligation to notify and seek approval for aid before it is granted, there are no State aid limits; and with the exceptions of export and local content subsidies, there are no outright bans on any form of State aid (in comparison, the EU system places limits on rescue and restructuring aid). It is therefore theoretically possible to give more State aid for different purposes under the ASCM.

16.3 However, under the ASCM, WTO members are able to challenge any aid where they believe there has been harm. Unlike under the EU regime, there is no concept of an ‘approvable’ aid, where the benefits of an aid are balanced against the negative effects on trade. In particular, it is likely that aid to industries (such as steel) where there are world surpluses, or aid to any highly competitive sector, such as the automotive sector, would be challenged. WTO members would be particularly sensitive in relation to mobile investment or to any subsidy that was obviously selective (e.g. to build a national champion).

16.4 Tax advantages would be actionable subsidies in the same way as any other form of aid. If a member could prove harm to their domestic industry or in a third market because of the alleged advantage it would be open to it to take action. This could result in the tax advantage being withdrawn or in the very worst case to countervailing tariffs being imposed against the UK.

16.5 Under the ASCM companies cannot complain about State aid directly – only members can do this. The threshold for complaint is high and in practice is highly political. There is no independent policing of State aid and the
emphasis is very much on resolving disputes by agreement to withdraw State aid measures rather than removing the anti-competitive effects through recovery.

16.6 Finally, the ASCM does not apply domestically. Thus if only WTO rules applied there would be no State aid control within the UK. There would therefore be a risk of domestic subsidy races and distortions of competition between various parts of the UK.

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?

17.1 As part of the industrial strategy, Government is identifying the UK’s competitive strengths, exploring with industry the ways in which Government can help, and will seek to put in place institutions and relationships to sustain higher levels of productivity over the long term. It is about creating an economy resilient to change and fit for the future, not about the Government propping up failing industries or picking winners, but about creating the conditions where winners can emerge and grow in all industries and sectors.

17.2 While the Government will need to be mindful of the needs of the industrial strategy in considering its approach to State aid after exit, we note that in practice the existing EU rules have always been sufficiently flexible to allow us to make innovative aid interventions where necessary.

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 The Government will be engaging the Devolved Administrations in discussions on this, in line with the other discussions concerning the UK internal market after Exit.