

## Monckton Chambers response

*This is a response on behalf of Monckton Chambers to the Brexit Competition Law Working Group (“BCLWG”) Issues Paper (“the Issues Paper”). It takes into account comments from a number of members of chambers but does not necessarily represent the views of any individual member. Certain individual members have submitted separate responses, in a personal capacity.*

### General comments

#### Introduction

1. The Issues Paper is concerned with the steps that the UK should take in response to Brexit in the field of competition law, assuming that the UK will not join the EEA. The following sections set out the key steps that we consider the UK Government should take, relating to private litigation, the content of the antitrust rules and their enforcement by the CMA. Annex I sets out comments on specific issues raised by the Issues Paper, including potential reforms in the areas of mergers and market investigations and transitional arrangements.
2. We begin in this section with some more general comments relating to the objectives and benefits of competition policy, including recent reforms in this area. These will, of course, be familiar to the BCLWG. However, we include them here because in our view it is important that these considerations should be emphasised to the Government by the BCLWG, and also other parties in the sector when making submissions on Brexit-related matters, in particular given the current political climate.

#### A dual regulatory burden

3. There may be a tendency among some to believe that, for the purposes of implementing Brexit, the UK should be looking to remove all traces of EU law or the EU regulatory regime from our domestic legal framework. In particular, those who argued in favour of Brexit often claim that by substituting UK for EU law, the regulatory burdens on UK companies will be reduced, allowing the UK economy to become more dynamic and productive.
4. Whatever the position elsewhere, that line of reasoning does not apply in the field of competition policy.
5. This is not an area in which one can simply substitute UK law for EU law. Rather, the reality will be that the UK regime will continue to operate in parallel with EU law, which will continue to apply to UK companies, including most large companies, whose activities are capable of affecting competition on continental Europe. As a result, the effect of Brexit will be to impose a dual regulatory burden on many UK businesses – with the risk of differing compliance regimes and double jeopardy in terms of investigations and penalties. It will therefore be necessary for domestic law to contain provisions enabling the UK authorities sensibly to co-ordinate their activities with their European counterparts, in order to minimise the regulatory burden on UK companies and to

avoid inefficient duplication of work (at the expense of UK taxpayers). The desire to minimise the dual regulatory burden also has implications for the substantive content of domestic competition law.

### The benefits of effective competition law enforcement

6. Competition law is not an area of EU law which imposes disproportionate regulatory burdens going beyond what we, in the UK, consider to be appropriate. On the contrary, when it reformed the domestic antitrust rules in 1998, the Government deliberately chose to model them on the main EU law provisions. The overriding concern of successive UK Governments has not been that there is too much UK enforcement of competition law, including of the EU competition rules, but that there has been too little.<sup>1</sup>
7. That has been in part because competition law protects consumers and small businesses, but also because it drives increases in UK productivity, now a key policy objective. The present Government, like its predecessors, believes that “[c]ompetitive markets are fundamental to fostering productivity growth”.<sup>2</sup> HM Treasury recognises that “The UK’s competition framework is a clear strength”, referring to research suggesting that improvements in competition policy may have accounted for 20% of industry productivity growth in the UK in the decade to 2005.
8. In order to protect consumers and drive productivity growth, competition law needs to be effectively enforced, in particular through private actions. Consistent with this, recent Impact Assessments relating to the Consumer Rights Act 2015<sup>3</sup> and the UK’s implementation of the Damages Directive<sup>4</sup> have recognised that making it easier to bring private enforcement actions in the domestic courts generates large benefits for UK consumers and the UK economy.
9. Crucially, for present purposes, these benefits flow from the effective enforcement in the UK of the EU competition rules, as well as of the UK provisions. That is because many of the largest distortions to competition in the UK will be result of anti-competitive practices operating across several European countries. These are exactly the type of practices that the European Commission (“Commission”) is likely to investigate and make subject to infringement findings.

### Follow-on actions

10. Currently, where the Commission has taken such a decision, private parties are able to bring claims for redress in the domestic courts without having to re-prove liability. It might be said, however, that following Brexit Commission decisions

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<sup>1</sup> In 2001, the Government observed that “[w]here behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators”, and stated that it was “keen to achieve a system in the UK where private actions are less inhibited than at present”. See DTI, *A world class competition regime*, July 2001.

<sup>2</sup> HM Treasury, *Fixing the foundations: creating a more prosperous nation*, July 2015.

<sup>3</sup> DTI, *Private actions in competition law: final impact assessment*, January 2013.

<sup>4</sup> BIS, *UK implementation of the EU Damages Directive (2014/104/EU) – impact assessment*, July 2015.

(or judgments of the European courts on appeal from such decisions) should not bind UK courts in respect of any matter, including whether there has been an infringement of EU competition law.

11. In our view, such an approach would be misguided, as its main effect would simply be to reduce the protections available for UK consumers and, as a result, the incentives on companies which sell in the UK to compete on the merits. One of the Government's priorities should therefore be to ensure that EU follow-on actions remain possible following Brexit.
12. As already noted, the substantive content of the UK and EU antitrust rules is for most purposes the same. The easier it is for parties to enforce the EU competition provisions in UK courts, the easier it is for UK companies and consumers to claim redress for the harm caused by activities that are contrary to (virtually identical) UK and EU laws.
13. A good example is the follow-on class action currently being brought against MasterCard on behalf of all UK consumers in the Competition Appeal Tribunal. The claim is worth £14 billion and is said to be the largest ever brought in the UK courts. The claim follows-on from a decision by the Commission, upheld by the EU courts, that MasterCard breached the EU competition rules. If the claimants can establish that the breach of EU law resulted in harm to UK consumers, millions of UK citizens will receive financial compensation.
14. Removing the possibility for such EU follow-on actions will make it significantly harder for UK consumers and companies (including SMEs) to bring such claims. While it would in principle be open to the CMA to conduct parallel investigations into all the EU-wide anti-competitive practices capable of affecting the UK market, in practice that will not happen as such investigations impose huge costs on the investigating authority. And since the main tool for bringing to light cartels is the operation of administrative leniency programmes, notably that of the Commission, the opportunities for UK parties to bring standalone actions in the national courts for breaches of the EU antitrust rules can be expected to be limited. It is possible for parties to bring standalone claims that do not concern cartels, of course; however, experience from the past decade shows that far fewer claims would be brought, given the difficulties and costs faced by a private party in re-proving liability.
15. In addition to benefitting UK consumers, the ability to bring EU follow-on actions also directly benefits the UK economy. The UK is currently the preferred destination in Europe for claimants to bring follow-on actions for breach of Articles 101 and 102.<sup>5</sup> The effect of removing the possibility for such follow-on actions would simply be to transfer a considerable volume of litigation business to other Member States. That litigation business is currently worth tens if not hundreds of millions of pounds to the UK economy, and losing it would clearly be contrary to the financial interests of UK plc.

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<sup>5</sup> European Commission, *Competition policy brief*, Issue 2015-11, January 2015. This suggests that between 2006 and 2012, 31 follow-on actions were brought in the UK. The countries with the next highest number of follow-on actions were Germany (with 14) and the Netherlands (with 5).

16. The steps required to preserve the ability to bring EU follow-on actions are discussed in the following section.

## Private litigation

### Bringing competition claims

17. We cannot see any reason why the Government would want to make it harder for claimants to bring private actions to enforce the UK antitrust rules, including through follow-on actions based on decisions of the CMA.
18. As for the EU antitrust rules, absent any legislative changes it seems likely that parties would be able to bring actions in the domestic courts based on an alleged breach of Articles 101 and 102 as claims for breach of a foreign tort. However, in order to remove any doubt in that regard,<sup>6</sup> we suggest that a provision should be enacted expressly providing that such claims may be brought in the High Court and the Tribunal.<sup>7</sup>
19. The default position would be that expert evidence would be required in order to prove the content of the EU antitrust rules as an issue of fact. In our view it would be helpful if legislative provision could also be made in order to remove this requirement in respect of the EU antitrust rules, which would instead be the subject of legal submission in the same way as matters of English law.
20. The need to adduce expert evidence would increase the costs of litigating the EU antitrust rules in the domestic courts, potentially discouraging such claims. And the requirement is not needed, as UK lawyers and courts are very familiar with the content of these rules - unlike, say, tort laws in France or Germany. UK lawyers and courts are likely to remain familiar with the EU antitrust rules for the foreseeable future, given that the UK antitrust rules are modelled on the EU provisions and EU authorities will remain at least of persuasive authority. Requiring the content of EU antitrust law to be proved as a fact would be unhelpful and unnecessary.<sup>8</sup>

### Proving breach

21. Regardless of whether the content of the EU provisions were the subject of expert evidence or legal submission, the question would then arise as to how their breach could be proved. Claimants could bring stand-alone actions in which they bear the burden of proving the infringement in the usual way.
22. However, for the reasons set out above, we consider that both UK consumers and the UK economy will benefit if it continues to be possible for parties to bring

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<sup>6</sup> The main risk is that the EU antitrust rules might be regarded as a foreign public policy law (see 14<sup>th</sup> edition of Dicey & Morris, 2006, §§5 to 33).

<sup>7</sup> And in the Court of Session and Sheriff Court in Scotland and the High Court of Northern Ireland.

<sup>8</sup> The position could potentially be revisited in the future, for example if over time the domestic rules diverged significantly from the EU rules.

follow-on actions based on infringement decisions of the Commission.<sup>9</sup> We therefore consider that s.47A of the Competition Act 1998 should remain substantively unchanged.

### Other issues

23. It would be helpful if it continued to be possible for national courts to communicate with the Commission in relation to claims alleging an infringement of the EU antitrust rules.
24. In a standalone action, UK courts will be more than capable of deciding for themselves (based on existing case law) whether there has been an infringement of the EU or UK antitrust provisions, as well as determining their own procedure. There will no longer be any risk of UK courts infringing their duty of sincere co-operation by taking decisions which conflict with current or anticipated decisions of the Commission or European Courts.
25. However, in any action where a Commission decision is relevant to the domestic claim (e.g. whether in a follow-on action or a standalone claim), practical questions could arise in respect of which the Commission might be able to assist. Examples could include precisely what was meant by certain recitals in a decision, or in relation to redactions, documents on the Commission file or matters of confidentiality.
26. As for whether the UK should retain whatever provisions are enacted in order to implement the Damages Directive in the UK, in our view there will be no good reason to repeal them. As the Government's consultation on implementation of the Damages Directive noted,<sup>10</sup> the Directive is designed to make it easier for claimants to claim compensation for breaches of the EU competition rules. Any provisions which further that objective can be expected to benefit UK consumers and enhance the competitiveness of the UK economy (insofar as breaches affect competition in the UK).
27. The Government's consultation document recognised that “[d]uring the negotiation of the Damages Directive, the UK successfully ensured that it was based closely on the UK model”.<sup>11</sup> The changes required to UK law were therefore relatively minor. However, the Government's preferred approach was to make the changes applicable to actions for breaches of the UK antitrust rules, as well as to actions for breaches of the EU provisions, reflecting the fact that the Impact Assessment found that they would positively benefit UK consumers and the UK economy in both categories of case.<sup>12</sup> The Impact Assessment implies that repealing the provisions would result in a loss to the UK economy of around £90 million.

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<sup>9</sup> Against parties who would have had a right of appeal against such decisions.

<sup>10</sup> BIS, [Implementing the EU Directive on damages for breaches of competition law](#), 2016, para 1.1.

<sup>11</sup> *ibid*, para 1.4.

<sup>12</sup> UK implementation of the EU Damages Directive (20014/104/EU) – impact assessment.

## The UK antitrust rules

28. In terms of s.60 and the status of EU case law post Brexit, the standard approach under UK law is that legislative changes do not affect rights and obligations accrued under the previous legislative regime.<sup>13</sup> As a result, we would anticipate that European Court judgments which have binding effect under s.60 will continue to have that status in respect of the pre-Brexit period. Any other approach would be inconsistent with the assumption against retroactivity in UK law.
29. The main issue concerns the status of European Court and Commission decisions in the field of competition policy in the post-Brexit period. This raises the more general question of whether it is in the UK's interest for UK antitrust law to continue largely to mirror the EU antitrust rules over the longer term. It seems to us that there are a number of reasons why this would be beneficial.
  - a. The context is that when the UK reformed its domestic antitrust rules in 1998 it was not obliged to model them on the EU rules but deliberately chose to do so.
  - b. That no doubt reflected the fact that the UK considered that rules with broadly the same content as the EU rules would effectively promote competition within the UK, with resulting benefits to UK consumers and productivity.
  - c. While there is always a lively debate within any competition law jurisdiction as to whether certain classes of agreement or conduct should be treated more or less leniently, we are not aware of any widespread dissatisfaction with the present approach amongst UK competition lawyers.
  - d. The EU will remain an important market for UK companies, which will therefore have to assess compliance with the EU antitrust rules. The overall compliance burden on UK companies is likely to be increased the more that the UK antitrust rules diverge from their EU equivalents.
  - e. The UK is currently an attractive destination for litigation based on the EU antitrust rules in part because of the familiarity with those rules of UK competition lawyers (and also economic experts and consultancies). UK lawyers will inevitably remain familiar with the EU rules over the next few years. Over the longer term, however, that familiarity may reduce if the domestic competition rules begin to diverge significantly from the EU rules. That may in turn reduce the attractiveness of litigating points of EU competition law in UK courts.

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<sup>13</sup> Interpretation Act 1978, s.16(1)(c).

- f. Similarly, the less UK competition lawyers need to be familiar with the EU rules for the purposes of applying domestic competition law, the less likely companies are to send advisory work based on the EU antitrust rules to UK lawyers, rather than to lawyers based on the continent, contrary to the interests of UK plc. (We recognise that, after Brexit, there may be a question whether legal privilege will be recognised by the EU institutions as attaching to advice given by a UK lawyer to their client. We consider that, as a priority, it should be sought to be agreed with the Commission that legal professional privilege will continue to be recognised for the advice of UK lawyers, as previously).
- 30. This is, of course, an issue that could potentially be revisited by UK policymakers in the future. However, at the time of Brexit UK companies are going to be subjected to a great deal of legal change. Maintaining the current *status quo* in terms of the substance of the UK antitrust rules, at least for the time being, would avoid creating yet more legal uncertainty for UK companies during what will be a very uncertain period.
- 31. As to how this approach could be implemented, ss.60(1) and (2) should be repealed: it is unlikely to be politically acceptable for UK courts to be bound by judgments of the European courts, and the UK Government will not have had an opportunity to intervene in any EU cases. Instead, a revised s.60 could provide that UK courts and regulators should, when applying the Chapter I and Chapter II prohibitions, ‘have regard’ to relevant judgments of the European courts, as well as to decisions and statements of the Commission (as currently required by s.60(3)).

## **Public enforcement of the UK antitrust rules**

### Leniency

- 32. The CMA and the sectoral regulators enforce the UK competition rules in part by monitoring market activity and initiating investigations. However, many of the most harmful cartels are brought to light as a result of whistleblowing encouraged by the existing leniency regimes.
- 33. UK and EU competition authorities are united in a belief that leniency regimes make it a lot easier to detect and punish the worst forms of anti-competitive agreements. Given that both UK and EU-wide cartels are capable of significantly increasing prices for customers, including UK businesses and consumers, it is in the UK’s interests to ensure that a UK leniency regime remains in place and dovetails effectively with the EU leniency regime. In addition, the requirement to make dual notifications would introduce an unnecessary dual regulatory burden on UK companies – and the risk that they might lose the ‘leniency race’ if their notification to the UK is not recognised in the Member States.

34. As a result, we suggest that the UK and EU should agree mutual recognition of leniency applications, such that a leniency applicant in one jurisdiction benefits from protections for leniency applicants also in the other jurisdiction.<sup>14</sup> The most straightforward way to achieve this would be to negotiate the mutual recognition of a leniency regime based on that currently set out in Regulation 1/2003 and the accompanying Commission notices.<sup>15</sup>
35. There is a related concern about the exchange of leniency and settlement documents between competition authorities and their use for other purposes (whether that is other competition law investigations in other States or wider regulatory investigations and/or market reviews). Regulation 1/2003 prohibits the disclosure of corporate leniency statements to jurisdictions which do not have equivalent protections for the rights of defence and/or the use of the admissions contained therein for the purpose of criminal investigations (such as in Ireland). Similar protections should be put in place to protect the rights of defence of individuals employed by UK companies that have participated in cartels.
36. Also, litigants are increasingly seeking access to the administrative file of competition authorities to obtain evidence to assist with competition damages actions. The Damages Directive contains protections restricting the disclosure of leniency and settlement statements and provides that they are not admissible as evidence before national courts in damages litigation. Similar protections need to be replicated for statements given by UK companies and disclosure guidance for national courts to uphold the leniency regime.

### Resources

37. As the Issues Paper notes, the ending of the one-stop-shop for mergers will result in the CMA having to undertake significant additional merger work. The CMA charges merger fees, and this may help to cover some or all of the cost of the additional work.
38. However, to the extent that merger fees are not sufficient to cover the additional work, we consider the Government should ensure that the CMA has sufficient funding that it does not need to divert resources from its other activities. The CMA's other activities include, in particular, Competition Act cases and market investigations, and the NAO's most recent report on the UK competition regime made it clear that the CMA needed to increase, rather than reduce, its caseload in

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<sup>14</sup> Among other things, this will involve ensuring that leniency applicants are awarded immunity for being first past the post, that voluntary leniency submissions cannot be used for the imposition of criminal sanctions, and that leniency statements will not be disclosed by NCAs or the Commission as part of access to the file or in subsequent damages actions.

<sup>15</sup> While some UK lawyers may be attracted by the balancing approach set out in the ECJ's *Pfleiderer* judgment, this is likely to be unattractive to the Commission, which clearly prefers the absolute prohibition on the disclosure of leniency materials set out in the Damages Directive. Given that the UK will need to negotiate numerous different reciprocal arrangements in the field of competition policy (let alone in other areas), accepting the current approach is likely to be the most straightforward option.

these areas.<sup>16</sup> Unless additional funding is provided, there is a real risk of an enforcement gap.

39. Any additional funding to enable the CMA to maintain and increase its enforcement activities should more than pay for itself.
40. That is true in the sense that a higher level of enforcement activity is likely to result in the Government receiving larger enforcement fines from infringement decisions. But it is also true more generally, as the NAO accepted CMA estimates that its enforcement activities produced average annual direct consumer benefits worth £745 million over the period 2012 to 2015. That represents a more than tenfold return, given annual direct spending on the UK competition regime of £66m.
41. These benefits are attributable in part from the deterrence effect produced by the CMA's Competition Act investigations. But they also result from the CMA's market investigations, widely regarded as one of the most effective aspects of the UK competition regime. A good example is the market investigation concluded in 2009 into BAA's airports, which resulted in the divestiture of Gatwick, Edinburgh and Stansted airports. A study has estimated that this will produce benefits for the UK economy of £870 million by 2020.<sup>17</sup>
42. If the CMA has to divert resources from elsewhere in order to manage its additional merger caseload, that is likely to reduce the overall benefits to the UK economy from the competition regime. In particular, it is likely to result in less competitive UK markets, at a time when the UK's overall economic strategy is likely to be based around creating a more dynamic and productive economy.

2 December 2016

**Monckton Chambers**

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<sup>16</sup> NAO, *The UK competition regime*, 5 February 2016.

<sup>17</sup> CMA, *BAA airports: evaluation of the Competition Commission's 2009 investigation remedies*, para 1.13.

## Annex 1: detailed points on the issue paper

### Part A: Immediate issues

<i>Mergers and market investigations</i>	
2.5.1	The CMA's resources should be increased. See paras 37 to 42 above.
2.5.2 to 2.5.4	Given that the CMA and Commission will be scrutinising some of the same mergers in parallel, it will be important for the UK to negotiate arrangements which allow the two bodies to cooperate closely. The more that the two authorities are able to share their developing analysis, the more the CMA will be able to take into account the Commission's work, which may allow it to avoid unnecessary duplication (saving costs for UK taxpayers).
2.6.1	When deciding whether to initiate a market investigation, the Commission's activities will be a relevant consideration for the CMA to take into account, but there should be no bar on the CMA investigating a market in parallel with the Commission where there are good reasons for doing so (for example, if any regulatory intervention needs to take place quickly in order to be effective). In other cases, the CMA might feel able to wait. There might be cases where, having seen the outcome of the Commission investigation, the CMA could invite parties to offer undertakings in lieu of a reference (e.g. potentially equivalent to commitments offered to the Commission).
<i>Antitrust rules</i>	
2.9.1	We doubt it would be appropriate to require the CMA to open investigations into activities and conduct under investigation by the Commission at the time of Brexit. This would prevent the CMA from determining its own workload based on its administrative priorities, and would place additional strain on its resources.
2.9.2	Where British companies are engaged in activities which restrict competition within the EU, we expect the Commission will have power to investigate those activities post Brexit in the usual way (in the same way as it currently has power to investigate the activities of companies located outside the EU which infringe the EU competition rules). The Commission is unlikely to be willing to relinquish this power, and we do not see why it would be in the UK's interests to try to limit it. Where an agreement or conduct is contrary to the EU antitrust rules and also restricts competition in the UK, the interests of UK consumers and the UK economy are promoted where enforcement action is taken against it, whether that action is taken by the CMA or the Commission. Any UK companies that are defendants in Commission investigations will have the usual rights of appeal.  In CMA cases, any statements of objection issued pursuant to Articles 101/102 will be of historic interest only. Should the CMA choose to take the case to a final decision, it will do so only on the basis of the Chapter I and Chapter II prohibitions.
2.9.3	Where a party acts in breach of commitments offered to the Commission and the conduct harms competition in the UK, it would be helpful if there was a mechanism under which the CMA could ask the Commission to take enforcement action. If the Commission is unwilling to take enforcement action, or there is legal uncertainty as to whether it has the power to take such action, it would be open to the CMA to indicate that it will consider opening a Competition Act investigation

	unless the party is willing to put an end to the conduct and offer binding undertakings to the same effect as the commitments offered to the Commission.
2.9.4	In relation to Block Exemptions, a provision could be enacted providing that EU Block Exemptions will apply in the UK unless specifically provided for. A schedule of EU Block Exemptions that do not apply in the UK could be managed by the CMA or the Secretary of State. An ‘opt-out’ regime seems preferable to an ‘opt-in’ regime, given that Block Exemptions only last for a fixed period of time and an ‘opt-in’ regime would require regular amendments to the schedule.
2.9.5	<p>The UK and EU should agree mutual recognition of leniency applications for future cases. See paras 32 to 36 above. Were the CMA to initiate an investigation into a cartel case currently under investigation by the Commission, we consider that the CMA should afford a leniency applicant the same protections as would have been afforded to him under the EU rules. Any other approach would appear unfair to the applicant and is likely to undermine attempts by the CMA to develop a good working relationship with the Commission in the post Brexit world.</p> <p>In any event, it may well not be efficient or proportionate for the UK to open Competition Act investigations in parallel with ongoing cartel investigations of the Commission. If it continues to be possible for parties to bring EU follow-on claims in the domestic courts, cartel members investigated by the Commission for breaching the EU antitrust rules will have a strong incentive to bring their cartel activity to an end, including to the extent that it harms UK companies and consumers. If public enforcement is also desired, once a Commission cartel investigation has been completed it would be open to the CMA to indicate that it will consider opening a Competition Act investigation unless the parties are willing to offer binding undertakings to the CMA to bring the cartel to an end.</p>
2.9.6	As the Issues Paper notes, EU case law currently only accords legal privilege to advice given to a company by external EEA-qualified legal counsel. To the extent the EU were to deny any legal privilege protections simply on the basis that the lawyer practices outside the EEA, it is not clear to us that this complies with the ECHR. In any event, however, given the importance of the issue the UK should negotiate that UK lawyers should be afforded the same legal privilege protections as EEA-qualified lawyers. This may be tied-into negotiations concerning the mutual recognition of legal qualifications.

## Part B: longer-term issues

<b>Mergers and market investigations</b>	
3.2 to 3.3	<p>As for the possibility that the UK merger criteria might be amended so as to include additional public interest criteria, a priority will be to maintain the actual and perceived independence of the CMA, which as the NAO recently stated is “central to its credibility and impact”.<sup>18</sup> Also the NAO also noted, the CMA “has established robust processes to maintain its independence, including publication of evidence submissions and of correspondence with ministers”. It is important that these protections are preserved, in particular if additional public interest considerations are introduced into the regime.</p> <p>There is no obvious nexus between Brexit and the inclusion of additional criteria, as the UK has previously chosen to limit public interest interventions to a narrow range of cases even for mergers falling outside the Commission’s jurisdiction. However, if additional public interest considerations were to be introduced, this should be possible within the existing legislative framework, under which the Secretary of State may intervene on specified public interest grounds, following which the CMA provides an advisory report on the public interest considerations with the final decision being taken by the Secretary of State. It would be harder for the CMA to maintain its perceived independence if it were required to take final decisions on public interest matters.</p> <p>We would associate ourselves with the CMA’s comments in <a href="#">its submission</a> to the Business, Innovation and Skill Committee’s inquiry into the Government’s industrial strategy. In particular, any additional public interest considerations should be clearly defined, in order to maintain legal certainty, and should be capable of being objectively assessed. And by assessing mergers primarily by reference to their effects on competition, the UK regime currently acts consistently with international best practice and decades of UK industrial policy, going back to the Tebbit guidelines of 1984, developed in parallel with – but independently of Europe. Before departing from that approach, careful consideration should be given to whether any changes might undermine the UK’s ability to attract investment from overseas through mergers and acquisitions.</p>
3.4	<p>While it would be preferable for the UK merger timetable to be aligned with the EU timetable, we doubt the UK Government will be willing to shorten the UK timetable simply for this reason. Indeed, there might be risks to shortening the UK timetable at the same time as the CMA will need significantly to expand its merger caseload. While the existence of dual merger regimes will impose additional costs and risks on businesses, the issue is not unusual or insurmountable: companies commonly deal with one or more national merger authorities outside the EU as well as making an EUMR filing.</p> <p>Over the longer term, the UK may wish to consider whether to adopt jurisdictional rules (such as a turnover test) that are more predictable and provide greater certainty than the present share of supply and material influence tests. In addition, given that under the present voluntary notification system the CMA will need to extend its merger scanning activities to a much larger number of international mergers, Brexit could potentially tip the balance in favour of a mandatory notification system. However, given the significant legal changes that will be</p>

<sup>18</sup> NAO, *The UK competition regime*, 5 February 2016.

	required by Brexit, these issues are probably best considered once the new regime has settled down.
3.5	Market investigations are a useful feature of the UK competition regime, and in our view there is no need to hamper the CMA by requiring it to consider how individual agreements or conduct falling within the scope of a market investigation would be treated under the antitrust rules. The analysis in antitrust cases generally focuses on the effects flowing from an individual agreement or course of conduct, whereas market investigations are typically concerned with the way in which the market as a whole is operating. If a market as a whole suffers from competitive distortions, then the CMA should have the power to take appropriate remedial action without having to conduct a separate analysis of individual agreements or conduct under a distinct set of provisions.
<b><i>Antitrust rules</i></b>	
3.6 to 3.9	In relation to s.60, see paras 28 to 31 above.
3.11	The current close cooperation between the CMA and the Commission promotes the effective enforcement of both the EU and UK antitrust rules. It would be in the interests of the UK to try to negotiate arrangements which allow the CMA and Commission to continue to cooperate closely following Brexit.
3.1.2	See comments above regarding paragraph 2.9.5.
<b><i>The future of private litigation</i></b>	
3.13 to 3.1.5.3	See paras 8 to 27 above.