Post-Brexit Scenarios for UK Competition Policy and Public Enforcement: The EEA Model v Complete Independence

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On 23 June 2016, the British people voted by majority to leave the European Union (EU) in an "advisory" referendum. The referendum result was a seismic shock, unexpected by financial markets and not predicted by final pre-referendum polls. With a new British Prime Minister now at the helm, the process of coming to terms with the referendum result and planning for the significant practical challenge of achieving Brexit is now underway in both the UK and Brussels.

For the time being, the UK is still a member of the EU, with all the rights and responsibilities that membership entails. As noted by the remaining 27 heads of state and government in the statement following their informal meeting of 29 June 2016, "until the UK leaves the EU, EU law continues to apply to and within the UK". Formal exit negotiations between the UK and the EU (to be conducted by the European Commission (Commission) on the basis of a mandate from the European Council) will only commence once the UK has delivered its so-called "article 50 notice".[1] Present indications are that this will not occur until early 2017, possibly much later.[2] Once the art.50 notice is delivered to Brussels, exit will occur two years later, unless all the EU Member States agree to extend the exit agreement negotiation period.[3]

A significant motivation for Leave voters in the UK referendum was the perception that too much national power had been devolved to the EU over the course of the 40-odd years in which the UK has been an EU member. The EU has the competences conferred on it by the EU's treaties, which form its constitutional foundation. Competences not conferred upon the EU in those treaties remain with the EU Member States.

In the area of competition law and policy, art.3 of the Treaty on the Functioning of the EU (TFEU) states that the Union shall have "exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market". But EU Member States retain their competence to regulate competition at the national level. So national competence and EU competence are autonomous and parallel. The European Commission's Directorate-General for Competition (DG Competition) acts as a supra-national antitrust agency for the bloc, while all the EU Member States have their own national competition authorities (NCAs). In the UK, that national agency is the Competition and Markets Authority (CMA).

So, as the UK starts to think about extracting itself from the EU, at least as concerns competition enforcement, it already has a national agency and national legislation in place and there is no immediate legal vacuum to fill before Brexit can occur. Nevertheless, owing to the unique and highly developed system of autonomous and parallel competition competence between the EU and its Member States, the UK's national competition regime is intertwined with that of the EU, so to speak, in a number of ways. This is because, over the years, DG Competition and the NCAs have developed various mechanisms in order to be able to work together effectively and efficiently. Some of this is reflected in EU and UK legislation. Other aspects are to be found in guidance notices or soft law.

The extent to which the EU's supranational competition regime will have to be disentangled from the UK's regime will ultimately depend upon the arrangement that the UK negotiates with the EU for its post-Brexit relationship. Much has been written as to the possibility of the UK adopting the so-called "Norway model", i.e. becoming a signatory to the EEA Agreement as an EFTA rather than

[1] Article 50(2) TEU provides that "a Member State which decides to withdraw shall notify the European Council of its intention". Article 50(1) allows any Member State to withdraw from the Union "in accordance with its own constitutional requirements". The UK constitutional requirements for delivering the art.50 notice are presently unclear. The UK Government takes the view that the Government may decide of its own accord when to deliver the notice, but several court challenges have been brought asserting that an Act of Parliament is required to trigger the withdrawal procedure, on the basis of the sovereignty of Parliament. See *Santos v Chancellor for the Duchy of Lancaster* CO/3281/2016, High Court of Justice, QBD (Admin) (19 July 2016). For a discussion of this issue see N. Barber, T. Hickman and J. King, "Pulling the Article 50 'Trigger': Parliament's Indispensable Role" (27 June 2016), U.K. Const. L. Blog, *https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king - pulling-the-article-50-trigger-parliaments-indispensable-role/* [Accessed 1 September 2016].

[2] Statement by UK Prime Minister Theresa May, joint press conference in Berlin with German Chancellor Angela Merkel (20 July 2016). The 27 remaining members of the EU have implicitly acknowledged that it is for Britain to decide the timing of the delivery of the art.50 notice: see Statement, informal meeting of the 27 (Brussels, 29 July 2016).

[3] TEU art.50(3) states that "the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in para.2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period".

EU Member State, [4] once the UK leaves the EU.[5] This is the closest form of relationship the UK could have with the EU short of being an EU member, and there have certainly been a number of political statements on both sides of the English Channel since the referendum to the effect that a close relationship between the UK and the EU post-Brexit is desirable.[6]

However, EEA membership for the UK exactly and fully replicating the arrangement presently enjoyed by Norway, Liechtenstein and Iceland could be a politically unpalatable solution for a number of Brexit proponents, since EEA membership includes single market access and entails signing up to the free movement of persons requirement.[7] This was arguably the most reviled aspect of EU membership for UK referendum voters in the Leave camp. Statements by the new Prime Minister, Theresa May, would indicate that the UK will be aiming to put in place limitations on the numbers of EU migrants who can come to the UK to work.[8] Any such limitations will probably mean that EEA membership in its purest form is not possible, but it is not out of the question that a unique tailored relationship with the EU might be negotiable, with special concessions concerning the free movement of workers.[9] Everything is a question of negotiation, and it is worth remembering that even now as an EU Member State, the UK's membership is not "standard". It has an opt-in in the area of Justice and Home Affairs legislation,[10] dispensation from the "ever closer union" requirement, and is not a member of the euro zone. Further, it only participates in some aspects of Schengen.[11]

Specifically in the area of competition enforcement seen discretely, it is possible that the EEA model might prove feasible, even if full free movement of persons is not an element of the UK's new relationship with the EU. Although the EEA Agreement has been in force for over 20 years, the way in which it functions and applies to competition matters is not widely understood. The purpose of this article is to look at this in some depth, and in doing so examine two opposing potential scenarios for UK competition policy post-Brexit: the first in which competition matters between the UK and the EU are regulated in the way which presently occurs under the EEA Agreement between the 27 EU Member States and Iceland, Liechtenstein and Norway; and the second in which the UK competition regime is completely, surgically separated from that of the EU. There may of course be a variety of other possible options in between these two scenarios, but they will not be explored in this article.

Post-Brexit competition arrangement along the lines of the current EEA Agreement competition regime

Articles 6 and 7 of the EEA Agreement provide that the *acquis communautaire* is part of the EEA Agreement. It follows that EU legislation implementing competition rules that are contained in the Treaty on the Functioning of the EU (currently set out in Annex XIV of the EEA Agreement) will apply in the EEA. The competition provisions of the EEA Agreement are to be interpreted in a manner that is consistent with judgments of the EU courts prior to the date of the signature of the EEA Agreement. The EFTA Court has gone further and held that subsequent judgments of the EU courts are relevant. In particular, it held that

> "the reasoning which led the EC Court of Justice to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which this Court has to interpret".[12]

It is important to note that certain products are excluded from the scope of the EEA Agreement and are therefore not subject to the competition provisions of the Agreement. In particular, art.8 of the EEA Agreement only applies to those products falling within Chs 25 to 97 of the Harmonised Description and Coding System (HS Nomenclature), with the exception of the products listed in Protocol 2 to the Agreement. It follows that neither the Commission nor the EFTA Surveillance Authority will be competent to apply competition rules in cases where products that fall outside the scope of the

[4] The UK is presently a signatory to the EEA Agreement in its capacity as a Member State of the EU.
[5] See for example Swati Dhingra and Thomas Sampson, "Life after Brexit: What are the UK's options outside the European Union?", LSE Centre for Economic Performance (12 February 2016), p.4; Wolfgang Münchau, "Brexit: The Norway option is the best available for the UK", Financial Times, 28 June 2016; Jean-Claude Piris, "If the UK Votes to Leave: The Seven Alternatives to EU Membership", Centre for European Reform (12 January 2016), p.2.
[6] "In the future, we hope to have the UK as a close partner of the EU and look forward to the UK stating its intentions in this respect": Statement by the remaining 27 heads of state and government (Brussels, 29 June 2016), para.4.
[7] The remaining 27 heads of state and government stated, following their informal Brussels meeting on 29 June 2016, that "access to the Single Market requires acceptance of all four freedoms": para.4.
[8] See for example Rowena Mason and Alex Duval Smith, "Theresa May takes Brexit's immigration message to eastern Europe", *The Guardian*, 28 July 2016, in which the Prime Minister is quoted as saying that UK voters had sent a "very clear message that they do not want free movement to continue as it has in the past". In an earlier interview with *The Telegraph* published on 3 July 2016, Mrs May said that as PM she would reform the free movement of people, but stopped short of saying she would abolish it altogether. In launching her campaign for leadership of the Conservative Party on 30 June 2016, she stated that "there is clearly no mandate for a deal that involves accepting the free movement of people as it has worked hitherto".
[9] While visiting eastern European countries in late July 2016, the Prime Minister stressed that she was keen for the UK to have its own distinct relationship with the EU, rather than an "off the shelf" model previously negotiated with other nations such as Norway or Switzerland.
[10] The UK's participation in EU legislation on Justice and Home Affairs is principally governed by Protocol 21 to the Lisbon Treaty. That allows the UK to choose, within three months of a proposal being presented to the Council, whether it wishes to participate in the adoption and application of any such proposed measure. If the UK notifies the President of the Council of its intention to participate within that three-month period, there is no possibility of opting out later. If the measure is adopted, the UK is bound, the European Court of Justice has jurisdiction over the matter and the Commission has the power to enforce in respect of any failure to properly implement the measure. If the UK does not opt in by the three-month point, it is still entitled to a seat at the negotiating table, but has no vote.
[11] See Protocol 19 to the Lisbon Treaty on the Schengen opt-out. The UK participates in the police and judicial co-operation elements of the Schengen *acquis*, but not in the border control elements.
[12] *Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority* (E-2/94) [1994–95] EFTA Court Report 59; [1995] 1 C.M.L.R. 851 at [11]. At [13], the EFTA Court rejected the EFTA Surveillance Authority's argument that judgments of the Court of First Instance were not of direct relevance.

EEA Agreement are concerned. In such cases, jurisdiction will revert to the national competition authority of the EFTA State.[13]

Antitrust

The competition provisions of the EEA Agreement mirror the rules contained in arts 101, 102 and 106 of the TFEU. In particular, arts 53 and 54 of the EEA Agreement contain prohibitions on anti-competitive agreements and the abuse of a position of dominance, respectively. Both provisions are applicable if trade between one or more EU Member States and one or more EFTA states that are signatories of the EEA Agreement (i.e. Iceland, Liechtenstein and Norway) is affected. Annex XIV extends the application of EU block exemption regulations which provide safe harbours for certain categories of agreements from the prohibition in art.101 TFEU.[14] Therefore, from a substantive standpoint, there would be no material changes to UK competition policy if the UK became a party to the EEA Agreement as an EFTA state.

The responsibility for the enforcement of the competition provisions in the EEA Agreement is shared between the Commission and the EFTA Surveillance Authority. The rules on the division of responsibility between the two authorities that are contained in art.56 of the EEA Agreement do not foresee concurrent jurisdiction, and are designed so that there is a "one-stop shop". In cases involving restrictive agreements that are caught by both art.101 TFEU and art.53 of the EEA Agreement, the Commission will have jurisdiction to take a decision for the entirety of the EEA territory.[15] Where an agreement only affects trade between the EU and one or more EFTA states and there is no appreciable effect on trade between Member States, jurisdiction will be determined by reference to the percentage of the combined EEA-wide turnover that was generated by the undertakings concerned.[16] If the undertakings concerned achieve 33 per cent or more of their turnover in EFTA territory, the EFTA Surveillance Authority will have jurisdiction; the Commission will have jurisdiction in cases where the undertakings concerned achieve 67 per cent or more of their turnover in the EU.[17] In cases where only trade between EFTA states is affected, the EFTA Surveillance Authority will have jurisdiction. These rules for the allocation of jurisdiction are replicated in cases involving the abuse of a dominant position.[18]

There are extensive co-operation and co-ordination provisions underpinning arts 53 and 54 that are set out in Protocol 23 to the EEA Agreement. These provisions are intended to promote the consistent application and enforcement of EU competition law principles. Protocol 23 puts in place obligations of mutual administrative assistance and consultation in enforcement activities as well as information sharing arrangements. This includes an obligation for the competent authority to consult the other surveillance authority prior to the issue of a statement of objections and the publication of a decision. Moreover, both authorities as well as the states that fall under their supervision are entitled to be present at Advisory Committee meetings of the competent authority. Protocol 23 essentially ensures that the EFTA Surveillance Authority enjoys the same rights as a national competition authority of an EU Member State.

It follows from the above that there would be no significant changes to the UK antitrust enforcement regime, in the event the UK were to join the EEA as an EFTA state.

Merger control

There would also be no material changes in the field of merger control if the UK were to become a member of the EEA post-Brexit. Where a transaction qualifies for review under the EU Merger Regulation, the Commission will be the sole competent authority in the EEA, with the exception of cases that relate to products that fall outside the scope of the EEA Agreement.[19] It follows that the Commission will exercise exclusive jurisdiction not only with respect to EU Member States, but also in relation to the territories of the EFTA states. Conversely, where the turnover thresholds are only exceeded in the territories of the EFTA states, as opposed to the whole of the EEA, the transaction will be reviewable by the EFTA Surveillance Authority.[20]

Protocol 24 to the EEA Agreement contains detailed rules on the referral of cases to or from EFTA states that are similar to those in the EU Merger Regulation. At the pre-notification stage, parties to a transaction are able to

[13] See for example Case COMP/M.7015 *Bain Capital/Altor/EWOS*. Two products that were subject to the transaction, namely tapioca starch (HS code 11.08.14) and fish feed (HS code 23.09.90) were not covered by the EEA Agreement. Consequently, the transaction, insofar as it related to those two products, was subject to merger control review in Norway. The Commission's decision only covered the EU with respect to tapioca starch and fish feed.

[14] Annex XIV of the EEA Agreement extends the application of the following block exemption regulations to Iceland, Liechtenstein and Norway: (1) Regulation 330/2010 on the application of art.101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices (Vertical Agreements Block Exemption Regulation) [2010] OJ L102/1; (2) Regulation 316/2014 on the application of art.101(3) of the TFEU to categories of technology transfer agreements [2014] OJ L93/17; (3) Regulation 1218/2010 on the application of art.101(3) of the TFEU to certain categories of specialisation agreements (Specialisation Block Exemption Regulation) [2010]OJ L335/43; (4) Regulation 1217/2010 on the application of art.101(3) of the TFEU to certain categories of research and development agreements (Research and Development Block Exemption Regulation) [2010] OJ L335/36); (5) Regulation 169/2009 applying rules of competition to transport by rail, road and inland waterway (Rail, Road and Inland Waterway Block Exemption Regulation) [2009] OJ L61/1); and (6) Regulation 906/2009 on the application of art.81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (Liner Shipping Block Exemption Regulation) [2009] OJ L256/31, as amended by Regulation 697/2014 [2014] OJ L184/3.

[15] EEA Agreement art.56(1)(c).

[16] EEA Agreement art.56(1)(b).

[17] The definition of turnover in art.3 of Protocol 22 to the EEA Agreement mirrors art.5 of Regulation 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/24.

[18] EEA Agreement art.56(2).

[19] EEA Agreement art.57(2)(a) and Annex XIV.

[20] EEA Agreement art.57(2)(b) and Annex XIV.

request a referral from the EFTA states to the Commission where it is reviewable under the national competition laws of at least three EU Member States and at least one EFTA state.[21] In the event of a veto by one or more EFTA states, the national competition authority of the competent EFTA state(s) will retain jurisdiction. However, a veto by an EFTA state will have no impact on the request for referral from the EU Member States to the Commission. In addition, the parties to a transaction may request a referral from the Commission to a competent EFTA state. The threshold for referral to an EFTA state is identical to the one contained in the EU Merger Regulation. The parties need to demonstrate by way of a reasoned submission that the

> "concentration may significantly affect competition in a market within an EFTA State, which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State".[22]

The EEA Agreement also enables the Commission to refer a transaction to an EFTA state post-notification.[23] The grounds for referral are twofold. First, a transaction may be referred to an EFTA state where it affects competition in a market within that EFTA state that presents the characteristics of a distinct market. Secondly, the Commission may refer a transaction to an EFTA state where the transaction affects competition in a market within that EFTA state, which presents all the characteristics of a distinct market *and* which does not constitute a substantial part of the territory covered by the EEA. Post-notification referrals to the Commission are also possible where a transaction may affect trade between one or more EU Member States and one or more EFTA states, and it threatens to significantly affect competition in one or more EFTA states.[24] However, while an EFTA state may join a referral request, it is unable to initiate a request itself.[25] It follows that the powers of EFTA states are in this regard more limited than those of EU Member States.

Given the above, UK membership of the EEA post-Brexit would not lead to significant changes to the merger control regime. In terms of jurisdiction, some transactions may no longer originally qualify for review under art.1(2) and 1(3) of the EU Merger Regulation since UK turnover would no longer count towards the EU-wide turnover thresholds. However, some of these would still find their way back to Brussels under the pre-notification upward referral provision in art.4(5) of the EU Merger Regulation in any event. So a significant proportion of transactions would still continue to benefit from a "one-stop shop" since they would be reviewable either by the Commission or the EFTA Surveillance Authority.

State aid

If the UK were to opt for EEA membership as an EFTA state, or an EEA-like arrangement concerning competition enforcement, it would be subject to a parallel state aid regime that is in line with EU rules in art.107 TFEU. Article 61 of the EEA Agreement mirrors the wording of art.107 TFEU, and the EFTA Surveillance Authority would assume the role of the Commission in monitoring state aid granted by the UK.

Post-Brexit competition arrangement in which the UK's competition regime is completely separate from that of the EU and EEA

This section examines the potential impact on UK competition policy and public enforcement in the event that the UK leaves the EU and does not remain in the EEA as an EFTA state or put in place EEA-like arrangements concerning competition enforcement.

Antitrust

From a substantive standpoint, there are unlikely to be any fundamental changes to the principles that form the basis of UK national antitrust rules since this would require a drastic shift in domestic competition law policy. In particular, the key theories of harm underlying the Ch.I and Ch.II prohibitions in the UK Competition Act 1998 (CA 1998) are universally accepted by antitrust regulators and policy-makers across the globe. Moreover, it is unlikely that the UK Parliament would have the appetite to embark on wide-ranging reforms to the domestic competition regime at a time when there will be a great deal of unavoidable legislative work to do as part of the exit process.

However, it must be said that the CA 1998 is currently modelled on EU competition law. Indeed, the wording of the prohibitions against anti-competitive agreements in s.2 CA 1998 (Ch.I) and the abuse of a dominant position in s.18 CA 1998 (Ch.II) are almost identical to the corresponding prohibitions in arts 101 and 102 TFEU. Although the likelihood of significant changes to the CA 1998 is low immediately following the UK's exit from the EU, it is entirely conceivable that, post-exit, there may be gradual divergence in the manner in which the principles underlying the EU and UK antitrust regimes are interpreted and applied as time goes by.

Section 60 CA 1998 currently requires that any questions arising under the Act are to be dealt with in a manner that is consistent with corresponding questions arising under EU law. This includes ensuring that there is no inconsistency between judgments of the UK courts, on the one hand, and the principles laid down in the TFEU

[21] EEA Agreement art.6(5) of Protocol 24.
[22] EEA Agreement art.6(4) of Protocol 24.
[23] EEA Agreement art.6(1) of Protocol 24.
[24] EEA Agreement art.6(1) of Protocol 24.
[25] EEA Agreement art.6(1) of Protocol 24.

and judgments of the EU courts, on the other hand.[26] The CA 1998 also currently requires UK courts to take into account any relevant decisions or statements of the Commission.[27] In the event that the UK exits the EU and does not become a party to the EEA Agreement as an EFTA state or put in place EEA-like arrangements in the competition sphere, the repeal of s.60 would be required.

Sovereignty and "taking back control" were key themes in the campaign to leave the EU prior to the 23 June 2016 UK referendum, and if these are followed through in every subject area of the exit negotiations, it may be that it would not be feasible to retain provisions which would require deference to EU competition law and policy. The Vote Leave camp clearly stated its desire to end the influence of the "rogue European Court of Justice".[28] Regulation 1/2003[29] would also no longer apply. Consequently, the UK would no longer be competent to apply arts 101 and 102 to conduct which might have an effect on trade between Member States.[30]

Additionally, under s.10 CA 1998, agreements that are covered by EU individual and block exemptions are currently exempt from the Ch.I prohibition. Also, where an agreement does not benefit from an EU block exemption since it does not produce an effect on trade between EU Member States, it will benefit from a parallel exemption.[31] Again, it seems unlikely that s.10 CA 1998 would survive in its current form in the event that the UK opts for a non-EEA solution in the competition sphere, since that would imply an application of EU law in the UK. Notwithstanding the possible repeal or amendment of s.10 CA 1998, the likelihood of a radical departure from existing policy seems low, and one would expect the UK Government to formulate and put in place a similar set of exemptions, or perhaps even go as far as simply transposing the various block exemptions into UK competition law.

That said, looking back to before the 2004 modernisation of the EU antitrust regime, it is not entirely inconceivable that some subtle differences in the treatment of agreements might then emerge. For instance, the UK's treatment of vertical agreements pre-2004 differed from the current Vertical Agreements Block Exemption Regulation.[32] In particular, vertical agreements other than those with a resale price maintenance component were excluded from the Ch.I prohibition. This was largely attributable to the fact that, from a domestic standpoint, the Office of Fair Trading did not share the Commission's concern that the single market might become compartmentalised.

Although a UK exit from the EU absent an EEA-like solution for competition enforcement would be unlikely to trigger any significant changes to the substance of UK antitrust rules, the procedural aspects of the existing regime would need to be overhauled. The Commission's Modernisation Package and in particular Regulation 1/2003 have led to some degree of procedural convergence and co-ordination in the enforcement of antitrust rules across the EU. This has been supplemented by the Commission's Network Notice, which created the European Competition Network (ECN).[33] Since the entry into force of Regulation 1/2003, the ECN has played an integral role in the shaping and development of a common antitrust enforcement culture and has helped to achieve some alignment in the enforcement procedures of Member States.

The disapplication of Regulation 1/2003 and the Cooperation Notice in the UK would remove the formal and informal mechanisms for the allocation of jurisdiction between the Commission and the NCAs of EU Member States. In practice, subject to limited exceptions, parallel antitrust enforcement actions in the EU are rare.[34] However, following the UK's exit from the EU, the initiation of proceedings by the Commission would no longer relieve the CMA of its jurisdiction.[35] In addition, the CMA would no longer be able to reject a complaint or suspend proceedings on account of an NCA commencing an investigation under arts 101 or 102.[36] Conversely, neither the Commission nor another NCA would reject a complaint that had already been dealt with by the CMA.[37] A further consequence would be that UK courts would be no longer consider staying proceedings in order to avoid issuing judgments which might run counter to a decision that is contemplated in proceedings initiated by the Commission.[38] Moreover, UK courts would no longer stay proceedings pending the outcome of an appeal to the EU courts.

This would mean that businesses could find themselves the subject of two substantially similar investigations or proceedings on both sides of the English Channel. This would inevitably increase costs, and involve a greater burden on company resources as well as increased uncertainty for businesses that have to manage two

[26] CA 1998 s.60(2).
[27] CA 1998 s.60(4).
[28] See *http://www.voteleavetakecontrol.org/a_framework_for_taking_back_control_and_establishing_a_new_uk_eu_deal_after_23_june.html* [Accessed 22 September 2016].
[29] Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty (Regulation 1/2003) [2003] OJ L1/1.
[30] Regulation 1/2003 arts 3 and 5.
[31] CA 1998 s.60(2). See also Regulation 1/2003 art.3(2).
[32] Regulation 330/2010 on the application of art.101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Agreements Block Exemption Regulation) [2010] OJ L102/1.
[33] Commission Notice on cooperation within the Network of Competition Authorities (Cooperation Notice) [2004] OJ C101.
[34] For instance, manufacturers of consumer detergents were subject to separate investigations by the French Autorité de la concurrence and the Commission. The Austrian Bundeswettbewerbsbehörde and the Commission also conducted separate investigations into anti-competitive arrangements that were entered into by manufacturers of lifts and elevators. In addition, Visa was subject to two separate investigations by the CMA and the Commission for its interchange fees.
[35] Regulation 1/2003 art.11(6).
[36] Regulation 1/2003 art.13(1).
[37] Regulation 1/2003 art.13(1).
[38] Regulation 1/2003 art.16(1).

separate processes. There would also be a risk of double jeopardy. The principle of *ne bis in idem* is a cornerstone of EU law. However, in the event of a UK exit, it is not clear how the CMA or the UK courts would interpret the facts of a case that is the subject of a separate enforcement action by the Commission or an NCA in order to determine which conduct specifically relates to the UK. The well-developed case law of the EU courts in this area would cease to apply in the event of an exit without EEA membership.[39] Accordingly, it is possible that a business could find itself subject to two fines for the same conduct.

A UK departure from the ECN would also deprive the CMA of an important enforcement intelligence and evidence gathering tool. Article 11(2) Regulation 1/2003 provides that the Commission will transmit to the NCAs the most important documents it has collected with a view to applying arts 101 and 102 TFEU. Similarly, art.11(3) Regulation 1/2003 requires all NCAs to notify the Commission in writing before, or without delay after, taking the first formal investigative measure in an art.101 or 102 case. This information may also be made available to other NCAs. Moreover, art.12(1) of Regulation 1/2003 provides that NCAs have the power to provide one another with, and use in evidence, any matter of fact or law, including confidential information. It follows that the exchange of information may take place between the NCAs and the Commission, and between the NCAs themselves.

That said, there are procedural safeguards and restrictions on the ability of the Commission and NCAs to use information obtained pursuant to art.11 Regulation 1/2003 as evidence. First, information submitted to the ECN may not be used by the Commission or NCAs as the basis for starting an investigation of their own accord, subject to limited exceptions.[40] Secondly, art.12(2) states that the information that is exchanged shall only be used for the purposes of applying arts 101 and 102 TFEU. This does not preclude NCAs from relying on the information in the same case in order to apply national competition rules in parallel with EU competition rules, provided those national rules do not lead to a different outcome. Thirdly, art.12(3) provides that the information that is exchanged may only be used as evidence to impose sanctions on individuals where (i) the law of the transmitting NCA foresees sanctions of a similar kind for infringements of arts 101 or 102; (ii) the information has been collected by the transmitting NCA in a manner that is consistent with the rights of defence of natural persons under the national rules of the recipient NCA; and (iii) the recipient NCA shall not use the information to impose custodial sanctions.

It is possible that the UK might enter into a memorandum of understanding (MOU) or co-operation agreement with the EU on competition matters in the event of a full exit without EEA membership or EEA-style competition arrangements. A key question is whether any such a future agreement between the UK and the EU (or indeed any other jurisdiction) would allow for the exchange of confidential information including leniency materials. If it did, it would be unprecedented. None of the competition MOUs and co-operation agreements that are currently in place between the EU and third countries permits the exchange of confidential information. Antitrust authorities outside the EU wishing to obtain information that has been submitted to the Commission need to secure a confidentiality waiver from the business that is the target of an investigation before the information can be shared between authorities. In the event that a new MOU or co-operation agreement were to permit the exchange of confidential information, similar protections to those that are currently in place under EU law would need to be included to avoid discouraging co-operation in future CA 1998 cases. However, there is no guarantee that such safeguards would be included in any future arrangements that are entered into by the UK. Additionally, the degree of co-operation envisaged in MOUs and agreements varies considerably. For instance, the agreements entered into by the EU with Canada, Japan, South Korea, Switzerland and the US contain extensive co-operation and enforcement co-ordination provisions. By contrast, the agreements entered into by the EU with Brazil, India, China and Russia envisage much looser forms of co-operation.

Additional UK civil service resources would need to be dedicated to enforcement activities following a Brexit without EEA membership or EEA-like competition arrangements. The CMA has already faced criticism from a number of quarters for not taking enough enforcement action, and practitioners have often bemoaned a dearth of legal guidance or certainty on certain common business practices as a result of a lack of precedents and underdeveloped decisional practice. This criticism was echoed in a recent report from the UK National Audit Office, which highlighted that the CMA faces significant challenges in increasing the low number of enforcement decisions to date.[41] It noted that the UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015

[39] See for example *Limburgse Vinyl Maatschappij v Commission* (C-254/99 P) [2002] E.C.R. I-8375; *Aalborg Portland v Commission* (C-204/00 P) [2004] E.C.R. I-123, [2005] 4 C.M.L.R. 4; *Showa Denko v Commission* (C-289/04 P) [2006] E.C.R. I-5859, [2006] 5 C.M.L.R. 14; and *Toshiba Corp v Úřad pro ochranu hospodářské soutěže* (C-17/10) EU:C:2012:72, [2012] 4 C.M.L.R. 22.

[40] Cooperation Notice, para.39. Paragraph 40 of the Cooperation Notice provides that information submitted by a leniency applicant may not be transmitted to another member of the ECN, unless their consent has been obtained. This extends to information that has been obtained following a dawn raid or any other fact-finding measure (e.g. information requests) that was made possible by the leniency application. Paragraph 41 of the Cooperation Notice provides that no consent is required where (i) the receiving authority has already received a leniency application in relation to the same conduct from the same applicant and it is not open to the applicant to withdraw the information which has already been submitted; and (ii) the authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the transmission will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant as well as employees and any other natural persons that are covered by the application.

[41] NAO, "The UK competition regime", Report by the Comptroller and Auditor General, National Audit Office, HC 737 Session 2015–16 (5 February 2016), *https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf* [Accessed 1 September 2016].

prices), compared with almost £1.4 billion of fines imposed by their German counterparts.[42] Michael Grenfell, the recently appointed executive director of enforcement at the CMA, has already signalled the CMA's ambition to increase its enforcement activities.[43] In the absence of additional resources, it is difficult to see how such an increase would be possible without placing considerable strain on an already stretched CMA.

As a final point, although the focus of this article is on public enforcement, it is worth briefly mentioning that the UK's exit from the EU could jeopardise the UK's position as the forum of choice for private enforcement actions. The attractiveness of the English courts stems from the existence of generous disclosure rules relative to other EU Member States (i.e. discovery), their willingness to readily accept jurisdiction on the basis of an "anchor defendant", as well as procedural efficiency. Commission decisions will no longer be binding if there is an exit from the EU without EEA membership, and the degree to which they can act as persuasive authorities will be unclear. In view of the improvements to the private enforcement regimes of EU Member States that are envisaged in the Damages Directive[44] and the fact that Commission decisions would continue to be binding before the courts of the EU's remaining 27 Member States, the UK is likely to become less attractive as a damages jurisdiction. Future claimants may switch to alternative EU jurisdictions such as Germany or the Netherlands, which are already considered to be claimant friendly.

Merger control

From a jurisdictional standpoint, the Commission currently has the exclusive competence to review all transactions that meet the turnover thresholds in art.1 of the EU Merger Regulation.[45] However, following the UK's exit from the EU, in the absence of an EEA-like arrangement for competition matters, turnover generated in the UK will no longer count towards the calculation of EU-wide turnover. Without EEA membership or EEA-type competition arrangements, this would result in some transactions being deprived of the benefit of a "one-stop shop". Some transactions would trigger filings in both the UK and the EU, or the UK and one or more EU Member States. Either scenario will inevitably result in higher transaction costs, and businesses will be exposed to an increased risk of delays and regulatory uncertainty. It is also possible that some transactions may escape merger control scrutiny in the UK owing to the voluntary nature of its filing regime.

In contrast to EU antitrust law, there are no binding rules that are designed to align the substantive aspects of merger control reviews across the EU, albeit there are a series of voluntary soft law measures.[46] In particular, there is no equivalent of s.60 CA 1998 (see above) in the UK Enterprise Act 2002 (EA 2002) that compels the CMA or the UK courts to apply the jurisprudence of the EU courts or take into account the decisional practice of the Commission. In practice, notwithstanding the fact that the UK and the Commission already apply slightly different substantive tests in their respective merger control reviews, a UK exit from the EU without EEA membership in theory should not give rise to a significant increase in the number of cases in which the CMA and the Commission reach different conclusions.[47] Indeed, the Commission and the CMA are both moving away from a structuralist analysis of mergers towards an approach that is more effects-based and focused on the qualitative aspects of competition (in particular the closeness of competition).[48]

However, a closer examination of the CMA's approach to the substantive review of mergers reveals that it employs economic tools in its competitive assessment to a greater extent than the Commission and most NCAs. This is reflected in the CMA's practice as well as its detailed Merger Assessment Guidelines on the economic assessment of mergers.[49] Indeed, it is not uncommon for CMA economists to be involved in merger cases at the outset, including in relatively straightforward cases that are cleared in Phase I. For instance, the CMA's assessment of unilateral effects, which is based on the hypothetical monopolist test, will typically involve detailed economic analyses including the use of econometric merger screening tools.[50] This is part of a growing trend of moving towards "narrower competition

[42] According to statistics compiled by the ECN, of the larger EU Member States, the UK and Poland adopted the fewest number of enforcement decisions. Between 1 May 2004 and 31 December 2015, the UK adopted 81 decisions, which is significantly lower than the number of decisions adopted by France (246), Germany (200), Italy (135), the Netherlands (105) and Spain (137). Statistics available at *http://ec.europa.eu/competition/ecn/statistics.html* [Accessed 1 September 2016].

[43] Speech delivered by CMA's Executive Director for Enforcement, Michael Grenfell, "How the CMA tackles cartels and anti-competitive practices" (November 2015), *https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-approach-to-competition-enforcement* [Accessed 1 September 2016].

[44] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (Damages Directive) [2014] OJ L349/1.

[45] EU Merger Regulation art.21(3).

[46] ECA, "Procedures Guide of the European Competition Authorities (ECA)" (2001), *http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf*; ECA, "Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation" (2005), *http://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf*; EU Merger Working Group, "Best Practices on Cooperation between EU National Competition Authorities in Merger Review" (2011), *http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf* [All accessed 1 September 2016].

[47] The UK applies the "substantial lessening of competition" test (SLC), whereas the EU applies the "significant impediment to effective competition" (SIEC) test.

[48] See for example speech delivered by Alex Chisholm, former CMA Chief Executive, "Public interest and competition-based merger control", Fordham Competition Law Institute Annual Conference (11 September 2014), *https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control*; and speech delivered by Carlos Esteva Mosso, "The Contribution of Merger Control to the Definition of Harm to Competition", GCLC Conference 2016, Brussels (1 February 2016), *http://ec.europa.eu/competition/speeches/text/sp2016_03_en.pdf* [Both accessed 1 September 2016].

[49] Merger Assessment Guidelines, OFT1254/CC2 (Revised) (September 2010) (Merger Assessment Guidelines). Adopted by the CMA as set out in Annex D of "Mergers: Guidance on the CMA's jurisdiction and procedure" (CMA2) (January 2014) (Jurisdictional and Procedural Guidance).

[50] Merger Assessment Guidelines (September 2010), paras 5.2.10 to 5.2.20. A set of substitute products (a "candidate market") will satisfy the hypothetical monopolist test if a hypothetical firm that was the only present and future seller of the products in the candidate market would find it profitable to raise prices. In applying the hypothetical monopolist test, the CMA will normally use a SSNIP of 5%.

criteria" and "a more technical and nuanced assessment" that has led to a corresponding decrease in the emphasis on market definition.[51]

The CMA's economic analysis toolkit includes the use of diversion ratios as one of the principal measures of the closeness of competition.[52] In some cases, the CMA may even encourage the parties to conduct a customer survey in Phase I in order to gain a better assess the closeness of competition. The CMA will also request extensive data on variable margins as well the price sensitivity of customers in order to compute metrics such as upwards pricing pressure (UPP), gross upward pricing pressure index (GUPPI) and illustrative price rise (IPR).[53] The end result is a data-intensive and sometimes lengthy review that will often involve extensive pre-notification discussions.[54] The Commission's use of merger screening tools is comparatively limited and reserved for more complex cases.[55] In this regard, as a matter of practice, the Commission has stated its preference for using quantitative economic analysis tools only where sufficient accurate data exist and it has sufficient time to analyse them.[56] The Commission is also aware of the need to reduce the burden and cost on the notifying parties while at the same time ensuring and enhancing the effectiveness of its substantive review.[57] Post-Brexit, this trend of greater reliance by the CMA on empirical economic analysis tools could lead to wider divergence in the approach to the substantive assessment of mergers. Such a shift would push the UK closer to the US approach to merger control review, which advocates the greater use of quantitative economic analysis tools.[58]

Moreover, the possibility that the EU may in the future adopt mandatory rules designed to achieve greater substantive convergence in the area of merger control cannot be excluded. Indeed, the Commission is intent on making improvements to the system of merger control review across the EU including the development of a "true 'European Merger Area', in which a single set of rules applies to mergers examined by the Commission and NCAs".[59] Post-Brexit, UK merger control law principles may set off on a different developmental trajectory that will not necessarily be aligned with the corresponding regimes in the EU and its Member States. The UK's exit from the EU, even if it becomes an EEA member or puts in place EEA-like competition arrangements, will inevitably remove its ability to shape reformed EU merger control rules and the development of a European Merger Area.

There may also be an increase in the number of conflicting decisions (however small). This would add a layer of complexity to cross-border transactions where a filing is triggered in the UK and the EU (or Member State(s)). Of course, it is possible that the UK may enter into a co-operation agreement with the EU similar to the one that is currently in place between the EU and the US, which may then minimise the risk of divergent outcomes in merger reviews. However, this cannot be guaranteed and the degree of co-operation envisaged by any future agreement may be limited.

The risk of conflicting merger decisions stemming from a lack of substantive convergence has already been illustrated in recent cases involving the CMA and NCAs. For instance, in April 2012, the CMA prohibited Akzo Nobel's proposed acquisition of Metlac,[60] whereas the German Bundeskartellamt cleared the transaction unconditionally.[61] The divergence can be explained by the different substantive tests that were applied by the two authorities. The UK applied the SLC test, whereas, at the time, the Bundeskartellamt applied a dominance test.[62] Most recently, in November 2012, the acquisition

[51] See fn.3. Indeed, the CMA's Merger Assessment Guidelines clearly emphasise that "the boundaries of the market do not determine the outcome of the Authorities' analysis of the competitive effects of the merger in any mechanistic way … the Authorities may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others" (para.5.2.2).

[52] Merger Assessment Guidelines (September 2010), para.5.2.15(a). The diversion ratio between Product A and Product B represents the proportion of sales that would divert to Product B (as opposed to Products C, D, E, etc.) as customers' second choice in the event of a price increase for Product A. Evidence which may be used to assess the closeness of competition includes internal documents, bidding data, relative price levels in the candidate market (and the correlation of those prices to each other), historical price and sales volumes, and information on the product/service characteristics of the merging parties (as well as competing suppliers).

[53] Merger Assessment Guidelines (September 2010), paras 5.2.1(b) and 5.2.1(c).

[54] The average pre-notification period in the first 10 months following the creation of the CMA was 25 working days. See talk delivered at the Law Society by Sheldon Mills, Executive Director Mergers, CMA, "UK Merger Control — a retrospective on the last 10 months at the CMA" (10 February 2015), *https://events.lawsociety.org.uk/uploads/files/19ceb373-1cdb-48d3-b06a-6b9791fc7f95.pdf* [Accessed 1 September 2016]. The CMA will also regularly make use of its powers under s.109 EA 2002 to request additional data following the formal submission of a merger notice. In the event that the parties are unable to comply with the request within the prescribed deadline, the clock may be stopped. According to CMA statistics, more than half of the s.109 requests issued in the first 10 months following the creation of the CMA resulted in the suspension of the statutory timetable.

[55] See for example Case COMP/M.5644 *Kraft Foods/Cadbury*; Case COMP/M.5658 *Unilever/Sara Lee Body Care*; Case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*; and Case COMP/M.6570 *UPS/TNT Express*.

[56] DG Competition Staff Working Paper, "Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 and in merger cases" (October 2011), *http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf* [Accessed 1 September 2016]. For instance, the Commission's review of the proposed merger between Deutsche Börse and NYSE Euronext took the view that it was inappropriate to conduct any empirical economic analysis in particular for market definition purposes since there was a lack of suitable data (Case COMP/M.6166 *Deutsche Börse/NYSE Euronext* at [251]). Similarly, the Commission did not undertake any extensive empirical economic analyses in its review of the joint venture between Telefónica, Vodafone and Everything Everywhere on account of the limited data that was available owing to "the nascent state of the markets under consideration" (Case COMP/M.6314, *Telefónica, Vodafone and Everything Everywhere* at [20]).

[57] Case COMP/M.6314, *Telefónica, Vodafone and Everything Everywhere* at [52].

[58] Department of Justice and Federal Trade Commission, 2010 Horizontal Merger Guidelines (19 August 2010), pp.20–24, *https://www.justice.gov/atr/horizontal-merger-guidelines-08192010* [Accessed 1 September 2016].

[59] Commission, "White Paper: Towards more effective EU merger control" (9 July 2014), paras 20–22, *http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf*; See also speech delivered by Joaquín Almunia at the European Competition Day, "Change and challenges, Weaving Europe's single competition enforcement area" (Rome, 10 October 2014), *http://europa.eu/rapid/press-release_SPEECH-14-678_en.htm* [Both accessed 1 September 2016].

[60] Competition Commission, "A report on the anticipated acquisition by Akzo Nobel N.V. of Metlac Holding S.r.l." (21 December 2012), *https://assets.publishing.service.gov.uk/media/5329e008e5274a226b0002ef/main_report.pdf* [Accessed 1 September 2016]. The Competition Appeal Tribunal subsequently upheld the Competition Commission's prohibition decision (*Akzo Nobel NV v Competition Commission* [2013] CAT 13).

[61] Bundeskartellamt (BKartA) No.B 3/187-11, Akzo Nobel NV/Metlac Holding Srl (24 April 2012).

[62] German merger control rules were subsequently reformed and the dominance test was replaced by the SIEC test, bringing Germany into line with the EU.

of SeaFrance assets by Eurotunnel was cleared by the French Autorité de la concurrence following a summary procedure,[63] but was blocked by the CMA.[64] In that case, despite identical substantive tests there were fundamental differences in the factual and economic assessments that ultimately compelled different outcomes. In particular, the CMA considered that DFDS/LD, a competing ferry operator on the Dover-Calais route, was likely to exit the market in the short term, which would have enabled Eurotunnel to successfully raise prices. In contrast, the competitive assessment by of the Autorité de la concurrence did not take into account the possible exit of DFDS/LD, since none of the evidence it gathered suggested this was a possibility. To some extent, these two different outcomes are attributable to the CMA undertaking a detailed in-depth investigation, which meant that there was more time to conduct a rigorous review. The Autorité de la concurrence on the other hand cleared the transaction in a summary procedure.[65] Nonetheless, the case demonstrates the possibility that diverging conclusions are possible even in situations where two authorities apply the same principles and are largely presented with the same facts.

Although the UK has traditionally been one of the EU's more liberal and open economies, an exit from the EU absent EEA membership or EEA-like competition arrangements would provide greater scope for domestic protectionism. In cases that are deemed to give rise to a public interest concern, the UK would no longer be constrained by art.21 of the EU Merger Regulation from prohibiting or imposing remedies on transactions that are notified to Brussels.

Article 21 of the EU Merger Regulation currently provides for limited circumstances in which a Member State can intervene in order to protect its legitimate interests, namely public security, media plurality and prudential rules. Any other public interest must be communicated to the Commission and assessed for compatibility with EU law, before a Member State is able to use it. Without the prior approval of the Commission, a Member State is unable to invoke other concerns such as industrial policy, a desire to limit foreign ownership or even the loss of jobs and UK R & D capacity as was the case in the abandoned takeover of AstraZeneca by Pfizer to stop a transaction.[66] Any intervention that is deemed illegitimate by the Commission is open to challenge and may be declared unlawful by the EU courts.

Under the EA 2002, the grounds for public interest interventions are currently more or less aligned with the EU Merger Regulation.[67] However, there would be greater scope for flexibility once exit occurs since the UK Government would be able to amend the list of public interest considerations to add further categories, without the threat of a challenge from the Commission.

Indeed, the new British Prime Minister has already said publicly since the referendum that the interests of workers, local communities and the "whole country" could be better taken into account in the deal-approval process for UK target companies, citing the failed AstraZeneca takeover attempt. Speaking in Birmingham on 11 July 2016, Theresa May said that "something radical" was needed to protect strategically important industries:

> "A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain."[68]

A strategy of this nature is unlikely to be compatible with EEA membership. Further, although a non-EEA solution in the area of competition enforcement post-Brexit would allow broader public interest considerations in UK domestic competition legislation, in practice the UK would not want to incite retaliatory measures by other countries which might want to prevent acquisitions of their companies by British acquirers.[69]

Another way to handle such issues post-Brexit would be for the UK to introduce a foreign investment review regime, similar to the CFIUS review in the US, the Foreign Investment Review Board (FIRB) process in Australia, or the Investment Canada Act in Canada. This would allow acquisitions of British companies by foreign corporations to be reviewed more broadly on "non-competition" public interest grounds. As Sir Philip Lowe has recently pointed out, the main problem with such public interest tests are that they can mean less predictability, clarity and transparency in the regulatory process because they provide greater scope for the exercise of political influence. On the other hand, they can provide great opportunities—both for parties to a transaction which may have otherwise been blocked on competition grounds, and for third parties trying to intervene to have transactions blocked.[70]

[63] Autorité de la concurrence No.12-DCC-154, Groupe Eurotunnel/SeaFrance (7 November 2012).
[64] Competition Commission, "A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A." (6 June 2013), *https://assets.publishing.service.gov.uk/media/5329dfe8ed915d0e5d00035d/final_report_excised.pdf* [Accessed 1 September 2016].
[65] This included a review of Eurotunnel internal documents, which suggested that its decision to acquire the SeaFrance assets was primarily driven by a desire to prevent DFDS/LD from acquiring the ferries and driving down prices. The Autorité de la concurrence did not see any of the Eurotunnel internal documents.
[66] See Alec Burnside, "EU legal review takes precedence in Pfizer/AstraZeneca case", Letters to the Editor, *Financial Times*, 16 May 2014.
[67] EA 2002 s.58 allows the Secretary of State to intervene in cases that give rise to issues of national security; media quality, plurality and standards; and financial stability.
[68] PaRR, "UK PM's merger review agenda may point to Brexit settlement outside the EEA — lawyers" (13 July 2016).
[69] "A 'repoliticisation' by adding more exceptions to competitive-based merger controls, or introducing criteria in foreign investment control that have previously been abandoned in merger control by successive governments, could undermine business confidence and the credibility of any merger regime." Alex Chisholm, former CMA Chief Executive, "Public interest and competition-based merger control", Fordham Competition Law Institute Annual Conference (11 September 2014)*https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control* [Accessed 1 September 2016].
[70] Sir Philip Lowe, "Brexit Bowl: Competing Public Interests? Politics and Competition Enforcement", FTI Consulting (20 July 2016).

Finally, an increase in the volume of merger cases that are reviewable under the EA 2002 would inevitably place a strain on the CMA's resources, although this may be partially offset by the fact that the UK operates a voluntary merger control regime.

State aid

The UK will no longer be subject to state aid rules if it leaves the EU and does not join the EEA or put in place an EEA-like competition regime. Any future UK state aid regime will ultimately be dependent on the terms of the relationship between the UK and the EU. For instance, if the UK were to enter into arrangements that are broadly similar to the ones that currently govern Switzerland's relationship with the EU, the UK would be subject to state aid rules that are similar to those that are contained in art.107 TFEU. In particular, art.23(1)(iii) of the EU-Switzerland Free Trade Agreement provides that any state aid which could distort competition by promoting certain undertakings or certain branches of production is incompatible with the agreement.[71] At a minimum, the UK will still be subject to World Trade Organization rules that govern state subsidies, and in particular the Agreement on Subsidies and Countervailing Measures (ASCM).[72] So the UK Government's ability to grant subsidies will probably still be subject to some regulatory constraints, although WTO subsidy provisions are less sophisticated and far less effectively enforced than the EU state aid regime.

Conclusion

Significant work is already underway in the UK to establish what its negotiating position will be in all policy areas going into the EU exit negotiations. As the months go by, we are likely to start to see a more focused debate in the competition sphere, and details will begin to emerge as to the direction the UK Government would like to take. In this article, we have set out the two ends of the possible spectrum of outcomes in the field of competition enforcement. There are doubtless a number of other potential solutions somewhere in between. Regardless of what the UK wants going in to the negotiations, it will have to reach a consensus with the remaining 27 EU Member States, and for a solution involving the EEA, Norway, Liechtenstein and Iceland as well.

Even if a full surgical separation of the EU and UK competition regimes is the final outcome, there will be no legal vacuum: the UK currently has a well-oiled national regime based on sound domestic competition legislation, which will continue to function well. But the regulatory burden on business would certainly be greater than in a post-Brexit scenario in which an EEA-type competition regime is put in place.

[71] EC-Switzerland Free Trade Agreement [1972] OJ L300/189, *http://trade.ec.europa.eu/doclib/docs/2007/january/tradoc_133045.pdf* [Accessed 1 September 2016].
[72] See *https://www.wto.org/english/docs_e/legal_e/24-scm.pdf* [Accessed 1 September 2016].