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Brexit and Competition Law

Written evidence submitted by

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Brexit and Competition Law

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Executive Summary

1. Post-Brexit, it is likely that there will be parallel investigations in the UK and the EU27, in particular in those cases that are currently investigated by the European Commission and in which there is a substantial effect on competition within the EU, such as global cartels.
2. This will have cost implications. Given that the enforcement resources of the CMA are already stretched, resulting in a dearth of enforcement actions compared to other European competition authorities, it will be a challenge to accommodate these additional cases, which are often particularly complex and resource intensive. There will also be an increased burden resulting from the increased costs of investigative coordination. These costs may partly be offset by higher fines imposed in these more serious cases, which will now be imposed by the CMA instead of the European Commission. Nevertheless, it seems inevitable that either the CMA's budget will have to be increased substantially, or there will be indirect costs resulting from under-deterrence of competition law infringements in the UK.
3. It is in the mutual interest of the EU and the UK to come to a competition cooperation agreement. The intensity of cooperation under such an agreement will inevitably fall short of that of the cooperation currently practiced within the European Competition Network. Given the current convergence of the competition regimes in the EU and the UK, which is not to be expected to disappear in the short to medium term, it should be possible to negotiate for cooperation that is at the upper bound of what is possible in international competition agreements. The agreement should, in addition to the staple provisions in competition cooperation agreements (such as notifications, negative and positive comity etc), also include provisions for the exchange of *confidential* information and for *enhanced* investigative cooperation.
4. We consider that a transitional arrangement is necessary for dealing with the disengagement of the CMA from a well-defined system of public enforcement cooperation within the EU. The CMA and the EU will still be dealing with cases with a cross-border dimension, thereby requiring coordination and cooperation.
5. The UK should make active efforts to reinforce its position as a jurisdiction of choice for private actions for damages, in particular for EU-wide cartels, by facilitating the access claimants have to evidence, eventually offering a wider disclosure of the evidence included

¹ Ioannis Lianos is the primary contact for the Introduction, Questions 1 (jointly with Despoina Mantzari) and 3. Deni Mantzari is the primary contact for Questions 2 and Question 7 (jointly with Florence Thepot). Florian Wagner von-Papp is the primary contact for Questions 4, 5 and 6.

in the file of a competition authority compared to that provided by EU law, by recognizing the binding effect of the decisions of the European Commission and NCAs of other Member States of the EU, and by making arrangements that could substitute for those of the Brussels Regulation recast that will be no longer directly applicable in the UK.

I. Introduction

6. With this submission we intend to contribute to the public debate on the opportunities and challenges of leaving the EU for UK competition policy, and to inform and influence the UK Government's consideration of these issues. Our response addresses the questions in the call of evidence, where we have particular expertise or knowledge.
7. We note that there is still great uncertainty about the modalities of exiting the EU, the process of Brexit, and the exact relationship that will exist between the EU and the UK, if and when the decision to exit is implemented. For this reason, we first explore some of the available options for the relationship between the EU and the UK and the implications for competition law now that the UK has entered into withdrawal negotiations with the EU.
8. There are various options. Some of these options entail some degree of participation of the UK in the European Single Market ('soft Brexit'), while others involve the UK leaving the European Single Market and entering into some form of bilateral trade deal/association agreement with the EU, or resorting to WTO rules ('hard Brexit'). We will explore the implications of each option for substantive competition law.
9. A possible option would be for the UK to join the European Economic Area (EEA) regime from which Iceland, Lichtenstein and Norway benefit, and be bound by the EEA provisions on competition (the so-called 'Norway Model').² These provisions, in Articles 53 to 60, Annex XIV and Protocols 21-24 of the EEA Agreement, are modelled on the equivalent provisions in the EU Treaties. EEA Members are also subject to the equivalent State Aid rules.³ EU Regulations and Directives are also transposed in the EEA legal order through decisions of the EEA Joint Committee. EU Notices, Communications, and Guidelines are also usually re-adopted by the European Free Trade Association (EFTA) Surveillance Authority. Joining the EEA will be the least disruptive option from the status quo.
10. There will be no serious substantive changes to be brought to the Competition Act 1998 (CA98), with the exception perhaps of Section 10 CA98 providing that an agreement that is covered by an EU Block Exemption Regulation (BER) will be exempted under UK competition law (the 'parallel exemptions' system), although in practice it seems unlikely that the UK competition law will diverge from the approach followed in the various EU BER and Guidelines. If the European Union (Withdrawal) Bill 2017-19 is enacted in the relevant part, the current EU BER will be incorporated into domestic law. In order to avoid regulatory divergence, it would be desirable to give the CMA the power to recommend to the Secretary of State adoption of future versions of the EU BER through Statutory Instruments, where necessary with the required modifications. Similarly, it may make sense to amend the 'convergence clause' of Section 60 CA 98 with regard to general principle of dealing with the questions relating to competition within the United Kingdom in a manner that is consistent with the treatment of corresponding questions in EU law. The government may decide that it does not make sense to impose on UK courts and competition enforcers the duty to avoid any inconsistency between the enforcement of UK competition law and the principles laid down by the jurisprudence of the EU courts.

² EEA Agreement [1994] OJ L1/1.

³ Art 61-64 EEA.

11. However, it appears desirable to continue requiring the courts and competition enforcers to 'have regard' to the to decisions of, principles established by, and interpretations of the law found by the Court of Justice of the European Union, decisions by the European Commission, Commission's Notices and Guidelines, and to avoid inconsistency with the decisions of, principles established by and interpretations of the law found by the EFTA Court and the EFTA Surveillance Authority. The EEA/EFTA option will not alter the current dynamics in merger control, as the European Commission has exclusive jurisdiction in the EEA to deal with all cases that have an EU dimension (Article 57 EEA). Similarly, the UK will still be subject to state aid rules under the EEA option.
12. From an institutional perspective, the CMA will have no competence to apply EU competition law, although it may apply EEA law, which is practically the same. It will also cease to be a national competition authority (NCA) within the EU competition law system and cease to participate in the ECN. A vibrant and effective European Competition Network ('ECN') exists, of which the UK's Competition and Markets Authority ('CMA') is a prominent member. The ECN facilitates coordination and cooperation in the development and enforcement of competition policy with, among other things, detailed notifications of enforcement activities among ECN members, exchange of non-confidential and confidential information, and intensive investigative assistance including joint inspections.
13. Another route would be for the UK to negotiate a bilateral deal providing some access to the EU Internal Market. This may result in anything ranging from the 'Swiss Model' or pure EFTA Model with tailor-made bilateral agreements to the 'Turkish Model' of a Customs Union style Association Agreement with the EU, or a simple free trade deal ('the Canada or CETA Model'⁴). If any of these options is chosen, the bilateral agreement between the EU and the UK, which will have to be negotiated, may cover some but not all areas of trade and, in any case, is unlikely to impose a general duty to apply EU laws. Competition law may be covered by such an agreement, with varying degrees of convergence and cooperation envisaged between the EU and UK competition law regimes. For instance, the recent EU-Switzerland competition cooperation agreement, which entered into force on December 1st, 2014, provides for extensive cooperation and coordination between the EU and the Swiss competition authorities, including the exchange of and transmission of confidential information.⁵
14. If any of these options is chosen, this may have some implications with regard to the substantive provisions of antitrust law (in addition to the ones indicated above for the 'Norway Model'), although both Swiss and to a certain extent Turkish competition laws resemble EU competition law in many respects. However, the EU Merger Regulation will cease to apply and, as a result, there will be no longer a one-stop shop principle for notification of mergers, as transactions in the UK will need to be notified to the European Commission, as well as to the UK competition authorities, which may decide to opt for a mandatory, and not voluntary as it is now, merger notification system. State aid rules will no longer apply. Of course, the parties in the negotiations are free to decide otherwise.
15. Choosing this option will also have significant implications with regard to enforcement and procedure. In addition to the implications hinted at above with regard to the 'Norway Model', in any of the models of the second route, the CMA will only apply UK competition law. Regulation 1/2003 will no longer apply and consequently the CMA will be able to initiate proceedings even if the European Commission has started investigations on the same case and irrespective of whether there is already an investigation by another NCA. Among

⁴ See, Comprehensive Economic and Trade Agreement (CETA), will enter into force provisionally from 21 September 2017.

⁵ Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws [2014] OJ L 347/3. See also below on Question 5.

the various other procedural issues one may refer to the legal professional privilege, as lawyers solely qualified in England & Wales, Scotland and Northern Ireland would no longer be enrolled in an EU Member State Bar or Law Society with the result that their advice would not be privileged in investigations conducted by the European Commission or NCAs from the EU27, and would not be entitled to plead before the European Courts, the case law of the CJEU reserving this benefit solely to EU-qualified lawyers.⁶

16. Although Brexit will not affect the jurisdiction of UK courts to apply EU competition law as an integral part of the law of an EU Member State, if this is the law applicable to the dispute pending before the UK courts (foreign applicable law), Rome II and Brussels I Regulations, with regard to applicable law and jurisdiction in cross-border disputes, would no longer apply.⁷ This may affect London's standing as an EU-wide competition litigation hotspot, with implications for law firms and economic consultancies based in the UK. However, it is possible that the arrangements negotiated with the EU will include some provisions re-establishing the effect of Rome II and Brussels I, or some equivalent regime, for the UK.
17. Another option that may be chosen is the WTO only (default) option, without any bilateral agreement between the EU and the UK being concluded ('The WTO Model'). Such option will have similar effects as those described in the previous (bilateral agreement) option, without any possibility for the parties to devise a regime that may carry some of the characteristics of the current relation between the EU and the UK competition law systems. In this option, the WTO rules on subsidies will continue to apply, thus constraining somewhat the possibility of the UK government to hand out subsidies and state aid.

II. Responses to Questions

General

Question 1: What should competition policy in the UK set out to achieve? What guiding principles should shape the UK's approach to competition policy after Brexit?

18. Competition law, as it is currently implemented, is primarily focused on protecting the competitive process and consumer welfare, and does not take into account the important shift of the global economy in the last two decades from markets to hybrid forms of firms' interaction with almost two thirds of the global economic activity taking place through coordinated global value chains (GVC) composed by thousands of firms and relying on various systems of transnational governance.
19. These supply chains start from the factors of production and other inputs needed for the production of a product and end up with distribution of the end product to the final consumer. GVCs not only drive and coordinate economic activity but also have a market-creating role, in particular by developing quality and safety standards to which economic activity abides.
20. An important priority of the UK competition law should therefore be to ensure the access of UK-based firms to GVCs, by bringing GVC analysis to the centre of competition law

⁶ Case 155/79, *AM & S Europe Limited v Commission* [1982] ECR 1575; Case C-550/07 P, *Akzo and Akros v Commission* ECLI:EU:C:2010:512.

⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40; Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/2. See further Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' (2016) *Journal of Private International Law* 12(2):195–210.

and policy. Competition law should not only aim at the protection of consumers, but should also seek to protect UK-based firms from monopolistic bottlenecks in other segments of the GVCs elsewhere, when their potential exclusion may lead to exploitative effects on consumers, or when these exclusionary practices may reduce the share of these companies, in particular small and medium size undertakings, in the total surplus value produced by the chain this having negative effects on their ability and incentive to innovate and their incentive to proceed to productivity-enhancing investments. This new focus on productivity is quite important in merger control, with some thought being given to the elaboration of merger remedies facilitating UK-based firms' access to GVCs.

21. Should the government decide to maintain a state aids/subsidies regime, as a safeguard to the likelihood of excessive and unwarranted subsidies or in order to avoid a possible subsidy war with the UK's main trading partners, this should include a favourable regime for R&D subsidies, in particular with regard to private investment on applied research that often works as a complement to public investment on basic research. Competition law should also accommodate "innovation commons" and other forms of cooperative R&D activity, while also ensuring that this cooperative activity does not lead to cartelization and the anticompetitive foreclosure of competitors.
22. There is ample evidence that competitive markets and active competition law enforcement significantly improve productivity growth. There is also evidence that product market competition fosters innovation in neck-and-neck sectors where firms operate at the same technological level.
23. Brexit may offer the opportunity for some rethinking of the directions of UK competition law and policy. We suggest that the following areas may require some detailed further analysis:
 - Reflect on the adoption of a UK State subsidies regime with specific rules for certain economic sectors and R&D subsidies.
 - Move to a more active implementation of the public interest test in assessing merger activity, eventually adopting an exhaustive list of public interest considerations (PICs) and reflecting on the inclusion of new ones related to the development of the "green" and "social" economy. The task of implementing this test may be delegated to the CMA so that the public interest analysis is performed in an evidenced-based and consistent manner by a politically independent authority. The practice of the Competition Commission of South Africa in implementing PICs in merger control may provide some useful insights.
 - Re-focus competition law enforcement on access to global value chains, eventually extending the extraterritorial application of UK competition law, so as to ensure that UK firms will not suffer from exclusionary practices abroad.
 - Ensure the interaction of institutions in charge of the various dimensions of competition policy, such as international trade, competition law enforcement, utilities regulation, intellectual property law, by eventually establishing a competition policy and innovation network and elaborating a number of MoUs between these various institutions so as to ensure cooperation, complementary action at all levels and active competition advocacy work.
24. We consider that the future role that competition law and policy will and should play in regulated sectors post-Brexit also deserves specific attention. Competition policy has been central to the regulation of industries such as communications and energy. Indeed, the

regulatory frameworks for those (and other) sectors reflect EU-wide policy, which again has been strongly influenced by UK policy and experience.

25. We consider that new powers to protect consumers, especially vulnerable consumers and consumers unlikely to switch, can be introduced even through retail regulation if need be, moving away from the trend in the EU to rely on general competition law safeguards and sector-specific wholesale regulation. Currently, any attempt to protect consumers through retail price regulation has to meet the rather strict conditions set out by the ECJ in its *Federutility* judgment.⁸ Following Brexit, the UK sector-specific regulators will be able to resort more freely to retail price regulation to protect vulnerable consumers, elderly consumers or consumers unlikely to switch.⁹ We are of the view, however, that the scope and conditions for state intervention set out in the ECJ's line of case law¹⁰ should still be given due regard before intervening so as to avoid unintended consequences.
26. With regard to telecoms regulation and the significant market power regime under the EU's regulatory framework for electronic communications, we consider that Brexit will entail that Ofcom may gain more leeway in defining relevant markets within the UK upon which to intervene. The same applies to Ofcom's freedom to determine the types of remedies required so as to address competition deficiencies. Under current rules, Ofcom has to re-examine its regulatory regime in each and every telecoms market every three years, raising the costs for the industry and the regulator. Post-Brexit, the regulator may enjoy a greater degree of discretion to examine relevant markets when it deems necessary.

Question 2: Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?

27. We consider that divergence via repealing Chapter I and II prohibitions of the Competition Act 1998 (which mirror Articles 101 and 102 on anti-competitive agreements and abuse of dominance respectively) would create legal uncertainty and would be detrimental to businesses and consumers.
28. We consider that a more likely form of divergence would be to retain the Chapters I and II prohibitions, but to allow their interpretation to evolve differently from EU jurisprudence. Section 60 of the Competition Act 1998 requires consistently with EU jurisprudence and it is combined with the right of UK Courts to refer questions of law to the ECJ. A possibility post-Brexit would be to modify section 60 to require UK authorities and courts to 'have regard to' EU law and precedent rather than acting consistently with it. That would allow UK courts and authorities to depart from EU law where they considered it appropriate and embrace, perhaps, a less formalistic and more economic effects-based competition law. Finally, the UK will not be bound by the EU single-market imperative, which has influenced EU competition law. Nevertheless, we consider it desirable that the UK, based on its own sovereign decision, continue to aim at the greatest possible harmony between future UK and EU competition law in order to avoid regulatory divergence and possible conflicts for compliance, which would impose unnecessary costs for the undertakings concerned.

⁸ Case C-265/08, *Federutility et al v Autorita per l'energia elettrica e il gas*, EU:C:2010:205.

⁹ See for example 'Ofcom's review of the market for standalone landline telephone services' (February 2017) available at <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2017/bts-landline-only-customers-set-for-cheaper-bills>. See further CMA, 'Energy Market Investigation' (9 February 2016) available at <https://www.gov.uk/cma-cases/energy-market-investigation>

¹⁰ See inter alia Case C-36/14, *Commission v Poland*, EU:C:2015:570 ; *Enel Produzione SpA v Autorità per l'energia elettrica e il gas*, EU:C:2011:861 ; Case C-121/15, *Association nationale des opérateurs détaillants en énergie (ANODE) v Premier ministre and Others*, EU:C:2016:248.

Regulatory divergence could also impair the degree of enhanced enforcement cooperation that can be negotiated with the EU (see also below Question 5).

Question 3: Will Brexit impact the UK's status as a jurisdiction of choice for antitrust private damages actions?

29. Jurisdiction can be defined as the government's general power to exercise authority over all persons and entities within its territory. We generally distinguish three forms of jurisdiction: prescriptive jurisdiction (which refers to the ability of a State to create, amend or repeal legislation, in our case applicable substantive competition law), adjudicative jurisdiction (which consists in the power of a court to hear and resolve legal and factual issues under substantive legal rules and to provide the adjudicative and remedial forum to resolve disputes over rights) and enforcement jurisdiction (the state's right to enforce this legislation by investigating an infringement of its laws and punishing the infringers, or the possibility of implementing a judgment). To the extent that Brexit may affect the capacity of the UK to exercise its jurisdiction in a competition law enforcement context, it will certainly impact on the UK's "market share" in the inter-jurisdictional competition law enforcement activity, in particular for global cartels, and its status as a jurisdiction of choice for private damages actions in particular.
30. A distinction is often made between follow on actions for damages and standalone actions for damages, the latter category regrouping claims brought where the alleged breach of competition law is not already the subject of an infringement decision by the European Commission or one of the national competition authorities (NCAs), and the former referring to actions for damages brought following an infringement decision adopted by the European Commission or an NCA and relying on this infringement decision. Brexit may have differential effects to the status of the UK as a jurisdiction of choice for standalone and follow on private damages actions. We will explore prescriptive jurisdiction, adjudication jurisdiction and enforcement jurisdiction, before concluding on the overall status of the UK for private actions for damages (standalone and follow on).
31. The right to claim damages for competition law infringements has been recognized in the UK long before the CJEU defined the contours of this EU remedy in *Courage v Crehan*.¹¹ Damages may be claimed for infringement of, either Articles 101 and 102 TFEU, or Chapters I and II CA98 (or for infringement of both EU and UK competition law). The EU Damages Directive 2014/104/EU had to be implemented in the UK, as in any other Member State, by December 27th, 2016.¹² As we highlighted in the Section above, the Directive aims to establish specific minimum standards that EU Member States must implement, each Member State maintaining the possibility to take into account the specificities of its own civil procedure and other comparative advantages (quick court procedures, well-trained judges, provisions for third-party litigation, the possibility of claimants to bring actions by assigning their respective claims etc) and provide a more claimant-friendly jurisdiction in the inter-jurisdictional competition that will certainly follow the period of the implementation of the Directive.
32. When the UK government opened a consultation in January 2016 with regard to the implementation of the Damages Directive in the UK, the government considered if it would be better to implement a separate regime for breaches of European competition law

¹¹ For an analysis of the Damages Directive, see I. Lianos, P. Nebbia & P. Davis, *Damages Claims for the Infringement of EU Competition Law* (OUP, 2015).

¹² The Damages Directive was implemented in March 2017 by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, Statutory Instrument 2017 No. 385.

(including where European competition law is applied in parallel with UK competition law) to sit alongside the regime for cases under UK competition law ('dual regime') than to apply the changes required by the Directive to cases brought as a result of breaches of either European or UK law (or both) ('single regime').¹³ In view of the reforms undertaken by the Consumer Rights Act 2015 and the CAT Rules 2015, many of the requirements set out by the Directive already exist in UK domestic law. The main idea was the 'gold-plating' of the Damages Directive into national law so that a single regime applies both to EU and domestic law infringements. Following its implementation in March 2017, the Directive forms part of domestic law that will continue to apply to competition law infringements regardless of the withdrawal from the EU. Following withdrawal, it would be possible to amend certain substantive parts of the The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 in order to offer the possibility to the UK government to develop its own model of damages action for competition law infringement, for instance providing for a lower degree of protection for the disclosure of confidential information or the protection of leniency statements, the presumption of harm and/or joint and several liability for leniency applicants.

33. *Prescriptive jurisdiction and cause of action*: Private individuals suffering loss caused by breach of Articles 101 and 102 TFEU can bring proceedings before the UK Courts for the tort of breach of statutory duty (as a cause of action on the basis of section 2(1) of the ECA 1972), seeking damages as well as injunctive relief.¹⁴ A claimant must show that the statute intends to safeguard through a civil action the relevant class of persons and for the type of injury corresponding to the claimant, there has been a breach of statutory duty, the breach has caused the loss suffered by the claimant. The Court of Appeal has confirmed in *WH Newson Holding Limited v IMI Plc* that section 47A CA98 may also cover claims relying on the tort of conspiracy to use unlawful means.¹⁵
34. To the extent that claimants will not be able to invoke directly Articles 101 and 102 TFEU for damages claims, they will be offered less causes of action than prior to Brexit, the claimants being able to only rely on Chapters I and II CA 98. The question if these provisions may apply to conduct having effects outside the UK will depend on the way UK courts interpret the substantive law provisions of UK competition law enabling extraterritorial enforcement. In the event of a soft Brexit where the UK joins the EEA, Articles 53 and 54 of the EEA Agreement may substitute for Articles 101 and 102 TFEU as causes of action, to the extent that the EFTA court has followed the EU law principles with regard to actions for damages.¹⁶
35. With regard to extraterritorial enforcement (prescriptive jurisdiction), EU competition law has adopted the relative expansive perspective of the "qualified effects doctrine".¹⁷ In the event of Brexit, UK-based conduct may still fall within the scope of EU competition law, should this produce "qualified" effects in the EU, the Commission having prescriptive jurisdiction to implement the provisions of EU competition law. EU-based conduct may also fall within the prescriptive jurisdiction of UK-based authorities, including courts. UK competition law has traditionally taken a cautious approach with regard to the possibility of

¹³ BEIS, Consultation: *Implementing the EU Directive on damages for breaches of competition law* (January 2016), para 2.4.

¹⁴ See also the position of the Court of appeal in *Crehan v Innterpreneur Pub Co CPC* [2004] ECC. 8; See also, *Provimi Ltd v Aventis Animal Nutrition SA and others* [2003] UKCLR 493.

¹⁵ *W.H. Newson Holding Limited and Others v IMI Plc and Others* [2013] EWCA Civ 1377.

¹⁶ Case E-14/11, *DB Schenker v EFTA Surveillance Authority* [2012] EFTA Ct Rep 1178..

¹⁷ Case C-413/14 P, *Intel Corp. v European Commission*, ECLI:EU:C:2017:632.

extraterritorial enforcement of competition law, being traditionally hostile to the effects doctrine.¹⁸ The implementation of ERA 2013 may alter this trend, as in its section 25(3) provides that the CMA “must seek to promote competition, both within *and outside the United Kingdom*, for the benefit of consumers”.¹⁹

36. With regard to Chapter I CA98, Section 2(3) of the Competition Act provides that the prohibition principle for anticompetitive agreements between undertakings, decisions by associations of undertakings or concerted practices contained in Section 2(1) CA98, “applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom”. Hence, it seems that the UK competition law adopts the *Wood Pulp* implementation doctrine. Things are less clear with regard to the application of the “qualified effects” doctrine. The principle of consistent treatment under UK competition law of corresponding questions arising in EU law, according to Section 60 CA 98, would indicate that the UK competition authorities and courts should apply the “qualified effects” doctrine. However, Section 60 CA98 provides that consistency should be achieved, “having regard to any relevant differences between the provisions concerned”, and it has been alleged that Section 2(3) CA98 with its explicit wording on the implementation doctrine qualifies as a “relevant difference”.²⁰
37. With regard to Chapter II CA98, there is no equivalent to Section 2(3), although Section 18(3) requires that the dominant position being (wholly or partly) within the UK. By virtue of the same Section 60 CA98 and the *Intel* judgment of the Court of Justice, one may expect that the “qualified effects” doctrine would apply and bring within the scope of Chapter II conduct occurring in a related market outside the UK if it has immediate, substantial and foreseeable effects within the UK. That said, much will depend on whether Section 60 CA98 will be repealed at the end of the transition period, for instance.
38. There is a long history of opposition of the UK to the extraterritorial enforcement of the competition laws of other jurisdictions, in particular the United States, following the implementation of the effects test in *Alcoa*. The UK Protection of Trading Interests Act 1980 was specifically passed by the UK Parliament in order to counteract the extraterritorial enforcement of US antitrust law and applies where there is harm to UK commercial interests.²¹ The Statute aims to block the extraterritorial application of the foreign law, by enabling the Secretary of State (SoS) to make orders requiring UK firms to give notice to the SoS of any requirement or prohibition imposed or threatened to be imposed on them as a result of measures taken under the law of a foreign country affecting international trade and threatening to damage the commercial interests of the UK and to give them directions for prohibiting compliance with any such requirement or prohibition.²² Similarly, the SoS has the power to prohibit compliance with the request of a foreign authority to provide commercial information to it in case that foreign authority does not have territorial jurisdiction. The SoS is also authorized to prohibit a UK court to comply with a foreign court's letter of request if the information sought infringes on British sovereignty or would prejudice national security or foreign trade relations. Foreign multiple damages awards, such as the US treble damages, cannot be enforced in the UK. Defendants are even entitled to recover multiple-damages awards paid in a foreign court as the UK Protection of Trading

¹⁸ See, R. Whish & D. Bailey, *Competition Law* (8th ed., 2015), 533.

¹⁹ Emphasis added.

²⁰ R. Whish & D. Bailey, *Competition Law* (8th ed., 2015), 534.

²¹ On the passage of this Act, see *inter alia* T.J. Kahn, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, (1980) 2(2) *Northwestern Journal of International Law and Business* 476

²² Three orders have been made under this Section, the most relevant one for antitrust purposes being the Protection of Trading Interests (US Antitrust Measures) Order 1983, SI 1983/900, which gave rise to the *Laker Airways* litigation in UK Courts: *British Airways Board v. Laker Airways Ltd*, [1985] AC 58.

Interests Act 1980 enables the UK defendants to bring an action in the UK to “claw back” the non-compensatory part of damages award. Although most of these restrictions relate to enforcement jurisdiction, they have an impact on prescriptive jurisdiction by foreign antitrust law, as the limits placed on enforcement jurisdiction may influence the exercise of prescriptive jurisdiction. One may expect that such legislation could also be used with regard to the application of EU competition law in the event of Brexit.

39. *Adjudicative jurisdiction* is mostly exercised within the territory of the country that has prescriptive jurisdiction, hence it raises less possibilities of conflict than prescriptive jurisdiction.
40. With regard to private enforcement, things are more complex as international law imposes certain limits on adjudicative jurisdiction in civil cases, such as actions for damages. First, civil and common law jurisdictions recognise the agreement of the parties as a basis for jurisdiction (jurisdiction based on consent). Second, international law accepts various foundations for adjudicative jurisdiction, such as a defendant’s domicile or residence, the place where the tort was committed, or on the effects of the tortious conduct within the jurisdiction. Third, in common law jurisdictions, principles of comity, as well as more broadly the recognition of the limits of the assertion of jurisdiction, have led to the development and increasingly frequent application of the *forum non conveniens* doctrine. Civil law countries do not generally recognise the doctrine of *forum non conveniens* although they require that the dispute must have sufficient connections to the jurisdiction. Fourth, there may be limitations to the exercise of adjudicative jurisdiction resulting from immunities provided in treaties and customary international law (sovereign immunities, political question etc). A major difference with public enforcement is that the fact that a specific court is seized does not determine, as in the case of public enforcement, the applicable law, as the court may apply foreign law. Private actors are guaranteed the same adjudication or ‘an international uniformity of result’, irrespective of whether the judgment will be handled in their own or another state.²³
41. Private international law rules may nevertheless regulate transnational dispute-resolution activity by domestic courts. The most important private international law rules operating at the EU level and regulating adjudicative jurisdiction for cross-border EU competition law cases is the Brussels I regime (including the Brussels I Regulation), which in addition to be concerned with the allocation of jurisdiction, also includes provisions on the recognition and enforcement of judgments in civil and commercial matters, as well as the coordination of proceedings within the EU.²⁴ In the absence of common rules, Member States are free to apply their own private international law (conflict of laws) rules.
42. As we have highlighted above, adjudicative jurisdiction requires some links connecting the defendant to the forum, whether by physical presence, such as the defendant’s domicile, or ‘minimum contacts’ with the jurisdiction. The EU has made the choice of fixed rules of

²³ T. Hartley, *The Modern Approach to Private International Law—International Litigation and Transactions from a Common-Law Perspective*, Vol 319, (Hague Academy of International Law, 2007), 27, observing that this principle entails that ‘the result of legal proceedings should be the same irrespective of the country in which they are brought’.

²⁴ Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (recast). The new Regulation 1215/2012 replaced from 10 January 2015 Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, and introduced slight amendments to the jurisdiction of EU Member States’ courts, but proceeded to more important amendments regarding the coordination of proceedings between EU courts and litigation in non-EU states and facilitated the recognition and enforcement of EU judgments.

jurisdiction and the Brussels regime aims to provide clear and foreseeable rules on adjudicative jurisdiction.²⁵

43. The Brussels regime applies in situations where the matter is within the substantive scope of the Regulation 1215/2012 (civil and commercial matters) and the defendant is domiciled in a Member State of the EU, although its scope has been extended to cover defendants domiciled in EFTA States as a result of the Lugano Conventions.²⁶ The Brussels Regime does not apply if the matter is dealt with by an arbitration clause. It also does not apply to disputes concerning defendants domiciled outside the EU (or EFTA), in which case the non-EU domiciled defendant will be subject to the national rules of jurisdiction applicable in the Member State seized, with the exception of instances of exclusive jurisdiction (Article 24 Brussels recast) or the presence of a jurisdiction agreement (Article 25 Brussels recast), which are subject to the Brussels regime. However, actions brought by a non-EU domiciled claimant against a defendant domiciled in the EU are subject to the Brussels regime, as only the defendant's domicile is a relevant factor for the application of the Brussels regime.
44. In the absence of exclusive adjudicative jurisdiction (under Article 24 Brussels recast), the Brussels Regulation provides the plaintiff with a choice between two possible heads of jurisdiction. The plaintiff may either choose the general jurisdiction of the defendant's domicile (Article 4 Brussels recast), or the special grounds of jurisdiction (according to Articles 7 and 8 Brussels recast). 'Domicile' is defined in Article 63 Brussels Regulation recast, which provides that 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat; (b) central administration; or (c) principal place of business'. Hence, it is possible that for a company having its statutory seat in Greece, its central administration in Austria, and its principal place of business in the UK, the courts of all three jurisdictions will have jurisdiction under Article 4(1) BR recast.
45. Special rules of jurisdiction are not mandatory and provide the claimant with the choice of where to sue. These provisions attempt to allocate the jurisdiction to the forum which has a close connection to the legal dispute, the claimant maintaining always the choice of whether to sue there or in the defendant's domicile. Article 7 contains the most important basis of special jurisdiction, which for contracts-based claims is the place of performance of the obligation in question (Article 7(1)) and for tort claims, the place where the harmful event occurred or may occur (Article 7(2)). Article 7(5) BR recast offers an additional head of jurisdiction to claimants as it provides that a defendant may be sued in the courts of a country other than its place of domicile 'as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated'. The operation of the branch concerns issues relating to the management of the branch—actions in delict arising out of the activities of the branch or undertakings entered into in the name of the parent company at the place of the intermediary. Furthermore, Article 8(1) BR recast permits claimants to initiate their claims against multiple defendants, which may be particularly relevant where a claimant has been the victim of an international cartel. According to Article 8(1), a person domiciled in a Member State may also be sued "where he is one of a number of defendants, in the courts for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of

²⁵ Case C-265/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (WABAG) and Others* [2002] ECR I-1699, paras 24, 26 (noting that the Brussels regime 'should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued').

²⁶ See the Lugano Convention of 1988, which was revised in 2007 and concluded between the EU, Denmark, and the existing EFTA States (Switzerland, Norway, and Iceland), closely modelled on the Brussels I Regulation.

irreconcilable judgments resulting from separate proceedings”. Section 4 of Brussels Regulation recast contains rules with the aim of protecting weaker parties in transactions, such as consumer contracts (Articles 17–19), in order to establish bases of jurisdiction favourable to private final consumers and to restrict jurisdiction agreements. Article 17(1)(c) determines the jurisdiction of the court for contracts concluded by a consumer (acting outside his trade or profession when the contract was concluded) with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several states including that Member State. The contract should also fall within the scope of such activities. The consumer has the choice to bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts of the place where the consumer is domiciled. Article 25 Brussels Regulation recast allows parties to choose a court having jurisdiction to hear their disputes (‘prorogation of jurisdiction’, forum selection clause, choice of forum clause), thus enabling greater party autonomy in forum shopping. These clauses provide legal certainty to the parties and may confer jurisdiction to the most efficient judicial system for the parties to that prorogation of jurisdiction agreement.

46. Although not within the scope of the Brussels regime, arbitration agreements may provide an alternative forum for adjudication of commercial disputes.
47. Following Brexit, the Recast Brussels Regulation will no longer be directly applicable in the UK. In the event of a “soft Brexit”, the UK remaining a member of the EEA, the Brussels Regulation recast will cease to apply. Indeed, the Brussels Regulation system is based on reciprocity and the principle of mutual trust and recognition, and this would seem improbable in the absence of an arrangement between the EU and the UK. In this case the Brussels Convention of 1968, which was superseded by the Brussels Regulation, may apply with regard to the EU Member States that are part of this Convention, the UK having joined the Brussels Convention on its own right in 1978.²⁷ With regard to Denmark, Iceland, Norway and Switzerland, it has been alleged that the 2007 Lugano Convention may not apply to the UK if it ceases its membership to the EU.²⁸ The UK may try to accede to the 2007 Lugano Convention. However, Article 70 of the Convention restricts accession to members of EFTA, members of the EU acting on behalf of non-European territories which form part of them or for whose external relations they are responsible, and those states that can satisfy the conditions in Article 72, including the unanimous consent of the Contracting States. The UK may also consider to participate to the 2005 Hague Choice of Court Convention, which entered into force on October 1st 2015, along with the EU, Singapore and Mexico although its scope is limited as it deals only with exclusive jurisdiction agreements and competition law matters are excluded from its scope, when these are the object of the proceedings.²⁹
48. In the event of a “hard Brexit”, the UK will not benefit from the Brussels Regulation, possibly not from the Brussels Convention as well as from the 1988 Lugano Convention, and in the absence of a multilateral or bilateral private international law framework the UK would need to fall back on the unilateral option of UK ‘common law’ rules on jurisdiction³⁰. This will enable English courts to assume jurisdiction over EU domiciled defendants on the

²⁷ Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1972] OJ L 299/32. This by virtue of Section 2(1) of the Civil Jurisdiction and Judgments Act 1982. Not all EU member States are parties to the 1968 Brussels Convention. It is also unclear if the Convention

²⁸ A. Dickinson, *supra* n 7.

²⁹ The Hague Choice of Court Convention may however be applicable if the competition law matter arises as a preliminary question or by way of defence. See Art. 2(3) of the Hague Choice of Court Convention.

³⁰ For a more detailed analysis of the private international law implications of Brexit, see A. Dickinson, *supra* n 7.

basis of a broader range of factors than those of the Brussels Regulation recast, thus potentially enlarging UK courts' adjudicative jurisdiction for competition law claims against EU domiciled defendants.³¹ The English courts will also have discretion to decline jurisdiction on *forum non conveniens* or similar grounds, in particular if claims under Articles 101 and 102 TFEU are considered as claims under foreign law. However, the attraction of English courts may be affected by a restriction of the UK's enforcement jurisdiction, as a result of a number of parameters.

49. In general, the court taking jurisdiction should determine the law applicable to the dispute between the parties, according to the conflict-of-law rules of the parties' jurisdiction (*lex fori*). The conflict-of-law rules of the EU Member States were harmonized by the Rome II Regulation on the conflict-of-law rules applicable to non-contractual obligations in civil and commercial matters. With regard to torts, Article 4 of the Rome II Regulation provides three approaches in order to determine the *lex causae* (the law which governs the question). A specific provision of the Rome II Regulation—Article 6(3)—harmonizes the conflict-of-law rules that concern competition-based litigation. However, Rome II does not go as far as harmonizing all possible conflict-of-law rules but only those relating to matters of substance, since matters of procedure and evidence, with some exceptions, are explicitly excluded from the scope of the Regulation by Article 1(3). Yet, the courts seized by a claim for damages need to determine the applicable law for matters of substance and matters of procedure. Matters of substance include issues such as the substantive law determining liability but also relevant rules for remoteness of damages (and the availability of passing on), the available remedies (such as the availability of punitive or exemplary damages), and rules applicable to the assessment of damages. The distinction is of importance, since it is well known in private international law that matters of procedure are governed by the *lex fori* (the laws of the jurisdiction in which a legal action is brought), whereas matters of substance are governed by the *lex causae*.
50. In the context of a cross-border action for damages for anticompetitive harm brought in one of the courts of the EU Member States, there is no question as to the applicable law with regard to the determination of the existence of a restriction of competition, or what some authors have referred to as 'market rules'. Articles 101 and 102 TFEU will apply, according to their criteria of applicability, the 'qualified effects doctrine' as indicated above. National courts are bound by their duty to apply EU competition law, in view of the principle of supremacy and the provisions of Article 3(1) of Regulation 1/2003. In addition, Articles 101 and 102 TFEU may be considered as a matter of public policy, hence applied *ex officio* by national courts, and in any case, being primary EU law, they will take precedence over secondary EU law, such as the Rome II Regulation, which provides harmonized rules on applicable law in non-contractual disputes. The primacy of Articles 101 and 102 TFEU also extends to all the civil liability rules 'deriving from the *effet utile* of these provisions', even if these are not explicitly provided for in the text of the Treaty, thus including rules resulting from the operation of the EU principles of equivalence and effectiveness.
51. Similarly, the conduct may also be subject to the application of national competition law, which can apply cumulatively to EU competition law, if, of course, the criteria of its applicability are satisfied. There is some discussion in this case whether the applicable law should be set in conformity with the provisions of the Rome II Regulation, or whether the applicability of national competition laws is something that is determined by the criteria of applicability of each national competition law, leading to the cumulative application of

³¹ CPR r. 6.37 and Practice Direction 6B provide for a broader range of territorial and other connections.

multiple national competition laws, should their unilaterally determined criteria of applicability be satisfied.

52. The different types of rules involved in a claim for damages based on an infringement of competition law raise the question of the scope of the Rome II Regulation. If it includes both ‘market rules’ and rules on the civil consequences of a competition law infringement, the applicable law should be determined by the special rules included in Article 6(3) of the Rome II Regulation for claims arising out of a restriction of competition. Such a ‘flexible’ interpretation of the scope of Rome II will make it possible to apply the competition law provisions (market rules) of a country other than the country of the forum, should Article 6(3)(a) apply. This may be the competition law of another EU Member State. As long as the affected market lies within the EU, and in view of the Europeanization process of national competition laws in Europe, the effect of the application of Article 6(3) will not be dramatic. However, the effect might be less marginal if the country in which the affected market lies is different from the country of the domicile of the defendant and it is a non-EU jurisdiction, such as the UK will be after Brexit. In this case the court may need to apply the market rules of the non-EU jurisdiction. A different approach would be to take the view that the scope of Rome II does not cover ‘market rules’ but uniquely rules on the civil consequences of the infringement. Yet, in order for these civil rules to apply, the conduct in question should first be found to constitute a violation of competition law. The competition rules will apply according to their own criteria of applicability, which will form the starting point of the analysis.
53. To the extent that following Brexit Rome II will no longer be binding on English courts, Sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 will in this case determine the applicable law with regard to the civil consequences of the infringement. These rules do not prevent a claim for compensation for competition law infringement on the basis of the foreign laws of one or more jurisdictions, as for instance will be the EU post-Brexit.
54. *Enforcement jurisdiction*: The Damages Directive contains several rules facilitating the efficient interaction between public and private enforcement at the EU level, while providing increased grounds for inter-jurisdictional competition between Member States so as to ensure the effective protection of the right of claimants for damages.
55. These rules concern, for instance, the disclosure of evidence included in the file of a competition authority (thus access to the public enforcement file) for which a balance must be struck between the vindication of the victim’s right to claim damages and the need to guarantee the effectiveness of the public enforcement regime, in particular by creating a regime under which leniency recipients remain confident that documents disclosed to the Commission will not automatically fall within the hands of would-be plaintiffs, in view of the important role leniency applications play in uncovering cartels. Article 6(6) of the Damages Directive contains a prohibition for courts to order the disclosure of leniency statements (not just leniency corporate statements) and settlement submissions held by a party or third party ‘at any time’ (permanent disclosure prohibition). If only parts of the requested document contain a corporate statement or settlement submissions, according to Article 6(8) the remaining parts of the documents shall, depending on the category under which they fall, be released in accordance with the relevant disclosure provisions in that article. However, under Article 6(7), ‘a claimant may present a justified request that a national court access [these] documents’, ‘for the sole purpose of ensuring that their contents correspond to that of a corporate statement and a settlement submission’. In that assessment, national courts may request assistance from the competent competition authority and the authors of the relevant documents may also have the possibility to be

heard. It is made clear that '[i]n no case, shall the national court permit other parties or third parties access to that evidence'. Article 7 of the Directive reinforces the limits on the use of evidence obtained solely through access to the file of a competition authority, declaring that evidence collected in contravention of Article 6(6) through access to the file of a competition authority in exercise of a right of defence will not be admissible in actions for damages and or otherwise protected under the applicable national rules to ensure full effect of the limits on the use of evidence pursuant to that provision, thus guaranteeing that corporate statements and settlement submissions are fully protected.

56. With regard to evidence included in the public enforcement file, other than that covered by the permanent disclosure prohibition of Article 6(6), the discretion of national courts to order disclosure is subject to more limits than those relating to the disclosure of evidence not included in the file of a competition authority, which is subject to the general regime of Article 5 of the Damages Directive.³² When assessing the proportionality of the disclosure request for this category of evidence, the domestic court should consider, 'in addition' to the conditions of Article 5(3), the following: (a) whether the request has been formulated specifically with regard to the nature, subject matter, or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority; (b) 'whether the party requesting disclosure is doing so in relation to an action for damages before a national court'; and (c) for certain categories of requests,³³ 'the need to safeguard the effectiveness of the public enforcement of competition law'.³⁴
57. The need to safeguard the effectiveness of the public enforcement of competition law, in particular general and specific deterrence, led the Commission to define instances in which the national court can order disclosure 'only after a competition authority, by adopting a decision or otherwise, has closed its proceedings (temporary disclosure prohibition)'. The interplay between the permanent and the temporary disclosure prohibition will be a matter for interpretation by the national courts.
58. Evidence in the file of a competition authority that does not fall into any of these categories previously examined may be disclosed, following an order by the national court, 'at any time', according to Article 6(9) of the Directive (full access regime). In any case, for any kind of evidence included in the public enforcement file (either it is subject to a permanent disclosure prohibition, a temporary disclosure prohibition, or a full access regime) Article 6(1) stipulates that 'Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file *only* where no party or third party is reasonably able to provide that evidence' (emphasis added). Article 6 does not, however, close the door on public access to documents under the Transparency Regulation 1049/2001 (Article 6(2)), which, however, may be limited. Similarly, it does not dispense with 'the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities' (Article 6(3)).
59. To the extent that the UK authorities may amend following Brexit the various provisions of the Directive as implemented in the UK by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, it may be possible for them to opt for a different balance between the victim's right to claim damages and the need to guarantee the effectiveness of the public enforcement regime. In view of the paucity of public enforcement action in the

³² According to Damages Directive, Art 6(4), (5).

³³ In particular, requests for the disclosure of evidence referred to in Damages Directive, Art 6(5) and (10), or 'upon request of a competition authority' pursuant to Art 6(11).

³⁴ Damages Directive Art 6(4).

UK, in comparison to other EU Member States, it is possible that UK authorities may want to promote standalone actions by victims of EU-wide cartels and thus provide a wider access to documents.

60. Public enforcement may facilitate private actions for damages by providing evidence of the existence of a competition law infringement, by avoiding this question to be examined by the court, at least with regard to the declaration of the infringement of competition law rules, according to Article 16 of Regulation 1/2003. If the European Commission has adopted an infringement decision, national courts, ruling on an action for damages brought against one or more of the undertakings found by the Commission to infringe EU competition law on the basis of the same antitrust violation as that found in the Commission's decision (same parties, same geographic period, same time period), should consider the competition law infringement as being established by the previous infringement decision of the Commission. The claimants in the follow-on action for damages would thus only have to prove the harm suffered and the causal link between the infringement and this harm. Similarly, national courts should avoid taking decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated. This binding effect also extends to the non-final decisions of the Commission, including where they have been appealed to the General Court and the appeal is still pending. To the extent that Regulation 1/2003 will not apply to the UK in case of Brexit, it will not be possible to rely on the Commission's decisions as conclusive evidence of the existence of a competition law infringement, although it would still be possible for them to be considered by the judge as it is now the case with decisions by competition authorities outside the EU.
61. With regard to the binding effect of decisions of NCAs of other Member States, the Damages Directive distinguishes between decisions of an NCA in the Member States in which is situated the court examining the damages claim and decisions of NCAs in Member States other than the one in which is situated the court examining the claim for damages. Article 9(1) of the Directive regulates the first situation and provides that 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be *irrefutably* established for the purposes of an action for damages brought before their national courts under Article 101 or 102 of the Treaty or under national competition law'. Article 9(2) of the Directive regulates the second situation and stipulates that 'Member States shall ensure that a final decision referred to in paragraph 1 given in another Member State may, in accordance with their respective national law, be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties'. Recital 34 of the Directive clarifies that this covers the nature of the infringement and its material, personal, temporal and territorial scope. It is unclear if this also covers the findings of the NCA in relation to passing on.³⁵ In any case, Article 15 of the Directive requests Member States to ensure that courts dealing with actions for damages introduced by claimants from different levels in the supply chain 'take due account' of 'relevant information in the public domain resulting from the public enforcement of competition law'. Following Brexit, and the end of the transition period, if such an arrangement is made, these provisions will not apply in the UK. English courts may nevertheless have regard to them, the same way they do for decisions of competition authorities of non-EU Member States.
62. Note that some Member States have recognized the binding effect of the decisions of the NCAs of other Member States for domestic courts seized of follow on claims for

³⁵ European Commission, Study on the Passing on of Overcharges (October 2016), p 180.

competition law damages.³⁶ It may be advisable for the UK to adopt similar rules, also with regard to the European Commission decisions, so as to enhance follow on actions, should considerations over the market share of the UK as a jurisdiction of choice prevail to any reticence with regard to the existence of an equivalent protection of due process rights in the foreign jurisdiction.

63. The recent reform of the Brussels I Regulation has also proceeded to abolish *exequatur*, thus greatly facilitating the recognition of foreign judgments in the EU.³⁷ According to Article 36 Brussels Regulation recast, judgments given in a Member State shall be recognized in the other Member States without any special procedure being required. Article 37 also provides that ‘a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required’. The recognition and enforcement of the judgment may nevertheless be refused, the Regulation providing for substantive, as well as procedural, public policy exceptions. The abolition of the *exequatur* certainly facilitates the free movement of judgments between the Member States of the EU, and from this perspective promotes jurisdictional competition among different national legal systems. To the extent that the Brussels Regulation will not be directly applicable to the UK following Brexit, this will affect the possibility for UK judgments to be recognized and enforced in the various jurisdictions across the EU and the EEA. This will certainly have implications as to the UK being a jurisdiction of choice with regard to both standalone and follow on antitrust damages claims. The UK needs therefore to put in place jurisdictional arrangements that will substitute for the absence of automatic *exequatur*.
64. Adjustments should also be made so as to provide for *lis pendens*, that is, the situation when proceedings involving the same cause of action and between the same parties are brought in the courts of different member States. This is provided for by Article 29 of the Brussels Regulation recast, a provision whose interpretation and application has led to considerable jurisprudence by the UK courts. Article 30 of Brussels Regulation recast also deals with situations that do not fall within the narrow scope of Article 29 of the Brussels I Regulation and the operation of the *lis pendens* rule. Unlike the mandatory stay provided under the *lis pendens* rule, Article 30, also a provision that led to important case law by UK courts, contains a discretionary power allowing any other court than the court first seized to stay its proceedings where ‘related actions’ are pending in the courts of different Member States (Article 30(1)) or to decline jurisdiction where the action in the court first seized is pending at first instance (Article 30(2)). Similar arrangements should also be made following Brexit so as to enhance the UK’s position in the inter-jurisdictional competition for claims for damages. The recent reform of Brussels regime also reinforces the effect of forum selection agreements, by enabling choice of court agreements to override the *lis pendens* rule. According to Article 31(2) BR recast, where an exclusive choice of court agreement designates the courts of a Member State, the courts of another Member State, even if it was seized first, must stay proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement. Furthermore, Article 31(3) states that ‘[w]here the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another member State shall decline jurisdiction in favour of that court’. The Regulation gives the court chosen by the parties precedence over all other courts, regardless of when proceedings are started. This ‘reversed *lis pendens* rule aims to limit the occurrence of the practice of Italian torpedoes, at least in the presence of a prorogation of jurisdiction clause. Although conflict cannot be excluded

³⁶ In Germany, such binding effect, is not only recognized for decisions of the German competition authorities but also for decisions of the NCAs of other Member States.

³⁷ Regulation 1215/2012 (Brussels I recast), Ch III.

if there are conflicting choice of court agreements and the designated courts reach different conclusions, the text of BR recast is a considerable improvement on the text of the old Brussels I Regulation and strikes a significant blow to the practice of Italian torpedoes, by removing the incentive of the parties in a choice of court agreement to start proceedings elsewhere than the designated court. One might expect that such legislative development following the recent reform of the Brussels regime will lead to the selection of the best placed jurisdiction, from the point of view of the parties, that is, jurisdictions with relatively quick proceedings and which are closely connected to the substance and the harm caused by the competition law infringement. The UK has all interest to ensure that such inter-jurisdictional competition remains possible for both standalone and follow on cases.

Question 4: Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?

65. When assessing the likelihood of parallel antitrust investigations post-Brexit, one has first to consider the pre-Brexit position and distinguish between at least six categories.
66. Substantive EU competition law applies in parallel to UK competition law whenever the infringement is capable of appreciably affecting trade between Member States. Where substantive EU law applies, the case may be allocated within the European Competition Network (ECN) to the European Commission or to one or more of the National Competition Authorities (NCAs).³⁸

Category 1: Infringement not capable of appreciably affecting trade between Member States

67. When the infringement is not capable of appreciably affecting trade between Member States — in particular in cases of local or regional infringements — only substantive UK competition law applies, and only the UK competition authorities are competent (*category 1*). For these cases, nothing will change post Brexit.

Infringement is capable of appreciably affecting trade between Member States

68. Where the infringement is capable of affecting trade between Member States — which will be true for most cases of national significance and in nearly all international cases — substantive EU competition law applies (Article 3(1) of Regulation (EC) No. 1/2003). The case allocation within the ECN is then determined under the Network Notice.³⁹ The case will usually be allocated to one or more ‘well placed’ authorities. Whether an authority is well placed is determined by assessing three cumulative conditions:⁴⁰

‘1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;

³⁸ Commission Notice on cooperation within the Network of Competition Authorities (‘Network Notice’) OJ 2004, C 101/43–53, para. 5.

³⁹ Network Notice, supra n.38.

⁴⁰ Network Notice, supra n. 38, para. 8.

2. the authority is able to effectively bring to an end the entire infringement, *i.e.* it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.’

Category 2: Where currently only the UK authorities are ‘well placed’

69. Where these three cumulative conditions are met only in the UK, only the UK competition authorities are well placed and the case will, absent extraordinary circumstances, be allocated to them (*category 2*).
70. Post-Brexit, it is *possible* that the European Commission, another NCA, or other NCAs will conduct parallel proceedings, provided that the infringement has a substantial direct effect on competition in the jurisdiction in question. In category 2, where it was postulated that *only* the UK authorities are well placed, the probability of such parallel investigations is arguably not particularly high; in many cases in this category, the intensity of the effects on other jurisdictions may be too low to make a parallel investigation worthwhile as a matter of case prioritisation.
71. Given that the UK authorities are already dealing with these cases in category 2 under the current regime, the workload will not be increased if the UK authorities continue to deal with these cases as a matter of domestic law post-Brexit. The parallel investigations by EU or Member States’ authorities will increase the workload of their authorities, but not lead to an increased workload for UK authorities. However, the parallel investigations may result in the need of cooperation and coordination with the European Commission or NCA(s), and to an increased burden for the undertakings concerned.

Categories 3 and 4: Two or three NCAs are ‘well placed’ and only one NCA takes action

72. Where the three cumulative conditions listed above are met in more than one Member State, several NCAs are ‘well placed’.
73. In this situation, the case may nevertheless be dealt with by one single NCA, provided that this NCA can take effective action sufficient to bring the infringement to an end.⁴¹ Currently, this single NCA can be a UK competition authority (*category 3*) or an NCA from the EU27 (*category 4*).
74. Post-Brexit, it is *very likely* in categories 3 and 4 that there will be parallel investigations post-Brexit, given that in these categories by definition there will be substantial direct effects on competition both in the UK and at least one Member State from the EU27.
75. In category 3, the main burden of the multiplication of investigations will (as in category 2) fall on the EU27, and not on the UK, given that the UK competition authorities are already dealing with these cases under the current regime. However, as in category 2, there may be the need for cooperation and coordination between authorities, and an increased burden on the undertakings concerned due to the duplication of investigations.
76. In category 4, the UK authorities will have a choice whether or not to initiate investigations post-Brexit.

⁴¹ Network Notice, *supra* n. 38, para. 11.

- a. If they do initiate investigations, these would add to the current workload of the UK authorities. Investigations may need to be coordinated with the EU27.
- b. If they do not initiate investigations, despite the postulated substantial direct effects on competition in the UK, then there may be indirect costs in terms of an on-going distortion of competition in the UK and/or a loss of deterrence. In some cases, it may be possible to ‘free-ride’ on the EU27’s enforcement. For example, where the EU27 find an infringement and order the termination of the infringement, and the infringing undertaking(s) cannot practically or economically continue with the infringing conduct in the UK only, the problem may be resolved, and competition in the UK be protected, without UK authorities taking action. However, such free-riding is not possible or desirable in all cases. Decisions by the EU27 competition authorities order the termination of the infringement for the European Economic Area (EEA), and fines for competition law infringements are usually calculated on the basis of domestic turnover within the Member State in question. Free riding on the EU27’s action entails the danger that the infringing conduct is terminated within the EEA by the action of the EU27 but continues in the UK (assuming that it will not be part of the EEA), and fines imposed by the EU27 may not be sufficiently deterrent.

Category 5: Two or three NCAs are ‘well placed’ and two or more NCAs take action

77. Where two or three NCAs are well placed, it is also possible for them to conduct parallel investigations, which are to be closely coordinated with each other to the greatest possible extent (*category 5*), and the Network Notice suggests that it may be appropriate to appoint a lead authority.⁴²
78. While such multiplication of work within the ECN and the consequent burden for the undertakings concerned is generally avoided, it does occur from time to time. For example, in the flour mills cartel, the Dutch, French, and German NCAs fined separate aspects of what arguably were interconnected cartel agreements after concluding parallel, coordinated investigations. Parallel investigations into most-favoured-nation (MFN) clauses used by online booking platforms highlighted the danger of conflicting decisions where parallel investigations are pursued.
79. Where parallel investigations are pursued in this manner already, post Brexit they would be pursued *a fortiori* — where competition authorities even within the ECN see the need to intervene and not leave intervention to another NCA, the perceived need for parallel investigations will, if anything, increase once the UK competition authorities are no longer members of the ECN.
80. In category 5, many of the costs of parallel investigations are already incurred, such as the multiplication of enforcement costs, the burden on the undertaking(s) concerned, and the danger of conflicting decisions.
81. However, currently parallel investigations within the ECN can be coordinated with few procedural hurdles, given that even confidential information may be exchanged among ECN members under Article 12 of Regulation (EC) No. 1/2003. To what extent, and in what procedure, information, particularly confidential information, can be exchanged between UK authorities and EU27 authorities post Brexit will depend on the cooperation agreement between the EU27 and the UK, if any.

⁴² Network Notice, *supra* n. 38, paras 12, 13.

Category 6: Where the European Commission is particularly well placed

82. Where more than three NCAs would be well placed, the European Commission is ‘particularly well placed’ to deal with the case.⁴³ In addition, the European Commission is also particularly well placed to deal with the case ‘if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement’.⁴⁴
83. In these cases (*category 6*), the European Commission may deal with the case in its entirety, or may decide the case for one national market, a decision which may then serve as a leading case for NCAs in the other markets.⁴⁵
84. This is a particularly important category, because it includes nearly all cases in which the relevant geographic markets are global or EEA-wide, and the economic effects are usually particularly substantial.
85. For the UK, the options are in principle the same as in category 4: conducting a parallel investigation (with the attending costs), or free-riding on the EU27’s enforcement action and refraining from taking action. Again the option of free-riding may be feasible in some cases, but risks underdeterrence if the UK leaves the EEA, given that the European Commission will order ending the infringement within the EEA, and that fines under the Fining Guidelines 2006 are calculated on the basis of EEA turnover.
86. Given the often serious nature of cases falling into category 6, and the fact that cases in this category will often have substantial effects on competition in the UK, it seems likely that the UK authorities would want to initiate parallel investigations.
87. In addition, it is possible that some cases in category 6, in which the UK authorities would have been the fourth well-placed NCA, will fall into one of the categories 4 or 5 after the UK’s exit from the European Union. As a consequence, there may not only be only a duplication of enforcement actions (European Commission plus UK), but possibly a further multiplication (for example, action by three NCAs plus the UK authorities).

Implications of parallel investigations

Increased workload for the UK authorities (in particular the CMA)

88. The analysis above has shown that the UK authorities’ workload will very likely increase in particular in those case categories in which the infringement has a substantial direct effect on competition in the UK but the investigation is currently pursued either by another Member State’s NCA (category 4) or, and most importantly, by the European Commission (category 6).
89. This is problematic because the main UK competition authority, the Competition and Markets Authority (CMA), is already stretching its resources to keep up with enforcement actions.
90. The National Audit Office noted in its report in 2016 that ‘the low caseload we identified in 2010 has continued, with the Office of Fair Trading and the CMA making 24 decisions

⁴³ Network Notice, supra n. 38, para. 14.

⁴⁴ Network Notice, supra n. 38, para. 15.

⁴⁵ Network Notice, supra n. 38, para. 14, example 5.

and the regulators just eight since 2010. The UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015 prices), compared to almost £1.4 billion of fines imposed by their German counterparts. The CMA faces significant barriers in increasing its flow of competition cases, although recent activity means it now has 12 ongoing cases'.⁴⁶

91. This is not meant as a criticism of the CMA. Within the ECN, the CMA has a reputation for excellent policy analysis, and as the former Chair of the Federal Trade Commission (and current non-executive director at the CMA) William E. Kovacic and David A. Hyman have noted, competition authorities have to balance investment and 'consumption' (in the form of high profile enforcement actions).⁴⁷
92. However, with regard to enforcement action the UK is trailing behind not only (as the National Audit Office noted) Germany, but also all EU27 states that have similarly large economies as the UK. In the period between 1 May 2004 and 31 December 2012, France notified 90 envisaged final decisions to the Commission, Germany 84, Italy 82, Spain 73, the Netherlands 41, Denmark 39; the Commission adopted 88 final decisions in this period.⁴⁸ In the same period, the UK notified only 16 envisaged final decisions to the Commission.⁴⁹
93. Even though the CMA (and its predecessor, the Office of Fair Trading) have recognised the relative dearth of enforcement actions since at least 2010 and consider increasing the level of enforcement a priority, it is difficult for the CMA to expand their enforcement activities in the bounds of the current budget.
94. It is difficult to see how, in this environment, the CMA would be able to handle the increase of the workload due to the duplication of cases that have hitherto been dealt with by foreign NCAs or the Commission, unless the budget for the CMA (and possibly the Competition Appeals Tribunal) is substantially increased.
95. The main problem for the CMA is arguably the litigation costs that are borne by the CMA if it loses a case, which discourages litigation and aggressive enforcement action. In other countries (such as Germany or the United States), litigation costs in case of lost actions are imposed on the federal budget and not on the agency's budget. A reform along these lines could allow the CMA to enforce the competition laws more vigorously.
96. Some of the funds for an increased enforcement budget for the CMA could come from higher fines imposed by the CMA once it deals with more cases that are of greater severity,

⁴⁶ National Audit Office, The UK competition regime, HC 737, Session 2015–16, 5 February 2016, <https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf> (last accessed 11 September 2017). The reference to the 2010 report is to National Audit Office, Review of the UK's competition landscape, 22 March 2010, https://www.nao.org.uk/wp-content/uploads/2010/03/0910_competition_landscape.pdf (last accessed 11 September 2017). See also Department for Business Innovation & Skills (BIS), A Competition Regime for Growth: A Consultation on Options for Reform (March 2011), paragraph 5.6.

⁴⁷ William E. Kovacic and David A. Hyman, Consume or Invest: What Do/Should Agency Leaders Maximize? (December 19, 2015), Washington Law Review, Forthcoming; GWU Law School Public Law Research Paper No. 2015-60; GWU Legal Studies Research Paper No. 2015-60; University of Illinois College of Law Legal Studies Research Paper No. 16-11, available at SSRN: <https://ssrn.com/abstract=2705919>.

⁴⁸ Wouter P.J. Wils, Ten Years of Regulation 1/2003 - A Retrospective (June 4, 2013), Journal of European Competition Law and Practice (2013 Forthcoming); presentation at the conference '10 Years of Regulation 1/2003' (Mannheim Centre for Competition and Innovation, 7 June 2013), available at SSRN: <https://ssrn.com/abstract=2274013>. Only Poland has a similarly large population and even fewer decisions (12). Ibid.

⁴⁹ Ibid.

that is, cases that are currently dealt with by the European Commission. Again, however, this is contingent on the CMA having enough resources to investigate and, if necessary, litigate these cases.

Need for coordination and cooperation with the EU27

97. Beside the increased workload for the UK authorities, parallel investigations require coordination and cooperation. Coordination is necessary in particular with regard to the timing of inspections and other investigatory measures, and to avoid conflicting decisions.
98. Within the ECN, such coordination of enforcement action and cooperation (including joint inspections, or inspections on behalf of another competition authority) are unproblematic. Outside of the ECN, coordination and cooperation will become more cumbersome. Nevertheless, with an appropriate competition cooperation agreement in place, intensive coordination and cooperation is still possible.

Question 5: Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?

Mutual interest in concluding a competition cooperation agreement

99. The economies of the UK and the EU27 are intimately connected, often by integrated supply chains. As such, it is very likely that many competition law infringements originating in the UK will have foreseeable, substantial, and direct effects in the EU27 and therefore fulfill the qualified effects test recently adopted by the European Court of Justice (ECJ) in the *Intel* decision.⁵⁰ Conversely, many competition law infringements originating in the EU27 are implemented on the territory of the United Kingdom.
100. A forthcoming publication has assessed the probability of a cooperation agreement between the UK and the EU as follows:

‘With regard to competition law enforcement, however, there is little doubt that a very close, and if possible uninterrupted, cooperation especially between the UK authorities and the ECN should be in the mutual interest [...]. In some respects, the circumstances are particularly conducive to agreeing on enforcement cooperation between the UK and the EU. Capobianco and Nagy have recently summarised factors that may impede enforcement cooperation: differences in the enforcement scheme (civil/criminal); differences in the substantive law; differences in procedural rules; and differences in size and economic development.⁵¹ The CMA itself, while young in its current emanation, is the successor of the OFT and so a well-developed competition authority, and the UK economy is as advanced as the economies of the remaining EU Member States. On exit day, the substantive and procedural provisions in UK law will be in full compliance with EU law (or so one would hope), so that substantive or procedural

⁵⁰ Judgment of the Court (Grand Chamber) of 6 September 2017, case C-413/14 P (*Intel v Commission*) ECLI:EU:C:2017:632, paras 40-65.

⁵¹ Antonio Capobianco & Aranka Nagy (2016) Developments in International Enforcement Co-operation in the Competition Field, (2016) 7(8) *Journal of European Competition Law & Practice* 566–583.

divergences should not prevent cooperation at that time. No further “approximation” of the laws would be required.’⁵²

EU’s interest in a competition cooperation agreement

101. The EU and some Member States among the EU27 have been actively enforcing their competition laws to reach extraterritorial conduct. One of the first cases in which the Commission reached extraterritorial conduct was the *Dyestuffs* case, in which ICI, a UK undertaking, was involved, at a time when the UK had not yet acceded to the European Economic Community.⁵³ After exit day, the UK will be, from the EU’s perspective, extraterritorial once again. The EU will very likely continue this practice of extraterritorial enforcement, that is, claiming ‘jurisdiction to prescribe’ extraterritorial conduct.
102. The EU cannot, of course, claim extraterritorial jurisdiction to *enforce*. Jurisdiction to enforce, including in particular taking investigatory measures and enforcing sanctions, is strictly territorial under public international law. In some cases, it may be possible for the EU to investigate and enforce sanctions against UK undertakings on EU territory, for example, by addressing requests for information to subsidiaries of UK companies located on EU27 territory using the ‘single-entity doctrine’ (as in *ICI-Dyestuffs*) or by executing penalty decisions by going after assets located on EU27 territory. The EU also claims the power to send statements of objections and decisions by regular mail to undertakings located abroad.
103. In order to investigate or enforce sanctions on UK territory, however, the EU will have to rely on cooperation with UK authorities. Given the size of the UK economy, and past involvement of UK undertakings in infringements of EU competition law, it is very likely that the EU, and possibly some individual Member States bilaterally, have a strong interest in concluding a competition cooperation agreement with the UK.

UK’s interest in a competition cooperation agreement

104. The UK has traditionally insisted that jurisdiction to prescribe must be based on either the nationality or the territoriality principle, and has been opposed to extraterritorial enforcement based on the effects test. In recent years, it seems to have accepted the EU’s implementation test, which is notionally based on the territoriality principle. It is unclear, however, whether the UK intends to rely on the implementation test after exit day, and what its position is towards the qualified effects test as adopted recently by the ECJ in *Intel*. Nevertheless, it seems very likely that the UK will want to enforce its competition law against infringements in which there is involvement of EU27 undertakings at least in those cases, in which the nationality or territoriality criterion is satisfied. In those cases, the UK may want the EU27 to provide, for example, investigative assistance.
105. In any case, the UK has a strong interest in being notified of any EU investigations that may affect the interests of the UK. It may also want to make use of the possibility, usually afforded by competition cooperation agreements, to investigate any competition infringements in the UK itself and request that the EU refrain from taking action during that

⁵² Florian Wagner-von Papp, ‘Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)’, forthcoming in *European Yearbook of International Economic Law 2017* (Working Paper available at <https://ssrn.com/abstract=2961721>).

⁵³ Commission Decision 69/243/EEC, OJ 1969 L 195/11 (*Dyestuffs*); AG Mayras’s opinion in CJEU, case 48/69, *ICI v Commission*, ECLI:EU:C:1972:32; CJEU, case 48/69, *Imperial Chemical Industries Ltd. v Commission*, ECLI:EU:C:1972:70.

time (negative comity), and/or to request that the EU take action against infringements taking place on EU territory (positive comity).

106. For these reasons, both the EU27 and the UK have a mutual interest in concluding a competition cooperation agreement.

What provisions would be necessary for an effective competition cooperation agreement

107. The Organisation for Economic Cooperation and Development (OECD) has adopted recommendations for international cooperation in competition matters and has published comprehensive inventories of cooperation agreements and inter-agency Memoranda of Understanding (MOU) not too long ago.⁵⁴

108. A detailed discussion of the provisions in these agreements is beyond the scope of this intervention; those looking for details will find most questions answered by consulting the OECD inventory.

109. The standard content of such cooperation agreements includes the following elements:

- a. A definitional section;
- b. notification requirements;
- c. provisions on enforcement cooperation and investigative assistance;
- d. negative comity provisions;
- e. positive comity provisions;
- f. provisions on information exchange;
- g. consultations and meetings; and
- h. rules on confidentiality.
- i. Occasionally, especially in competition agreements or MOU accompanying free trade agreements, provisions on transparency are included, obliging the parties to inform the other parties of legal or policy statements and developments.

Most of these provisions are relatively standardised across these agreements, but there are occasionally substantial variations, for example, when it comes to information exchange and the extent of cooperation; these will be discussed below.

110. A weakness common to these provisions in all international intergovernmental agreements and inter-agency MOU is that jurisdictions are not prepared to limit their discretion, and accordingly the provisions generally do not provide for legal duties (for example, to refrain from taking action while the other party takes action under negative comity or to enforce one's own competition to law under positive comity). The agreements are for the most part promises to take the other party's interests into account, but leave actual cooperation in individual cases largely in the parties' discretion, to be exercised on a case-by-case basis. They *allow* but do not *compel* the parties' competition authorities to cooperate. This is not to say that the agreements are without value — on the contrary, some of the provisions may be necessary conditions for cooperation to arise —, but they are not sufficient conditions for cooperation, that is, they cannot in themselves guarantee intensive (or indeed any) cooperation.

⁵⁴ OECD, Inventory of co-operation agreements, 20 November 2015, DAF/COMP/WP3(2015)12/REV1, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3\(2015\)12/rev1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2015)12/rev1&docLanguage=En); OECD, Inventory of provisions in inter-agency co-operation agreements (MoUs), 26 July 2016, DAF/COMP/WP3(2016)1/REV2, [https://one.oecd.org/document/DAF/COMP/WP3\(2016\)1/REV2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)1/REV2/en/pdf).

111. It should be noted that therefore none of the existing international agreements comes close to the degree of cooperation possible and practiced within the ECN, where Regulation (EC) No. 1/2003 establishes legal obligations to notify, share certain information, and cooperate. While it would be highly desirable from the UK's perspective to replicate the provisions on cooperation contained in Regulation (EC) No. 1/2003 in an agreement with the EU, it would be unrealistic to believe that this can be accomplished. Not even the cooperation between the European Commission and the EFTA Surveillance Authority, despite the far-reaching provisions in Protocol 23 to the EEA Agreement, is as sophisticated and smooth as the cooperation within the ECN.
112. Two provisions are particularly important for effective cooperation, but will also be the most difficult to agree: the exchange of *confidential* information and *enhanced* cooperation and investigative assistance.

Information Exchange

113. Nearly all competition cooperation agreements and MOU contain provisions on the exchange of information. However, in practically all cases these provisions do not cover the exchange of *confidential* information, unless the persons to whom the information relates have signed waivers. Much of the information in competition proceedings is confidential, and waivers will often not be obtainable in adversarial cases; the waiver system generally works well in merger cases where the parties have an interest in smooth cooperation, and where the number of undertakings required to consent, and therefore the transaction costs in acquiring the necessary waivers, are usually low.
114. Remarkably few agreements confer power on the competition authorities to exchange confidential information without such waivers. One such agreement, and one that could arguably be used as a working draft for a UK-EU agreement, is the relatively recent EU-Switzerland agreement.⁵⁵ Its Article 7 provides for the exchange of information. Article 7(4) deals with the exchange of confidential information in the absence of waivers:

‘(4) In the absence of a consent as referred to in paragraph 3, the competition authority of a Party may, upon request, transmit for use as evidence information obtained by investigative process that is already in its possession to the competition authority of the other Party, subject to the following conditions:

- i. information obtained by investigative process may only be transmitted where both competition authorities are investigating the same or related conduct or transaction;
- ii. the request for such information shall be made in writing and shall include a general description of the subject matter and the nature of the investigation or proceedings to which the request relates and the specific legal provisions involved. It shall also identify the undertakings subject to the investigation or procedure whose identity is available at the time of the request; and
- iii. the requested competition authority shall determine, in consultation with the requesting competition authority what information in its possession is relevant and may be transmitted.’

⁵⁵ Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws OJ 2014 L 347/3-9.

115. Even the otherwise exceptionally far-reaching EU-Switzerland cooperation agreement, however, excludes the transmission of information obtained under the parties' leniency programmes and settlement submissions (Article 7(6) of the Agreement), unless the undertaking in question has expressly consented. There are limits on the use of the information obtained under the Agreement's information exchange provision (Article 8 of the Agreement). For example, it may not be used to impose sanctions on individuals (Article 8(4) of the Agreement, a provision that is somewhat more restrictive than Article 12(3) of Regulation (EC) No. 1/2003, which considers the same issue for information exchanges within the ECN).
116. Care should also be taken that the information may be transmitted directly between competition authorities. Some international agreements require the use of diplomatic channels, and competition authorities have in the past complained about the cumbersome and occasionally slow procedure.

Enhanced Cooperation

117. As indicated above, most competition cooperation agreements do not oblige either of the parties to limit their discretion. In most cooperation agreements, the only duties not subject to the full discretion of the parties or their competition authorities are to notify the other party or that party's competition authority at certain stages of the proceedings.
118. There are, however, a few agreements that contain true obligations with regard to investigative cooperation. Outside of the competition-specific context, this is the case in Mutual Legal Assistance Treaties (MLATs). Most of these MLATs are, however, restricted to criminal enforcement. And yet, there is no logical or legal necessity for restricting the cooperation to criminal enforcement; it could be extended to the administrative fine procedures more typically used in EU competition law (Article 23(5) of Regulation No. 1/2003).
119. Such an extension of MLATs to administrative fine proceedings in competition law are not unheard of. For example, the Treaty between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters defines 'criminal investigations or proceedings for the purpose of this Treaty' as including 'investigations or proceedings relating to regulatory offences (Ordnungswidrigkeiten) under German antitrust law.'⁵⁶ This Treaty provides for legal assistance, among other things, with regard to search and seizure, taking of testimony, and the production of documents (Articles 10, 11 of the US-Germany MLAT).
120. The 1999 Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance provides for similar mutual legal assistance in an agreement dedicated specifically to competition law,⁵⁷ and Australia and New Zealand have also entered into an enhanced cooperation arrangement.⁵⁸
121. A competition cooperation agreement between the UK and the EU should aim at including cooperation provisions that are at least as far reaching as the ones in the US-Germany MLAT and the US-Australia Agreement. Given that on exit day the regulatory

⁵⁶ Article 1(1) of the Treaty between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, signed 14 October 2003, in force since 18 October 2009, Treaties and Other International Acts Series 09-1018, <https://www.state.gov/documents/organization/188782.pdf>.

⁵⁷ Available at <https://www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement>.

⁵⁸ Co-operation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the Provision of Compulsorily-Acquired Information and Investigative Assistance (April 2013), available at <http://www.comcom.govt.nz/the-commission/media-centre/features/cooperation-arrangement-accc/>.

environment in the UK and the EU27 will be largely identical, and certainly more similar than in the trans-Atlantic and trans-Pacific relationships, it should be possible to negotiate a position that goes even a little further. How far the cooperation in competition matters will go, will likely also be determined by the negotiations with regard to cooperation in criminal and security matters more generally.

Question 6: How will Brexit affect the CMA's ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK's influence in developing global competition policy?

Effect on the ability to cooperate with non-EU competition authorities

122. The EU has over the past decades developed a network of cooperation agreements, sometimes dedicated specifically to competition law, sometimes consisting of competition provisions in free trade or association agreements, in particular the 'Stabilisation and Association Agreements' (SAAs), 'Euro-Mediterranean Agreements' (EMAs) and 'Partnership and Cooperation Agreements' (PCAs).⁵⁹ GD Competition provides an index of these arrangements on its website.⁶⁰
123. The EU has entered into many dedicated competition cooperation agreements. Some of these have taken the form of inter-governmental agreements, such as the agreements with the United States of America (1991/1995⁶¹, 1998⁶²), Canada,⁶³ Japan,⁶⁴ the Republic of Korea,⁶⁵ and — as mentioned above — Switzerland.⁶⁶ The Directorate-General Competition of the EU Commission (DG Competition) has entered into MOU directly with

⁵⁹ An overview can be found in Florian Wagner-von Papp, 'Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)', forthcoming in *European Yearbook of International Economic Law 2017*, vol. 8 (Working Paper available at <https://ssrn.com/abstract=2961721>). For an in-depth analysis, see Anestis Papadopoulos, *The international dimension of EU competition law and policy* (Cambridge University Press 2010); Anestis Papadopoulos 'External competition law of the EU', in: Hermann, Krajewski, and Terhechte (eds) *European Yearbook of International Economic Law 2013*, vol 4, pp. 87–108.

⁶⁰ <http://ec.europa.eu/competition/international/bilateral/index.html>.

⁶¹ International Legal Materials 30 (1991), p. 1491. Although the CJEU later declared this Treaty a nullity, because only the European Community, and not the Commission could be party to such an agreement – CJEU, case C-327/91, *France/Commission*, ECLI:EU:C:1994:305 –, the 1991 Treaty was ratified ex post in 1995 by the competent bodies with *ex tunc* effect, OJ 1995 L 95/45, corrigendum OJ 1995 L 131/38.

⁶² Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ 1998 L 173/26.

⁶³ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ 1999 L 175/49.

⁶⁴ Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, OJ 2003 L 183/12.

⁶⁵ See Council Decision 2009/586/EC of 16 February 2009 relating to the conclusion of the Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, OJ 2009 L 202/35.

⁶⁶ See Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ 2014 L 347/3.

the competition authorities of other countries, such as Brazil,⁶⁷ China,⁶⁸ India,⁶⁹ the Russian Federation,⁷⁰ and South Africa.⁷¹

124. Any benefits of these cooperation agreements between the EU and third countries will be lost post-Brexit, and bilateral cooperation will have to be re-established.
125. Given that there will be limited resources available post Brexit to negotiate international agreements, priority should be given to re-establishing bilateral cooperation agreements with jurisdictions that are major trading partners of the UK, and jurisdiction that have particularly vigorous antitrust enforcement. Clearly, the main priority should be to negotiate a cooperation agreement with the EU. Other important agreements include in particular the United States, Canada, Japan and South Korea, but also, for example, Brazil and Chile. China and India, important economies as they are, have so far been reluctant to enter into deep cooperation agreements with the EU, and it is not to be expected that they would be more forthcoming towards the UK.

Effect on the UK's ability to influence global competition policy

126. Even though there are more than 130 countries with competition regimes today, in international terms there are only two regimes that have substantially influenced global competition policy: the United States of America and the European Union. Nearly all other competition regimes are related to one, the other, or both. This is unlikely to change post Brexit.
127. This is not to say that UK competition policy will lose all its global influence. After considering the EU and US positions, particular innovations in the UK competition regime that depart from both EU and US law or policy will likely retain influence, in particular in current or former members of the Commonwealth. The CMA, the Competition Appeal Tribunal and the courts have an internationally very strong reputation, and this reputation will likely afford the UK influence in the global debate.
128. However, it also has to be recognised that the currently strong reputation of the CMA is more built on its policy interventions than on its track record of enforcement. Post-Brexit, enforcement protecting the domestic UK market will have to be safeguarded primarily by the CMA (and sectoral regulators). Resources currently used for competition advocacy and policy development will likely have to be diverted to enforcement. In Kovacic and Hyman's terminology,⁷² unless there is a substantial increase in the budget of the competition authorities, there will have to be more 'consumption' and less 'investment'.

Question 7: Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK's withdrawal from the EU? If so, what transitional issues would such arrangements need to address?

⁶⁷ See the Memorandum of Understanding on cooperation between DG Competition and CADE and SEAE of the Government of the Federative Republic of Brazil, signed 8 October 2009.

⁶⁸ Memorandum of Understanding on cooperation in the area of anti-monopoly law between DG Competition and NDRC and SAIC, signed 20 September 2012.

⁶⁹ Memorandum of Understanding between DG Competition and the Competition Commission of India on cooperation in the field of competition laws, signed 21 November 2013.

⁷⁰ Memorandum of Understanding on cooperation between the DG Competition and the Federal Antimonopoly Service (FAS Russia), signed 10 March 2011.

⁷¹ Memorandum of Understanding between DG Competition and the Competition Commission of South Africa, signed 22 June 2016.

⁷² *Supra* n. 47.

129. We consider that a transitional arrangement is necessary for dealing with the disengagement of the CMA from a well-defined system of public enforcement cooperation within the EU. The CMA and the EU will still be dealing with cases with a cross-border dimension, thereby requiring coordination and cooperation.
130. On-going cases dealt with on EU level involving the UK market are likely to be dealt with within the pre-Brexit regime conditions (with the case allocation rules set in Regulation 1/2003) with no change in approach, unless the EU decides to drop investigation in the UK affected part of the market. Therefore, one transitional arrangement to be sought would be to ensure ongoing investigations are carried out with full consideration of the effect on the UK market.
131. The main transitional issues relate to cases concerning pre-Brexit conduct – but only investigated after the UK’s withdrawal of the EU. The first issue relates to resources spent at EU level to investigate potential breaches that affect UK markets (and have a cross-border dimension). If the EU de-prioritise the UK market, there will be a risk of under-enforcement. The CMA will then be the sole authority for investigating and prosecuting antitrust violations that affect the UK market while UK markets and consumers were protected by both EU and UK competition laws until then. The UK may want to seek the commitment of the EU of not disengaging from the UK market (for behaviour pre-Brexit).
132. The most likely scenario is that the CMA will have to step in to investigate cases that would have been dealt with at EU level (be it by the European Commission or led by the CMA). It means that there will be a number of parallel cases (See above Question 4). Procedural efficiency will necessarily be affected unless a transitional arrangement for information sharing and cooperation is established. Both the EU and the UK would gain from agreeing effective case allocation and information sharing for cases where both the EU and UK potentially can take enforcement actions.
133. Another issue that arrangements need to address relates to the leniency programme, which is a cornerstone of the fight against cartels. The possible concurrent cases led by the EU and UK increases uncertainty for leniency applicants. Should company that have been granted leniency under the EU programme be granted immunity in the UK too? This issue is one particularly for cases started pre-Brexit since post-Brexit, companies will certainly file applications in both jurisdictions. The transitional arrangement should be such that the CMA ought to provide leniency to all companies that fall within the EU programme and issue clear guidance about this arrangement.
134. Another enforcement issues relates to commitments concluded under Article 9 of Regulation 1/2003; commitments obtained pre-Brexit will theoretically no longer bind the UK who could seek new commitments in each of the cases (although this seems unlikely due to the burden this would create). It has been recommended for these commitments to be fully adopted as legally binding in the UK and for the CMA to enforce them.⁷³
135. Finally, the protection from disclosure associated with legal privilege in investigations may cease to protect UK qualified lawyers. A transitional arrangement should seek to provide the continued recognition and protection of legal privilege of external advice that will be then provided by non-EEA qualified lawyers.

⁷³ See BCLWG report (July 2017) available at : <https://www.bclwg.org/wp-content/uploads/2017/07/BCLWG-Conclusions-and-Recommendations-Final.pdf>, at 5.12.