

Oxera – Written evidence (CMP0012)

1 Introduction

- 1.1 Oxera Consulting LLP is one of Europe's leading economics consultancies in the fields of competition and state aid, and we frequently contribute to important policy debates such as this one.
- 1.2 Both before and since the EU referendum, Oxera has conducted a range of economic analyses looking at the likely economic consequences of Brexit. We have also published several papers and organised events on the topic. [\[1\]](#) We contributed to the Brexit Competition Law Working Group (BCLWG), a group of leading competition practitioners and academics who recently published a set of recommendations on competition policy after Brexit. [\[2\]](#)
- 1.3 This written submission to the House of Lords Internal Market Sub-Committee draws on Oxera's prior contributions. We aim to assist the Committee's deliberations by bringing to the debate the perspective of an economic practitioner. As such, we focus on the questions posed by the Committee on competition policy and state aid where we feel economics has the most to add.

2 Responses

2A 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?

- 2.1 Economics provides much of the thinking behind competition law. From an economist's perspective, the aim of competition policy is to maintain and promote effective competition between firms so as to produce concrete advantages for consumers such as new products, greater output, lower prices and higher quality of the goods and services consumed. With such considerations being important to consumers everywhere, there is little economic rationale for the aims of UK competition policy to differ substantially from those elsewhere in the world. Recent history has seen considerable global convergence in competition law (albeit there is still some way to go), reflecting these common aims and a growing economic understanding of the legal provisions that can help achieve these aims. [\[3\]](#) For the most part, we consider that competition law is an area where policymakers in the UK and other EU member states should find a high degree of overlap in what is desirable from the post-Brexit regime.
- 2.2 Based on our experience working in the application of economics to competition law, we would advance three principles that should shape UK competition law after Brexit:
- **economic coherence:** competition policy should be founded on economic evidence that links legal provisions and decisions to demonstrable positive economic effects for consumers (or the avoidance of negative effects);

- **efficiency**: competition law should not be unduly costly or time-consuming to enforce—i.e. the requirements of the legal process and/or economic evidence in the private and public enforcement of competition law should be proportionate given the economic impact of the decision;
- **predictability**: businesses should be able to make decisions with confidence based on legal advice and established competition case law. In practice, this principle supports widespread **continuity** of the existing law after Brexit.

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

- 2.3 Consistent application of competition law will be beneficial to the many businesses that operate both in the UK and the rest of the EU; it will increase certainty and avoid the ‘double cost’ of having to comply twice with separate sets of laws. On this issue, the BCLWG advocates a requirement for courts to ‘have regard to’ EU jurisprudence in the application of UK competition law.^[4] This would also set a reasonable standard for economists, and we recommend that competition economists at the European Commission and the UK Competition Markets Authority (CMA) continue to pay close attention to the economic approaches and analyses applied in the other’s anti-trust and merger review processes.
- 2.4 Maintaining an economically coherent and consistent approach in the future will depend on the approaches of the UK and the EU to novel questions in competition law (questions, for example, about algorithmic pricing, online distribution and market power arising from big data). In this, it is essential that the focus is not on the UK alone, but also on the evolution of EU competition law. Over the years the UK government and competition authorities have had a positive (economically oriented) influence on competition policy both in the EU as a whole, and in other individual member states. It would seem important for the UK to remain engaged in the pan-European discussions on competition policy. Some well-defined form of continued participation of the CMA in the European Competition Network (ECN) would be the most natural means of achieving this.
- 2.5 Departure from the EU will provide the CMA with an opportunity to independently investigate conduct that would previously have been the exclusive jurisdiction of the European Commission. Even if the content of competition law remains unchanged (and we have stressed in the previous question the benefits of continuity in this regard), there would be an opportunity for the CMA to adopt a more ‘effects based’ approach to its antitrust enforcement.^[5]
- 2.6 Excessive focus on conduct that can be assessed with ‘form based’ analysis (such as cartels) *at the expense* of assessing conduct that requires a more careful ‘effects based’ economic analysis (common, for example, in cases of abuse of dominance) will certainly limit the effectiveness of competition law. In the past, the European Commission, the General Court and the European Court of Justice have been criticised for concentrating effort on form-based cases, or applying a form-based

approach where an effects-based approach would be appropriate.^[6] However, recent developments^[7] appear to go some way to answering these criticisms, with recent judgments placing more clarity on the limits of form-based analysis in European law.^[8]

2.7 With the momentum of EU competition law appearing to have moved back to a greater focus on effects-based analysis, there does not appear to be any short-term need for the UK competition authorities to deviate from the methods and approaches followed by the European Commission in their antitrust enforcement activities. In the long run, however, an increasing focus on effects-based analyses may be economically advantageous, in particular when faced with increasingly complex competition issues such as those arising in digital markets.

2C Will Brexit affect the UK's status as a jurisdiction of choice for antitrust private damages actions?

2.8 Our analysis suggests that competition law is a small but important part of UK legal services, providing about 5% of the business of the largest UK-based law firms. This includes not only private damages cases under competition law, but also other forms of competition law litigation (e.g. 'original private actions' against anticompetitive conduct, competition claims raised in the context of IP and copyright litigation and advice in public enforcement actions). The different areas of competition litigation advice are complementary products that cannot be considered in isolation. For example, a law firm engaged for advice in an antitrust investigation may also then advise on private damages in relation to that same conduct. To the extent that London-based firms are no longer the 'advisers of choice' for matters of general EU competition law, the expectation may be that more damages actions may be handled by firms with significant presence outside the UK, which, in turn, might mean fewer cases in UK courts.

2.9 Focusing more narrowly on the issue of private damages, the largest such actions in UK courts are frequently made as 'follow-on' claims to breaches of European competition law and based on decisions of the European Commission. According to our analysis, around a third of the monetary claims brought in the UK Competition Appeal Tribunal are based on decisions of the European Commission. The attractiveness of UK courts as a destination for competition law damages will therefore depend heavily on UK courts' continued ability to interpret EU competition law and enforce their rulings outside the UK. This in turn depends on the question of how legal jurisdiction is managed outside the Brussels regulations, a question that is much wider than competition law.

2.10 Economically, we observe that, post-Brexit, the cause of efficient private enforcement of competition law will be well served if a single court (based in the UK or in a remaining EU member state) can hear a case for damages relating to conduct across the UK and the remaining EU member states, and relating to breaches of both UK and EU competition law. This would avoid duplication, reduce uncertainty, and improve access to competition law redress for businesses operating under both competition law regimes. It provides a further reason why issues around jurisdiction should be a high priority for a technical resolution after Brexit.

2.11 Aside from this, we would not advocate any particular steps with the aim of 'preserving' London as the destination of choice. Even taking a narrow focus on the UK, the need for such steps is unclear; London as a centre for litigation has a number of agglomeration advantages that are not easily replicated, such as the reputation for robustness and independence of the courts^[9], and the clustering of legal and economic advisers, including for complementary services such as international arbitration. More fundamentally, to the extent that London does face additional competition for private damages cases after Brexit, perhaps following the harmonised EU procedure in the Damages Directive^[10] or the growth of other EU courts that will hear cases in English, such competition may have positive effects for businesses operating across the EU, including those based in the UK.

2D What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?

2.12 The consideration of additional public or national interest criteria (alongside the existing provisions for public security, media plurality or financial stability allowed for in the current UK Enterprise Act^[11]) is unlikely to result in net economic benefits to the UK. In particular, any rules that seek to preserve UK ownership of firms could deter^[12] mergers that would otherwise contribute to UK employment and competitiveness.^[13]

2.13 Where other public interest aims exist that are not addressed in the current Enterprise Act (for example, regional development or environmental protection), it is not clear the merger regime could effectively advance these. In merger decisions, the long-term effects (such as the economic impact on a given group, geography or environment) are difficult to identify, particularly given the strict timetables of merger reviews. Short-term direct effects such as job losses will tend to be more directly apparent, quantifiable and politically salient than longer-term effects that are inherently less certain and diffuse. This short-term bias could create risks of merger decisions that are detrimental in the long term.

2.14 If, notwithstanding these concerns, it is decided the UK should adopt such a test, economics principles suggest three policy features that would be desirable.

- **Non-subjective test:** for a given public interest objective, the associated test of whether to allow or prohibit a merger should be conducted under a prescribed framework, with the authority and/or merging party being required to demonstrate the contribution or harm that a merger poses to that objective. Established 'impact assessment' tools for assessing regulatory interventions may provide a useful basis.
- **Independent assessors:** we consider the assessment would be best conducted by an independent body rather than a UK government department. While the CMA should maintain its role overseeing merger reviews, alternative independent assessors, such as sector regulators or a specialist panel, could have a role to play in such a test.

- **Transparency:** whatever the specifics of the process, the same standards of transparency would need to apply as those applied to the competition assessment. As with many areas of policy, this would help to maintain trust in the process, and allow decisions to be subject to wider scrutiny and challenged where appropriate.

2E Does the Competition & Markets Authority (CMA) have the capacity to manage an anticipated increase in UK merger notifications post-Brexit? Could regulators with concurrent competition powers, e.g. Ofgem and Ofcom, play a greater role?

2.15 We do not, in this submission, seek to specify the resource requirements or particular priorities of the CMA after Brexit. The CMA itself will be well placed to do so. However, we would emphasise that a preliminary review of public data indicates that the CMA is significantly under-resourced for operating in an environment in which the UK and EU competition regimes are separate. If the CMA is to continue conducting market investigations (which, according to its own impact assessment, is the CMA activity that contributes the greatest return to consumers), the shortage will be particularly acute. This is partly a result of the end of the 'one-stop shop' for merger notifications, but also partly because of CMA's additional responsibility for investigating anticompetitive conduct that would arise after Brexit.

2.16 While concurrent competition powers may have a role to play in addressing the latter, we would argue against full merger reviews being conducted by regulators aside from the CMA. First, economically, it is unclear how the use of sector regulators mitigates the need for additional resource. Assuming that the same standards of rigour are maintained, staff at sector regulators will require just as much time, experience and resources to review a merger as those at the CMA. More widely, such a move would seem to undermine the economically sound principle that mergers should be assessed in a consistent way, on the basis of their impact on competition only. The risk cannot be dismissed that sector regulators may be minded to approve or reject mergers depending on their contribution to that regulator's other goals in the sector.

2.17 Additional resources at the CMA would therefore appear to be necessary following Brexit if competition law is to be effectively enforced. We agree with the assessment of other commentators^[14] that this need not mean additional net expenditure from a public finance perspective. There is, for example, scope to increase merger filing fees, and the fines generated from antitrust enforcement can be very large.

2F Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?

2.18 State aid provisions are indeed likely to form an essential component of any future trade agreement between the UK and the EU, particularly given the geographical proximity of the UK to the rest of Europe. This is reflected in the European Council guidelines for the Brexit

negotiations, which state that any future trade agreement with the UK 'must ensure a level playing field, notably in terms of competition and state aid'.^[15] Furthermore, with the exception of Switzerland, every European country with which the EU has entered into trade agreements has accepted to comply with state aid rules.^[16]

2.19 The two main examples of trade agreements between the EU and third countries involving state aid provisions include:

- the European Economic Area (EEA) Agreement between the EU and Iceland, Liechtenstein and Norway, which replicates EU rules on competition law, and would therefore require minimal changes to the state aid framework. Under this model, the EFTA Surveillance Authority and the EFTA Court perform roles broadly similar to those of the European Commission and the European Courts respectively;
- the Association Agreement between the EU and Ukraine, which requires Ukraine and the EU to report state aid granted on an annual basis to each other. State aid rules in Ukraine are controlled and monitored by an operationally independent authority, based on the European Commission's guidance and precedents from the European Court of Justice.^[17]

2.20 Trade agreements also exist between the EU and countries such as Canada, Singapore, and Vietnam, which do not contain any state aid provisions, but which instead refer to the World Trade Organization's Agreement on Subsidies and Countervailing Measures (SCM). The rules contained in the SCM Agreement are far less stringent and comprehensive than the EU state aid rules contained in the EEA Agreement or the Association Agreement between the EU and Ukraine.

2G Will the UK require a domestic state aid authority after Brexit?

2.21 Depending on the nature of the arrangements between the UK and the EU after Brexit, a domestic state aid authority may be required in the UK.

2.22 If the UK were to join the EEA, the EFTA Surveillance Authority would be in charge of monitoring state aid granted by the EEA member states, and therefore no domestic state aid authority would be required under this scenario. Similarly, if a trade agreement is established based on the SCM Agreement's anti-subsidy rules, the WTO Dispute Settlement Body would be in charge of examining breaches of the SCM Agreement, without a need for a domestic state aid authority.

2.23 However, a domestic state aid authority would be required in the UK if a trade agreement similar to the Association Agreement between the EU and Ukraine is signed after Brexit. The most natural candidate to fill this role in the UK would be the CMA given its operational independence and expertise in dealing with competition matters.^[18] However, this could present some practical challenges in terms of expanding the CMA's responsibilities and the resources available to it, issues around its expanded mandate (e.g. being able to order the recovery of incompatible state aid through national courts), and the need to comply with the European Commission's guidance and precedents from the European Court of Justice.

2H What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO antisubsidy rules restrict the UK's ability to support industries, or individual companies, through favourable tax arrangements?

2.24 In theory, a Brexit without a trade agreement with the EU could lead to higher levels of state funding in the UK. The UK would still be bound by the anti-subsidy rules contained in the SCM Agreement (including subsidies in the form of favourable tax arrangements), but these are far less stringent and comprehensive than the EU state aid rules (e.g. they cover trade in goods only, but not services). As discussed in the subsequent question, the UK has traditionally provided levels of aid per capita that are much lower than those seen in some other European countries. Therefore, the absence of the EU state aid framework may not necessarily translate into significantly higher levels of public investment or more favourable tax arrangements.

2.25 Further challenges could include the fact that the European Commission may have a limited incentive to investigate complaints made by UK businesses regarding illegal subsidies provided by other EU member states, and may treat these with a lower priority. UK businesses would also lose the right to appeal decisions adopted by the European Commission in front of the European courts, and may lose funding provided by the EU. Finally, in the absence of a trade agreement containing state aid provisions, the UK would no longer be able to influence the development of EU state aid law (including the economic principles and criteria underpinning the legal developments). For example, the change towards a 'more economic approach' to the state aid rules at the EU level in the past few years has been in part driven by UK-based policymakers and practitioners. [\[19\]](#)

2I How will the Government's industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission's state aid policy limited interventions that the UK Government may have otherwise pursued?

2.26 If the UK exits the EU without a trade agreement, it could in theory proceed with a more selective industrial strategy to support struggling sectors, such as steel and manufacturing, or sectors otherwise considered as 'strategic'. For example, in the absence of a trade agreement containing state aid provisions, the UK could intervene and provide state support to assist the Port Talbot steelworks without being constrained by EU rules. The UK would still be subject to the anti-subsidy rules contained in the SCM Agreement, but these are less stringent than the EU state aid rules.

2.27 From an economic perspective, the case for unilaterally increasing the level of state support or selective tax benefits to industry in the absence of state aid rules is questionable. Any such policy would require careful cost–benefit analysis, given the potential distortive effects of such measures on competition and the risk of devolved institutions entering into undesirable subsidy races within the UK (see the following question).

2.28 However, even if state aid rules were to become less stringent in the UK, public spending might not increase significantly as the UK has historically spent significantly less than other countries on aid. For example, over the 2009–15 period, the average amount spent by the UK on aid was approximately €100 per capita, compared with €181 in Belgium, €224 per capita in France and €266 per capita in Germany.^[20] This would imply that, to date, the existing EU state aid rules have not constituted a significant limiting factor in UK policy interventions.

2J What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?

2.29 If the UK signs a free trade agreement with the EU containing state aid provisions, the responsibility of state aid control would fall on the EFTA Surveillance Authority (in the EEA scenario) and on a national independent authority (in the case of a trade agreement similar to that between the EU and Ukraine). In both of these cases, devolved institutions would need to comply with state aid rules, but would not play a role in state aid control.

2.30 In the event that the UK does not sign a free trade agreement containing state aid provisions, it is possible that the devolved institutions might attempt to attract businesses to their areas through public funding (e.g. grants, credit guarantees, subsidised loans, and fiscal incentives) with the aim of increasing employment and growth in those areas.^[21] From an economic perspective, this could lead to an undesirable subsidy race between the different regions of the UK, and might threaten to distort competition between UK firms by favouring certain industries over others.

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[1] These are collected at our [website](#), accessed 11 September 2017.

[2] BCLWG (2017), '[Conclusions and recommendations](#)', July, accessed 31 August 2017.

[3] See Organisation for Economic Co-operation and Development (2014), 'Challenges of International Co-operation in Competition Law Enforcement'.

[4] BCLWG (2017), '[Conclusions and recommendations](#)', July, paragraph 2.8, accessed 31 August 2017.

[5] Competition law distinguishes between assessments that are: (i) form-based, where a type of conduct is known to be, in itself, detrimental to competition, and therefore, once that conduct is proven, there is no need to examine further its impact on the market and consumers; and (ii) effects-based, where the impact of a type of conduct may be pro- or

anticompetitive, and empirical analysis is needed to determine its effects in the specific case being considered.

- [6] See, for example, Gerard, D. (2012), 'Effects-based enforcement of Article 101 TFEU: the "object paradox"', *Kluwer Competition Law Blog*, 17 February.
- [7] See, for example, the judgment in the Intel case: European Court of Justice (2017), '[Judgment in Case C-413/14 P: Intel](#)', 6 September, accessed 11 September 2017. See also the earlier judgment in the Post Danmark II case: European Court of Justice (2015), '[Judgment in Case C-23/14: Post Danmark II](#)', 6 October, accessed 11 September 2017.
- [8] Oxera has published a series of articles on these developments. Oxera (2015), '[The Post Danmark II judgment: effects analysis in abuse of dominance cases](#)', *Agenda*; Oxera (2016), '[The latest intel from Luxembourg: an Advocate General prefers effects analysis in abuse cases](#)', *Agenda*; and Oxera (2017), 'Moore's Law or Murphy's Law: Intel and the reform of the EU abuse of dominance rules' *Agenda*, September (forthcoming).
- [9] Notes for example, in [Bristows' submission to the BCLWG](#), accessed 11 September 2017.
- [10] European Commission (2013), 'Antitrust: Commission proposes legislation to facilitate damage claims by victims of antitrust violations', press release, 11 June.
- [11] Enterprise Act 2002, Article 42.
- [12] The deterrence effect on foreign investment of a government preference for domestic ownership has some empirical backing. See Serdar Dinc, I. and Erel, I. (2013), 'Economic nationalism in mergers and acquisitions', *The Journal of Finance*, **68**:6, pp. 2471–514.
- [13] A survey of evidence for the Economic and Social Research Council confirms positive effects on overall employment and competitiveness from non-UK takeovers of UK firms. See Economic and Social Research Council (2010), 'Foreign ownership and consequences for British business', Evidence Briefing, December.
- [14] In particular, see BCLWG (2017), '[Conclusions and recommendations](#)', July, accessed 31 August 2017.
- [15] European Council of the European Union (2017), 'European Council (Art. 50) guidelines for Brexit negotiations', press release, 29 April, paragraph 20.
- [16] Switzerland has a number of bilateral agreements with the EU. However, in general, state aid rules are not applied in any sector outside the aviation sector.
- [17] Similar provisions can be found in agreements between the EU and Albania, Bosnia and Herzegovina, Macedonia, Serbia, and Turkey.
- [18] See, for example, Peretz, G. and Bacon, K. (2016), '[Paper on post-Brexit options for State aid](#)', November, accessed 6 September 2017.
- [19] [UK's Response to the Commission Roadmap on State Aid Reform](#), paragraph 3, accessed 11 September 2017.
- [20] Oxera analysis, based on European Commission State Aid Scoreboard 2016 and population data from the World Bank.
- [21] However, the UK would still be subject to the anti-subsidy rules contained in the SCM Agreement, although these are less stringent relative to EU state aid rules.