



# UK competition policy post-Brexit: taking back control while resisting siren calls

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## ABSTRACT

A notable effect of ‘Brexit’ is that it will create new freedoms for the UK to shape its competition policy outside the EU, but these freedoms come at a cost and could prove damaging to competitive markets. In merger control, the UK will be free to employ more frequent public interest interventions (especially for foreign acquisitions), but these could be misused and create uncertainty. In State aid, there will be pressure for greater protection of UK industries through State interventions, but such freedom will constrain, and be constrained by, the UK’s new trade arrangements and could prove wasteful. In antitrust, the UK will be free to set its own path, for example by fully criminalizing its cartel enforcement regime, but cooperation with other EU competition agencies will dwindle. The UK also faces difficulties in continuing to benefit from the significant level of fines currently imposed by the European Commission on its behalf. The article concludes that any immediate changes to policy should be avoided and that it may even be necessary to legislate to limit the exercise of some new freedoms. We also note how, for current EU/UK levels of enforcement to be maintained, the Competition and Markets Authority’s resource requirement may have to be doubled.

**KEYWORDS:** Competition Policy, Public Interest, Industrial Policy, Merger Control, State Aid, Brexit

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## I. INTRODUCTION

The premise of this article is that when the UK leaves the European Union, its competition regime will no longer be bound by the constraints of EU law, making it free to shape its competition rules as it sees fit. Post-Brexit competition policy must be understood in the context of the arguments used during the EU referendum debate, and the political response to the disaffection that led to the result. Brexit is largely being shaped by the imperative to ‘take back control’,<sup>1</sup> particularly over areas such as immigration and trade. We highlight three ways in which the pressure to assert greater sovereignty over UK affairs, free from the constraints of EU membership, could be manifested: (i) a move towards more frequent public interest interventions in merger control, particularly in relation to foreign acquisitions; (ii) greater protection of UK industry through State aid interventions; and (iii) a more comprehensive exercise of antitrust powers, including the UK’s criminal cartel offence. We examine the implications of each of these for UK competition policy, with a warning that new freedoms entail new costs that could lead to weaker competition and enforcement.

As we argued in an early working paper on this subject,<sup>2</sup> the rhetoric used during the EU referendum debate—and the political response to the disaffection that led to the result—has made a ‘hard Brexit’ outcome almost inevitable.<sup>3</sup> Both the UK’s Conservative Government and the official Opposition Labour Party interpreted the referendum result as being principally about controlling immigration and ending the supremacy of EU law.<sup>4</sup> On 1 February 2017, this culminated in overwhelming parliamentary backing for a Bill which gave the Government the authority to trigger Article 50 of the Treaty on European Union, and to begin the two-year process of EU withdrawal. This trigger was pulled by the Prime Minister on 29 March 2017.<sup>5</sup> The Government published a White Paper setting out its objectives for leaving the

1 The phrase ‘take back control’ was coined by Dominic Cummings, the Campaign Director of ‘Vote Leave’, and became much-repeated by various figures campaigning for a leave vote; see Henry Mance and George Parker, ‘Combative Brexiter Who took Control of Vote Leave Operation’ *The Financial Times* (London, 14 June 2016).

2 Bruce Lyons, David Reader and Andreas Stephan, ‘UK Competition Policy Post-Brexit: In the Public Interest?’ (2016) CCP Working Paper 16–12.

3 A hard Brexit outcome is generally understood to involve the UK forgoing its membership of the European Economic Area in addition to its EU membership; see Anand Menon and Brigid Fowler, ‘Hard or Soft? The Politics of Brexit’ (2016) 238(1) *National Institute Economic Review* R4, R8.

4 This has been evident in various statements by the Prime Minister, Theresa May, and the Leader of the Opposition, Jeremy Corbyn; see eg: Theresa May, ‘The government’s Negotiating Objectives for Exiting the EU: PM Speech’ (*Global Britain event*, London, 17 January 2017); Theresa May, ‘Britain after Brexit: A Vision of a Global Britain’ (Conservative Party Conference, Birmingham, 2 October 2016), where the Prime Minister proclaimed ‘[w]e will decide for ourselves how we control immigration’; and Jeremy Corbyn, ‘Keynote speech’ (Labour Party Annual Conference 2016, Liverpool, 28 September 2016).

5 The Government resisted calls for Parliament to have a vote on triggering Article 50 TEU and did so only after a ruling by the UK Supreme Court in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Ironically, *Miller* may have actually made a hard Brexit outcome more probable, by ensuring the Prime Minister enjoyed both a popular mandate (from the referendum) and an overwhelming mandate from the House of Commons to pursue a clean break from the EU. Three weeks after triggering Article 50, the Prime Minister called a General Election for 8 June 2017. This article goes to press before the result is known.

EU.<sup>6</sup> These include: controlling the number of EU nationals entering the UK; introducing a Great Repeal Bill to convert EU law into domestic law; ending the supremacy of EU Law (including in relation to competition and State aid rules) and the jurisdiction of the Court of Justice of the European Union (CJEU); and having the freedom to secure new trade agreements with countries outside the EU.

Crucially, this strategy explicitly seeks to end the UK's membership of the Single Market,<sup>7</sup> and implies an exit from the EU Customs Union.<sup>8</sup> This hard Brexit strategy has been contentious, especially as the referendum result was close and geographically divisive. Moreover, the Prime Minister herself had supported the 'Remain' side of the referendum campaign.<sup>9</sup> However, anything other than a hard Brexit strategy would require serious compromise on the political imperatives identified above. In particular, any kind of associated membership of the EU or the Single Market would have required free movement of people and some continued oversight by the laws and institutions of the European Union.<sup>10</sup>

For example, membership of the European Economic Area (EEA) would provide free access to the Single Market without being subject to common EU policies on agriculture, fisheries, external trade (EEA Members are not part of the Customs Union), justice, home affairs or monetary union. However, the EEA Agreement requires that all four freedoms of the EU be respected and, furthermore, EEA Members are bound by key areas of EU Law but without a vote on EU legislation. Politically, the 'four freedoms' of the Single Market (i.e. the free movement of goods, capital, services, and people) are central to the vision of key European leaders of an integrated Union. Legally, there is a need for consistency and for infringements of the law to be dealt with at the EU level; at least inasmuch as it affects trade between Member States. For this reason, the European Commission oversees the Single Market in conjunction with Member States and their actions are subject to judgments and guidance from the CJEU.<sup>11</sup> The implication, confirmed by numerous European Commission and Member State leaders, is that the UK can no longer be a member of the European Single Market.<sup>12</sup> This is of great significance for

6 Department for Exiting the European Union, *The United Kingdom's Exit from and New Partnership with the European Union* (White Paper, Cm 9417, 2017).

7 *ibid* 35.

8 *ibid* 51.

9 A number of possible alternatives to full EU membership had been identified prior to the referendum; see Cabinet Office, *Alternatives to membership: possible models for the United Kingdom outside the European Union* (Policy Paper, London, 2 March 2016).

10 Free movement of people is one of the EU's four fundamental freedoms and, in December 2016, its importance was demonstrated by the way in which Switzerland was forced to make a U-turn on plans to introduce EU worker quotas, in order to protect its bilateral agreements with the EU; Jon Henley, 'Switzerland makes U-turn over EU Worker Quotas to keep Single Market Access' *The Guardian* (London, 16 December 2016).

11 Those in favour of Brexit tended to focus on the economic arguments of mutual benefit from free trade to suggest that free access to the Single Market would continue, but this was never likely to outweigh the political and legal arguments against this.

12 eg In response to a speech by Theresa May, Guy Verhofstadt, chief Brexit negotiator for the European Parliament and a leading candidate to be its President said the UK could not 'cherry pick' and went on to say '[i]f you want the advantages of a single market and customs union, you have to take the obligations'; see Shehab Khan, 'EU Brexit negotiator Guy Verhofstadt says Theresa May can't "cherry pick" benefits of the European Union' *The Independent* (London, 17 January 2017) <<http://www.independent.co.uk/>

competition policy because the most natural form of ‘soft Brexit’—membership of the EEA—would have meant very little change in the UK’s competition laws. For example, Articles 53 and 54 of the EEA Agreement directly mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Indeed, in its application of both antitrust and merger control, the European Commission’s jurisdiction extends to the EU and the EEA, where the arrangement or merger has a Union and EEA dimension.<sup>13</sup> EEA Members are also subject to the same State aid rules and jurisdiction of the CJEU.<sup>14</sup>

Leaving the Single Market but remaining in the EU Customs Union is also rendered impractical because of the political imperatives. A key feature of the UK Government’s post-Brexit strategy appears to be to enter into new preferential trade agreements around the world, with the aim of boosting exports and mitigating any loss of trade with the EU.<sup>15</sup> This would not be possible if the UK were to remain in the Customs Union. On the contrary, it would allow the EU to continue negotiating trade deals on the UK’s behalf, at a time when the UK’s influence within the Union would be very significantly diminished. Furthermore, the UK would have to continue accepting some oversight from the CJEU in Customs Union matters.<sup>16</sup> As this would not amount to taking back full control of UK policy, the Government instead wishes to create a new trading relationship with the EU, even if this means being subject to certain tariffs, border controls and other non-tariff barriers to trade.

The political priorities that are shaping Brexit must also be understood in the wider context of a revival of interest in *Industrial Policy*. The financial crisis, economic slowdown, and stagnation of real wages over the past decade have undermined confidence in the economic system, including the ability of competitive markets to provide the best economic outcomes. Instead of interventions only to restore or extend competition, politicians from both ends of the political spectrum are beginning to believe that government should use more instruments for intervening in market forces. For example, the UK Government has announced it will review the public interest regime in UK merger control and consider greater controls on foreign investment.<sup>17</sup> It has also created a Department for Business, Energy and Industrial

news/world/europe/chief-eu-brexit-negotiator-guy-verhofstadt-theresa-may-cherry-pick-illusionspeech-benefits-europeana-7531971.html> accessed 8 March 2017.

13 This means the arrangement, conduct or merger affects more than one EU or EEA member; see EEA Agreement [1994] OJ L1/1, arts 55–57. Where cases have an EEA-only dimension, they are dealt with by the EFTA Surveillance Authority and the EFTA Court.

14 *ibid* arts 61–64. Art 61 is the equivalent of art 107 TFEU. On the status of CJEU jurisprudence, art 105(2) of the EEA Agreement states: ‘The EEA Joint Committee shall keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court. To this end, judgments of these courts shall be transmitted to the EEA Joint Committee which shall act as to preserve the homogenous interpretation of the Agreement’. In addition, Protocol 34 to the EEA Agreement allows the EFTA Court to ask the CJEU to decide on the interpretation of an EEA rule.

15 Brexit White Paper (n 6), s 9. The very severe difficulties in achieving post-Brexit trade deals are rather chillingly explained in Peter Holmes, Jim Rollo and L Alan Winters, ‘Negotiating the UK’s Post-Brexit Trade Arrangements’ (2016) 238(1) *National Institute Economic Review* R22.

16 See eg Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1, art 66.

17 See Department for Business, Energy and Industrial Strategy, ‘Government confirms Hinkley Point C project following new agreement in principle with EDF’ (Press Release, London, 15 September 2016);

Strategy, the third element of which is suggestive of intervention or planning at a level that has not been seen in the UK for decades.<sup>18</sup> This Department sponsors and oversees the UK's independent competition authority, the Competition and Markets Authority (CMA), which is responsible for the primary enforcement of competition law. In addition to the Government's apparent shift towards greater interventionism, the Opposition Labour Party is hostile to free markets and EU State aid rules, explicitly advocating industrial subsidies and state ownership.<sup>19</sup>

Against this backdrop, we examine three directions in which UK competition policy will be free to move post-Brexit: (i) an enhanced role for public interest tests in merger control; (ii) the use of State aid tools to help protect or promote British firms; and (iii) a more comprehensive use of antitrust powers, including criminal sanctions. Each of these new freedoms will enable the UK to shape its competition policy outside the EU, but this article warns that these freedoms entail a number of foreseeable costs.

We caution against changes to UK competition policy without very strong justification. In particular, any move towards a more interventionist approach, or a significant divergence from EU competition rules, could risk future negotiations on access to the Single Market, the efficient development of UK-based firms, and investment in the UK. Competition law provides a very powerful set of tools that can be used for market intervention. Losing the restraints due to EU membership ('taking back control') opens up the possibility of non-competition based interventions that could be used and abused for short-term political gain ('siren calls'). We suggest some specific areas where it may be beneficial to re-introduce new restraints that would be beneficial in the long run.

## II. PUBLIC INTEREST TESTS IN MERGER REGULATION

When considering the prospect of an enhanced role for public interest tests in merger control, it is important to recognize the lessons that can be drawn from the history of UK competition policy. This historical context is particularly illuminating for merger control, given that Brexit raises the prospect of resurrecting policies that were more familiar in the 20th century, when the UK's competition policy regime was formally based around the broad notion of the 'public interest'.<sup>20</sup> During the genesis of the UK merger regime, the question of whether a merger 'operates, or may be expected to operate against the public interest' was a question to be determined by the Secretary of State, who would receive advice from an independent

and George Parker and Arash Massoudi, 'UK Set for US-style Investment Regime as May Clamps down on Foreign Deals' *The Financial Times* (London, 10 October 2016).

18 Previous names for the business ministry going back to pre-EU membership in 1970 (with most recent first) include: Department for Business, Innovation and Skills; Department for Business, Enterprise and Regulatory Reform; and Department of Trade and Industry. Our point is about direction of travel and what becomes permissible, not what is actually likely to happen over the next few years. In Section III, we discuss the January 2017 Green Paper on 'Building our Industrial Strategy'.

19 For example, Jeremy Corbyn has expressed an intention to press Labour's 'own Brexit agenda including the freedom to intervene in our own industries without the obligation to liberalise or privatise our public services . . .', Corbyn (n 4).

20 Public interest has its origins in the Monopolies and Restrictive Practices Act 1948.

competition authority.<sup>21</sup> The Secretary of State would then decide if any adverse effects to the public interest could be remedied or whether the merger should be blocked.

The concept of the 'public interest' was commonly criticized for being kept intentionally broad and ill-defined. Governments were reluctant to draft a more precise definition because of fears this would excessively restrict the scope of the competition authority's inquiries, on which it bases its advice.<sup>22</sup> This created uncertainty and inconsistencies between merger decisions.<sup>23</sup> Moreover, these statutory shortcomings were further compounded by additional anxieties expressed towards the regime's use of ministerial decision-making, which embedded an inherent subjectivity at the heart of the assessment process. This subjectivity manifested itself in the form of notable inconsistencies between 1973 and 2001, where—upon receiving advice from the Director General of Fair Trading (DGFT) on whether or not to refer a merger—Secretaries of State acted contrary to the DGFT's advice on 31 occasions.<sup>24</sup> Indeed, the inference from a number of commentators is that this allowed some Secretaries of State to take a 'softer approach' to merger control than others.<sup>25</sup> Only a small number of mergers were ever blocked under this regime, but as each of these cases was determined on slightly different grounds, the result was that merging parties found it more difficult to predict outcomes and lawyers struggled to provide advice with a high degree of certainty.<sup>26</sup>

By the 1980s, UK government policy had shifted towards a more liberalized, laissez-faire approach to regulating markets. In 1984, procedural changes brought about by the Tebbit doctrine essentially put an end to the broad public interest regime; mergers were to be assessed primarily on the basis of their effect on competition, with wider public interest concerns only considered in exceptional circumstances.<sup>27</sup> Even so, it was not until the introduction of the Enterprise Act 2002 that an end was put to 'substantial room for the exercise of political preferences'.<sup>28</sup> The Act established a formal competition test which assesses whether the merger 'has resulted, or may be expected to result, in a substantial lessening of competition' within the relevant markets (section 22). Furthermore, this would no longer be decided by a Minister, but by the independent competition authority. The test is

21 Monopolies and Mergers Act 1965 and later the Fair Trading Act 1973.

22 See eg CK Rowley, 'Mergers and Public Policy in Great Britain' (1968) 11 *Journal of Law and Economics* 75, 82.

23 See eg Andrew Scott, Morten Hviid and Bruce Lyons, *Merger Control in the United Kingdom* (OUP 2006) 5; *ibid* 83; T Ellis, 'A Survey of the Government Control of Mergers in the United Kingdom' (1971) 22 *NILQ* 251.

24 Stephen Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (MUP 1999) 226.

25 *ibid* 226–7. For example, in 1990, Trade Secretary Peter Lilley decided acquisitions by foreign state-owned firms would be subject to greater scrutiny (under what became known as the 'Lilley Doctrine').

26 Martin McElwee, 'Politics and the UK Merger Control Process: The Public Interest Exceptions and other Collision Points' (2010) 9 *Competition Law Journal* 77, 80.

27 Norman Tebbit MP, HC Deb 5 July 1984, vol 63, cols 213–14W. In practice, the Tebbit doctrine had an immediate impact and wider public interest goals were almost completely ignored by the competition authority; see Charlie Weir, 'The Implementation of Merger Policy in the U.K. 1984–1990' (1993) 38 *Antitrust Bulletin* 943, 962.

28 Wilks (n 24) 228.



widely interpreted as economic effects-based with a clear focus that allows parties to reasonably predict the issues that will arise in their transaction.<sup>29</sup> The 2002 Act retains only a limited role for public interest interventions.<sup>30</sup> Under section 57, the CMA Board has a duty to notify the Secretary of State where it believes a merger raises a public interest issue specified in section 58, namely: (i) national security, (ii) certain issues relating to media plurality and the presentation of news, and (iii) stability of the UK financial system. Moreover, subject to the approval of Parliament,<sup>31</sup> the Secretary of State can add to this list of public interest criteria. Indeed, this occurred during the 2007–08 financial crisis when the Government added (iii) to the explicit list of public interests in order to force through a merger between two banks, Lloyds and HBOS, even though the transaction raised competition concerns.<sup>32</sup> Therefore, in principle, government can continue to add to the list of public interest exceptions without the need to pass an Act of Parliament.

While the current regime has been relatively uncontroversial, calls for greater public interest scrutiny of mergers have been gaining momentum in recent years, driven by fears surrounding the perceived ease with which foreign firms are able to acquire UK businesses.<sup>33</sup> In particular, some fear the lack of government protection and intervention is resulting in job losses and asset stripping. Perhaps the starkest illustration of this was Kraft's acquisition of Cadbury plc in 2010, which—despite commitments from Kraft to the contrary—was later followed by the closure of the Cadbury Somerdale factory with a loss of 400 jobs. The Labour Business Secretary at the time, Lord Mandelson, rejected calls for 'a political test for policing foreign ownership', saying it ran 'the risk of becoming protectionist and protectionism is not in our interests'.<sup>34</sup> The issue surfaced once again in 2012, when Prime Minister David Cameron's Coalition Government commissioned an independent review on economic growth, to be undertaken by the Conservative peer Lord Heseltine.<sup>35</sup> The findings of the review included a recommendation for the Government to show a 'greater willingness' to use its public interest powers under the Enterprise Act 2002,<sup>36</sup> one of the few recommendations the Government chose to reject in its response to the review.<sup>37</sup> Indeed, Cameron's Conservative Party was the only major party not to propose extending the public interest test in its 2015 General Election

29 The question of the extent to which such tests are stable or predictable is explored in Ariel Ezrachi, 'Sponge' (2017) 5 *Journal of Antitrust Enforcement* 49.

30 Enterprise Act 2002, s 42(2) affords the Secretary of State the power to intervene on specified public interest grounds.

31 *ibid*, s 42(7) confers a duty on the Secretary of State to 'finalise' proposals for new public interest criteria, which – by virtue of s 42(8)(b)—includes obtaining Parliamentary approval.

32 See Andreas Stephan, 'Did Lloyds/HBOS Mark the Failure of an Enduring Economics-Based System of Merger Regulation?' (2011) 62(4) *NILQ* 529, 548.

33 See, for example, the views of the former Business Secretary, Sir Vince Cable, in the wake of Pfizer's failed bid for AstraZeneca in 2014; Vince Cable, 'Strengthening Confidence in the UK's Takeover Laws' (*Liberal Democrat Voice*, 13 July 2014) <[www.libdemvoice.org/vince-cable-writesstrengthening-confidence-in-the-uks-takeover-laws-41522.html](http://www.libdemvoice.org/vince-cable-writesstrengthening-confidence-in-the-uks-takeover-laws-41522.html)> accessed 8 March 2017.

34 Lord Mandelson, 'Mansion House Speech' (Trade and Industry Dinner, London, 1 March 2010).

35 Lord Heseltine, *No Stone Unturned: In Pursuit of Growth* (Independent Report, BIS 2012).

36 *ibid*, paras 5.102–5.111 and Recommendation 73.

37 Department for Business, Innovation and Skills, *Government's response to the Heseltine review* (Cm 8587, 2013) 59.

manifesto. However, UK politics is moving rapidly. The EU referendum result has heightened calls to protect British industry and Theresa May's Government is setting a very different course to that of her predecessor.<sup>38</sup>

The stage is therefore set for the public interest regime in UK merger control to undergo its most substantial reforms in over a decade. Within a few weeks of the new Prime Minister assuming office, her Government signalled its intentions to: (i) subject foreign takeovers to case-by-case scrutiny to determine whether their transaction is in the 'national interest',<sup>39</sup> and (ii) review the public interest regime under the Enterprise Act 2002 and to introduce 'a cross-cutting national security requirement' for ownership of critical infrastructure.<sup>40</sup> It is evident that the underlying philosophy of these proposals is to safeguard the public interest by subjecting foreign bidders to harsher scrutiny—a departure from the existing public interest gateways, which do not directly discriminate between foreign and domestic firms.<sup>41</sup> This raises a number of important questions concerning the way in which these proposed reforms are to be framed in legislation, and the institutional arrangement in which they will operate.

The current public interest gateways for UK mergers are used about once a year, with seven interventions on national security grounds, four on media plurality or broadcasting standards grounds and one on financial stability grounds, since the Enterprise Act came into force in 2003.<sup>42</sup> The most recent of these have included a European intervention notice (EIN) in the proposed *21st Century Fox/Sky* merger in March 2017,<sup>43</sup> and a public interest intervention notice (PIIN) in the *Hytera/Sapura* transaction in April 2017;<sup>44</sup> both of which were subject to ongoing Phase I assessments at the time of writing. Hard Brexit provides the Government an opportunity

38 See Brexit Competition Law Working Group, *Issues Paper* (Consultation document, 25 October 2016) 3.2–3.3 <[www.bclwg.org/wp-content/uploads/2016/10/BCLWG-Issues-Paper-FINAL.pdf](http://www.bclwg.org/wp-content/uploads/2016/10/BCLWG-Issues-Paper-FINAL.pdf)> accessed 8 March 2017.

39 These comments were made by the PM's spokesperson in the wake of SoftBank's £24.3bn bid for ARM Holdings in July 2016; George Parker and Yukako Ono, 'ARM takeover puts Focus on UK's Industrial Strategy' *Financial Times* (London, 18 July 2016).

40 Greg Clark MP, 'Hinkley Point C' (Oral statement to Parliament, House of Commons, 15 September 2016). In January 2017, the Prime Minister expressed her intentions to subject these changes to a separate consultation, rather than as part of a broader consultation on industrial strategy; George Parker, 'Theresa May Steps Back from Tough Stance on Foreign Investment' *The Financial Times* (London, 20 January 2017).

41 However, it should be noted that the 'national security' exception, under s 58(1) of the 2002 Act, will usually only take effect where a foreign firm is part of the transaction.

42 Competition and Markets Authority, *Written submission to Business, Innovation and Skills Committee's Industrial strategy inquiry* (27 September 2016) para 29. It is clear that 'national security' is already fairly widely interpreted.

43 The Secretary of State issued the EIN on the basis that media plurality and commitment to broadcasting standards (s 58(2C)(a) and s 58(2C)(c) of the 2002 Act, respectively) may amount to relevant considerations within the assessment process. For a discussion, see Sally Broughton Micova and David Reader, *CCP Response to Ofcom: Invitation to Comment for Public Interest test on the Proposed Acquisition of Sky plc by Twenty-First Century Fox, Inc* (Consultation Response, 29 March 2017) <<http://competitionpolicy.ac.uk/documents/8158338/16525214/1+CCP+response+to+Ofcom+Fox-Sky+consultation+-+March+2017.pdf>> accessed 23 April 2017.

44 Interestingly, while previous PIINs made on national security grounds have involved domestic firms with notable contractual ties to the British Armed Forces, Sepura's main activities are in supplying mission critical communications and public safety networks to emergency service authorities. The definition of 'national security' under s 58(2) of the Enterprise Act 2002 includes 'public security', so—given that Sepura's products and services contribute to protecting the safety of UK citizens—it would be premature



to enforce a more expansive public interest regime for *all* mergers affecting UK markets—and the Government's recent rhetoric would suggest it may well take this opportunity.<sup>45</sup> As a member of the EU, the UK is currently subject to the provisions of the EU Merger Regulation (EUMR),<sup>46</sup> which states that mergers with a Union dimension will be assessed by the European Commission, rather than by national competition authorities (a process that has been dubbed 'one-stop' merger control), under a substantive test based on competition grounds.<sup>47</sup> This means that the Secretary of State may be unable to make a public interest intervention in some of the mergers that are most likely to have an impact on the public interest—namely, foreign takeovers of UK firms that have a Union dimension.<sup>48</sup> In such cases, the UK Government can currently submit an Article 21(4) notification to the Commission to request jurisdiction to rule on the public interest dimension of mergers that raise 'legitimate national interest' concerns.<sup>49</sup> However, the Commission has afforded a narrow interpretation to what constitutes a 'legitimate interest' in practice,<sup>50</sup> and what measures a Member State can put in place to protect them.<sup>51</sup> In addition, Article 21(4) may only be applied 'negatively', meaning the Commission will only consider granting a legitimate interest request if the merger in question is not found to significantly impede effective competition in the relevant market.<sup>52</sup> In other words, the provision may enable a Member State to *block* a competitive merger on public interest grounds, but never to *permit* a merger that the Commission has ruled to be anticompetitive. In light of this narrow interpretation, some Member States have resorted to adopting ex ante measures as a means of frustrating mergers that endanger their public interest goals (legitimate or otherwise), including maintaining so-called 'golden shares' which enable governments to exert influence over domestic

to conclude that the PIIN in this case was in any way influenced by the Government adopting a stricter approach to foreign takeovers.

- 45 The Government's stance is significant here because, even if the public interest test were to be expanded, the UK's previous commitment to a competition-based approach would otherwise indicate that public interest interventions would continue to be very rare; Alison Jones, 'Brexit: Implications for UK Competition Law' (2017) <<https://ssrn.com/abstract=2923725>> accessed 8 March 2017; Geert Goeteyn, 'Brexit's Implications for Merger Control' (*International Financial Law Review*, 26 September 2016) <<http://www.iflr.com/Article/3585484/Brexit-implications-for-merger-control.html>> accessed 8 March 2017.
- 46 Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/1.
- 47 A merger will amount to having a Union dimension if it exceeds prescribed turnover thresholds; *ibid*, art 1(2). Such a merger will be prohibited if it significantly impedes effective competition.
- 48 Conceivably, a large-scale public interest merger could fall within the UK's jurisdiction if the transaction meets the 'two-thirds' rule; *ibid*, art 1(3).
- 49 *ibid*, art 21(4).
- 50 Article 21(4) provides a non-exhaustive list of three legitimate interests: public security, media plurality and prudential rules. The provision has experienced a somewhat turbulent history, plagued by acts of protectionism, which has led the Commission to treat Article 21(4) requests with great suspicion.
- 51 In particular, the measures should be proportionate, non-discriminatory and necessary in the absence of less restrictive alternatives; see Michael Harker, 'Cross-border mergers in the EU: the Commission v the Member States' (2007) 3(2) *European Competition Journal* 503, 524.
- 52 European Commission, 'Community Merger Control Law' (1990) *Bulletin of the European Communities*, Supplement 2/90, 24.

firms in strategic industries.<sup>53</sup> Recognizing that ‘golden shares’ can act to obstruct the freedom of establishment and the free movement of capital under the Treaty,<sup>54</sup> and thereby deter mergers, the Commission has enforced a hardline policy against Member States who adopt such measures.<sup>55</sup> This acts to demonstrate how the Commission’s enforcement—both under the EUMR and the Treaty—has limited the capacity for Member States to give effect to their public interest goals in the context of cross-border mergers.

There are two opposing perceptions of what the EUMR and the Treaty represents for UK merger control. On the one hand, it acts to obstruct the UK’s ability to protect the public interest in large-scale mergers, while on the other hand, it provides an important safeguard against protectionism and undue political intervention from any one EU Member State, which could risk undermining the competition-based regime. Hard Brexit would give the Secretary of State much more freedom to intervene in the CMA’s investigation, especially if that merger raises public interest concerns.<sup>56</sup> Indeed, free from the confines of the EUMR and the fundamental freedoms of the EU, the Government would be in a far stronger position not only to block unwanted foreign takeovers, but also to permit anticompetitive mergers between UK firms in order to create ‘national champions’.<sup>57</sup> If this type of behaviour were to materialize in practice, there is every possibility that this would lead to: (i) a resurgence of public interest interventions in the EU,<sup>58</sup> (ii) the remaining Member States putting pressure on the Commission to adopt a more protectionist stance to promote European Champions,<sup>59</sup> and (iii) retaliatory action against UK firms by other countries.

53 Thatcher notes that, although ‘golden shares’ are legally challengeable, they nonetheless offer an effective procedural obstacle that can deter and frustrate mergers; Mark Thatcher, ‘From Old to New Industrial Policy via Economic Regulation’ (2014) 2 *Rivista della Regolazione dei mercati* 6, 16.

54 Arts 49 and 63 TFEU, respectively.

55 For an evaluation of the European Commission’s early ‘golden share cases’, see Harker (n 51) 520–34.

56 However, the UK would not be entirely free to determine its own public interest regime because any trade agreements entered into by the UK would likely contain safeguards against any practices that might be seen as discriminating against foreign firms.

57 Under a case-by-case approach, permitting anticompetitive mergers is often seen as more harmful than blocking competitive mergers, given that blocking a merger merely leaves the market in its existing state. Under a rule-based approach, the opposite is widely considered to be true; see Frank H Easterbrook, ‘Limits of Antitrust’ (1984) 63(1) *Texas Law Review* 1.

58 Evidence for this can be found in the national merger control regimes of Member States, including France, Germany, Italy, the Netherlands, Spain, and Portugal. For a discussion, see Harry Phillips, ‘The European Champions Leagues’ (2014) 17(8) *Global Competition Review* 5. The Commission’s ability to challenge protectionist behaviour by Member States is also highly questionable; Jonathan Galloway, ‘EC Merger Control: Does the Re-emergence of Protectionism Signal the Death of the “one stop shop”?’ (3rd Annual CCP Summer Conference, Norwich, June 2007). <[www.competitionpolicy.ac.uk/documents/8158338/8258622/galloway\\_paper.pdf](http://www.competitionpolicy.ac.uk/documents/8158338/8258622/galloway_paper.pdf)> accessed 8 March 2017.

59 Paul Johnson, ‘Brexit: The Implications for EU and UK Merger Control’ (2016) *Competition Law Journal: Brexit Special Online Edition* 10, 16 <[www.jordanpublishing.co.uk/system/froala\\_assets/documents/1340/CLJ\\_2016\\_BrexitSpecial.pdf](http://www.jordanpublishing.co.uk/system/froala_assets/documents/1340/CLJ_2016_BrexitSpecial.pdf)> accessed 8 March 2017. Some commentators suggest that the prospect of the EU adopting a more protectionist approach may, to a certain extent, be dictated by the performance of Eurosceptic parties at general elections in France and Germany in 2017; Rachel Brandenburger and others, ‘Changing Times? The Outlook for Antitrust Enforcement in the EU and the US’ (2017) 1(2) *CPI Antitrust Chronicle*.

Even in the absence of reforms to the existing public interest regime, there is evidence to suggest that public interest interventions will become more prevalent post-Brexit. In 2014, for example, senior figures in the Coalition Government were reportedly weighing-up a public interest intervention when Pfizer's bid for UK-based AstraZeneca raised concerns over the future of the UK's science base. After it became apparent that the merger would amount to having an EU dimension under the EUMR, the Government was advised that an Article 21(4) request was unlikely to be approved by the Commission, thus forcing the Government to consider alternatives.<sup>60</sup> This is one instance where, had the UK not been a member of the EU, it is conceivable that the Secretary of State would have exercised their residual power under section 58(3) of the 2002 Act to propose a new public interest ground for 'protection of the UK science base'. Indeed, given the tough rhetoric that Theresa May's Government has recently taken on foreign takeovers, such outcomes are even more conceivable in the present day.

A return to the uncertainty witnessed under the old broad public interest regime is clearly undesirable, especially as it would multiply Brexit risks.<sup>61</sup> The current economic effects-based approach is widely understood and offers a high level of predictability. The key question for the Government is whether it is able to incorporate a public interest test with sufficient clarity and safeguards to ensure that (i) it only trumps competition considerations where there is a legitimate justification, and (ii) it is never manipulated for short-term political gain. The UK is among a large majority of merger regimes worldwide that choose to assign a 'restricted' role to public interest considerations,<sup>62</sup> and if the Government does choose to expand the public interest regime, it is important that it maintains this restricted approach by specifying clear public interest 'exceptions' to the competition test. Indeed, a requirement to facilitate a transparent and predictable investment regime is likely to feature in any forthcoming trade deals between the EU and the UK; similar to that contained within the EU–Canada Comprehensive Economic and Trade Agreement (CETA).<sup>63</sup>

To resist temptation to concede to short-term siren calls, there may be a rational basis for repealing the Secretary of State's residual power to propose new public

60 David Reader, 'Pfizer/AstraZeneca and the Public Interest: Do UK Foreign Takeover Proposals Prescribe an Effective Remedy?' (2014) 10(1) *CPI Antitrust Chronicle*.

61 The second BCLWG Roundtable drew a clear consensus among the experts present that introducing more non-competition law grounds into merger regulation would be counterproductive and that there were better means by which to address wider policy goals; see BCLWG, *Note of second roundtable* (Summary of discussions, 11 January 2017) <[www.bclwg.org/activity/bclwg-note-second-roundtable](http://www.bclwg.org/activity/bclwg-note-second-roundtable)> accessed 8 March 2017. See also John Vickers, 'Consequences of Brexit for Competition Law and Policy' (Oxford Review of Economic Policy/British Academy conference on 'The Economic Consequences of Brexit', London, December 2016) 5 <[www.bclwg.org/wp-content/uploads/2016/12/Vickers-British-Academy-7-Dec-16.pdf](http://www.bclwg.org/wp-content/uploads/2016/12/Vickers-British-Academy-7-Dec-16.pdf)> accessed 8 March 2017.

62 An estimated 81.3% of countries avoid considering public interest criteria or frame it narrowly; see David Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) CCP Working Paper 16-3, 19.

63 CETA, arts 27.1–27.5. It is worth noting that CETA recognizes the rights of parties to 'achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity' (CETA, art 8.9, para 1). To facilitate transparency, any trade agreements between the UK and the EU (or other jurisdictions) would seemingly necessitate a similarly precise set of named legitimate public interest grounds.

interest criteria under section 58(3), as its existence leaves the door open for a post-Brexit influx of new criteria to be introduced in lieu of primary legislative reform.<sup>64</sup> Alternatively, if the Government feels section 58(3) continues to represent an 'important safety valve' to provide flexibility in unforeseen circumstances,<sup>65</sup> it should at least consider introducing additional safeguards to ensure the Secretary of State is not routinely lobbied to propose a new public interest ground. At a more fundamental level, the Government must also decide whether merger control is the most appropriate forum in which to enforce its strategy of protecting UK firms from unwanted foreign investment, or whether this aim would be better served by corporate governance reform or a separate foreign investment review.<sup>66</sup> Whichever route it chooses, it is important that such a strategy is applied transparently in an effort to facilitate legal certainty and to reduce the prospect of other countries viewing and treating the UK regime with suspicion.<sup>67</sup>

Public interest criteria do not sit neatly within the decision-making process of the CMA, which is essentially a body that is expert in competition and has no special understanding of wider public interest issues.<sup>68</sup> Equally, the prospect of requiring the CMA to incorporate public interest considerations within its assessments would inevitably sit at odds with its statutory duty to promote competition.<sup>69</sup> This implies a continued role for the Secretary of State. While elected Secretaries of State bring democratic accountability to the decision-making role, their suitability has been brought into question by previous controversies regarding impartiality,<sup>70</sup> and inherent issues surrounding subjectivity, political preferences and their proneness to being lobbied.<sup>71</sup> As such, the Government may seek to evaluate alternative options, such as

64 David Reader, 'UK Public Interest Mergers: Uncertain Times Ahead' (2013) 26 CCP Research Bulletin 18.

65 This was the key rationale for the inclusion of s 58(3) within the Enterprise Act 2002; see HL Deb 15 October 2002, vol 639, col 801 and HL Deb 18 July 2002, vol 637, col 1498. The financial crisis proved to be one such 'unforeseen' circumstance.

66 For an account of the advantages of pursuing corporate governance reform over extending the public interest test, see Stephan (n 32) 548.

67 Damien Neven, 'Ownership, Performance and National Champions' in Abel M Mateus and Teresa Moreira (eds), *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* (Edward Elgar 2010) 310.

68 See CMA (n 42) paras 25–28. Indeed, in the aftermath of the referendum result, a senior figure at the CMA noted that the authority would 'stick to what we know about, which is competition law and economics, and making markets work better for consumers and businesses'; Pallavi Guniganti, 'No Politics for CMA even after Brexit, says Inquiry Chair' (*Global Competition Review*, 12 July 2016) <<http://globalcompetitionreview.com/article/1068062/no-politics-for-cma-even-after-brexit-says-inquiry-chair>> accessed 8 March 2017.

69 The CMA derives this duty under the Enterprise and Regulatory Reform Act 2013, s 25(3). Before the EU referendum, the CMA's outgoing Chief Executive, Alex Chisholm, suggested that one of the 'harder nuts to crack' for the CMA going forward would be to deal with 'challenges to the primacy of competition analysis when sensitive mergers give rise to calls for public interest interventions'; Alex Chisholm, 'The CMA's Achievements over the last 2 Years' (Whitehall & Industry Group Breakfast Briefing, London, 11 May 2016) <[www.gov.uk/government/speeches/alex-chisholm-on-the-cmas-achievements-over-the-last-2-years](http://www.gov.uk/government/speeches/alex-chisholm-on-the-cmas-achievements-over-the-last-2-years)> accessed 8 March 2017.

70 See eg Robert Winnett, Andrew Porter and Holly Watt, 'Vince Cable Stripped of Responsibility for Media Competition after Rupert Murdoch Comments' *The Telegraph* (London, 21 December 2010).

71 Alison Jones and John Davies, 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) *European Competition Journal* 453, 492. A recent empirical

an expert ‘public interest’ panel, sector regulators,<sup>72</sup> or a ‘hybrid’ decision-making process.<sup>73</sup> Assuming there are no significant changes in EU merger policy, all of these approaches will adversely affect cooperation between the CMA and European Commission on merger clearance, raising costs for businesses operating in both jurisdictions.<sup>74</sup>

Finally, hard Brexit would end ‘one-stop’ merger control,<sup>75</sup> so if a merger involving a UK firm also has an EU dimension, it will be subject to separate investigations by the European Commission (under the EUMR) and the CMA (under the Enterprise Act 2002).<sup>76</sup> This duplication will be costly for firms, whose incentives to merge may be diminished as a consequence.<sup>77</sup> In addition, it will put further stress on the CMA’s resources. Without an increase in the budget of the CMA, particularly in light of the added complexity of public interest issues, the resources available for high quality merger assessment will be reduced with adverse effects on the clarity and predictability of merger decisions.

### III. STATE AID AND INDUSTRIAL POLICY

Interventions on public interest grounds were not the only previous form of political interference in UK markets. During the 1960s (eg through the Industrial Reorganisation Corporation) and 1970s (eg through the National Enterprise Board), UK governments also pursued industrial strategies which were directly at odds with regulation on competition grounds. Sections 7 and 8 of the Industry Act 1972—relating to financial assistance for industry—included ‘some of the most interventionist powers to direct and subsidise industry ever taken outside wartime’.<sup>78</sup> Co-operation, agreements, scale, national champions, and initiatives to protect British manufacturing from a loss of control and unacceptable foreign ownership were

study by Mehta, Srinivasan and Zhao (2017) also finds evidence of a link between political influence and merger review outcomes in a sample of US mergers decisions by the FTC and DOJ between 1998 and 2010. Within the study, ‘lobbying, political contributions, and prior business connections’ were each found to be statistically significant factors in incentivising politicians to influence merger reviews; Mihir N Mehta, Suraj Srinivasan and Wanli Zhao, ‘Political Influence and Merger Antitrust Reviews’ (2017) <<https://ssrn.com/abstract=2945020>> accessed 23 April 2017.

- 72 A role for regulators has previously been proposed by the House of Lords Communications Committee in the context of Ofgem and mergers raising media plurality concerns; David Reader, ‘Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?’ (2014) 4(1) CPI Antitrust Chronicle.
- 73 The hybrid system is very similar to the current decision-making arrangement, with the one difference being that the Secretary of State must either (i) accept the advice of the sector regulator (on the public interest) and the CMA (on competition), or (ii) ‘explain why that advice has been rejected’; Lord Leveson, *The Leveson Inquiry: An Inquiry into the Culture, Practices and Ethics of the Press* (Independent report, 2012), vol 3, Part 1, Ch 9, para 6.11.
- 74 Martin Rees and Cathal Flynn, ‘Effect of a British Exit from the EU on Competition Law Enforcement in the UK’ (2015) 21(3) *International Trade Law & Regulation* 67, 68.
- 75 See eg Richard Whish, ‘Brexit and EU Competition Policy’ (2016) 7(5) *Journal of European Competition Law & Practice* 297, 297; Johnson (n 59) 12.
- 76 The eradication of the ‘one-stop shop’ and its potentially adverse impact on M&A activity in the UK was a key matter of debate before the referendum, see eg Rees and Flynn (n 74) 68.
- 77 There is evidence to suggest that the UK’s ‘business-friendly environment’ has been the main contributing factor to its M&A and FDI activity—more so than its membership of the EU; Martin Beck, ‘Brexit and FDI’ (2016) 40(2) *Economic Outlook* 26, 28–29.
- 78 Wilks (n 24) 182



preferred to tackling anti-competitive behaviour.<sup>79</sup> This policy proved counter-productive and was criticized in 1978 for creating unsustainable tensions with competition policy.<sup>80</sup> Meanwhile, the UK had joined the EU in 1973 and such interventions would eventually be constrained by the exercise of State aid rules. In practice, it took a very long time for State aid control by the Commission to become effective, not least because of the fundamental sensitivity of prosecuting individual member states who wanted to give aid.<sup>81</sup>

This section considers the implications of the UK enjoying greater freedom to provide State aid and whether it may be in its best interests to continue being bound by equivalent rules. State aid in the EU is regulated by Articles 107–109 TFEU. In particular, Article 107 prohibits aid which may distort competition, in so far as it also affects trade between Member States. The main potential exemptions are for regional development, social needs, projects of a common European interest, or serious economic disturbance. The Treaty obligations are operationalized by specific rules on State aid to agriculture and fisheries, and particular guidance on certain other sectors, including transport, broadband and steel. Cutting across these sectoral rules, there are ‘horizontal rules’ relating, for example, to subsidies for regions, SMEs, R&D and innovation, environment, and rescue and restructuring aid. There is also a general block exemption for tightly specified categories of aid that are deemed to deliver benefits to society that outweigh the possible distortions to competition.<sup>82</sup>

The fundamental rationale for State aid control is that selective aid results in cross-border ‘externalities’ with a negative effect on firms that do not receive similar subsidies.<sup>83</sup> National governments are primarily concerned with their own firms so tend to ignore negative effects abroad. One consequence can be excessive aid, as countries compete to attract internationally mobile firms or to strengthen the competitive position of local firms against international rivals. This is particularly seductive if it increases market share in profitable international markets, and if international rivals are deterred from competing against subsidised firms.<sup>84</sup>

An important example of the type of aid that is tightly controlled by the EU State aid regime, and which will be far easier to grant post-Brexit, is rescue and

79 *ibid* 183. For a succinct summary of some of the evidence of industrial policy failure, see Nicholas Crafts, ‘Brexit and State Aid’ (2017) Oxford Review of Economic Policy S105. The Crafts paper came to our attention only as our paper went to press.

80 See the Liesner Committee’s Green Paper; Department of Trade and Industry, *A Review of Monopolies and Mergers: A Consultative Document* (Green Paper, Cmnd 7198, 1978), discussed in Wilks (n 24) 41. This period of the mid-1970s also brought a combination of rising unemployment and rising inflation.

81 The difficulty of restraining State aid will be a recurring theme in this section. Effective enforcement of Treaty provisions did not begin until after the Single European Act [1986] OJ L169/1 heralded the Single European Market, which was expected to be ‘completed’ by 1992. A second major shift towards a more rational, economically grounded policy came after the State Aid Action Plan agreed in 2005. See Hussein Kassim and Bruce Lyons, ‘The New Political Economy of EU State Aid Policy’ (2013) 13(1) *Journal of Industry, Competition and Trade* 1.

82 Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

83 For a detailed integrated law and economics review, see Vincent Verouden and Philipp Werner (eds), *EU State Aid Control: Law and Economics* (Kluwer International 2016).

84 For some recent empirical studies, see Paul Krugman and Alistair Smith (eds), *Empirical Studies of Strategic Trade Policy* (University of Chicago Press 1994).



restructuring aid (R&R aid). Aid to firms in financial difficulty puts a brake on the normal process by which the most innovative and efficient firms see their market shares grow because they better serve the needs of consumers, while their less productive competitors shrink and possibly exit the market.<sup>85</sup> Recent economic research confirms that much of productivity growth can be attributed to shifting market shares from less productive to more productive establishments.<sup>86</sup>

Refusal to subsidize a failing business can be politically unpopular as it is easily misrepresented as doctrinaire and even callous because closures have serious implications for individuals and their families. However, while it is entirely appropriate to use public funds to help redundant workers to re-skill and ease economic transition, it is not wise to give subsidies that anyway tend to flow to senior managers (who may have been responsible for the firm's difficulties) and shareholders (who may live in comfort elsewhere). Furthermore, the prospect of subsidies can incentivise reckless behaviour by senior managers in weak firms, and the prospect of subsidies for a weak rival reduces the incentive for efficient firms to compete aggressively to attract customers.<sup>87</sup> The discipline provided by EU rescue and restructuring State aid control, which is allowed only in limited circumstances and subject to incentive safeguards, is therefore systemically important for the nurture of effective competition.

In this context, it is useful to recall the reasons why national governments in the EU adopt the apparently paradoxical position of wanting both to grant State aid to firms located in their territory, yet at the same time to submit to EU rules that limit their ability to do so—after all, there are good economic reasons for subsidies when there is a wider public benefit that cannot be captured by the investing firm (ie a positive externality).<sup>88</sup> The first set of reasons is that submitting to controls of their own behaviour is the price that must be paid for limiting the ability of other countries to gain an international advantage for their own firms. For example, 'near market' R&D subsidies may give one country an advantage in product development, but that would be cancelled out if other countries do the same. Mutual control to avoid

85 This process is sometimes called 'creative destruction'. The emergence of new products and processes whose success destroys the old is the essential dynamic feature of market economies. See Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Brothers 1942).

86 Early research is summarized in: Lucia Foster, John C Haltiwanger and CJ Krizan, 'Aggregate Productivity Growth: Lessons from Microeconomic Evidence' in Charles R Hulten, Edwin R Dean and Michael J Harper (eds), *New Developments in Productivity Analysis* (University of Chicago Press 2001); In evidence from the UK, Disney and others find that 'external' restructuring (exit, entry, and market share change), as distinct from 'internal' restructuring (improvements by incumbents), accounts for 50% establishment labour productivity growth and 80-90% total factor productivity growth; Richard Disney, Jonathan Haskel and Ylva Heden, 'Restructuring and Productivity Growth in UK Manufacturing' (2003) 113(489) *The Economic Journal* 666, provides evidence from the UK. Much of this comes from multi-establishment firms closing poorly performing plants and opening high-performing new ones. Additionally, external competition is an important determinant of internal restructuring. For example, Bartelsman and others examine comparable data for 24 countries, including European (Estonia, Finland, France, Latvia, Netherlands Portugal, Slovenia, UK, and West Germany) and North and South American firms; Eric Bartelsman, John Haltiwanger and Stefano Scarpetta, 'Microeconomic Evidence of Creative Destruction in Industrial and Developing Countries' (2004) IZA Discussion Paper No 1374.

87 For more detail of the arguments in this paragraph, including relevant evidence and an analysis of the role of capital markets, see Bruce Lyons and Ulrich Soltész, 'Rescue and Restructuring Aid' in Verouden and Werner (n 83).

88 Examples include infrastructure projects and basic research.

*excessive* subsidies can prevent a mutually ruinous subsidy war. Similarly, subsidies or tax exemptions to high energy using firms, or other specific advantages, can distort an otherwise level playing field on which efficient firms can succeed in international competition. As can be seen from the recent cases involving Fiat, Apple, and others, the European Commission's State aid control can further reach into corporate tax deals offered by some Member States to attract multinational firms (or their profit flows) away from more efficient locations (or where profits have been generated).<sup>89</sup> These examples each relate to the advantages of rules that limit the ability of *other* countries to subsidize in ways that put a government's home firms at a competitive disadvantage.

A second set of reasons why national governments might voluntarily submit to State aid rules relates to *self-control*. Huge lobbying efforts and political pressure can result in 'irrational' subsidies being conceded, especially if that pressure comes from a marginal constituency or in the run-up to a general election.<sup>90</sup> It can then be advantageous for a government to tie its hands credibly so that it cannot grant subsidies for short-term political gain. Furthermore, it greatly reduces wasteful lobbying pressure if everyone knows that there are clear limits as to what aid can be offered.<sup>91</sup> Upon leaving the EU, the UK will no longer be subject to European State aid rules. In principle, this frees up Government policy to provide greater assistance to industries it wishes to promote or protect, but in practice this both weakens its self-discipline and leaves UK firms more vulnerable to the consequences of aid granted to continental firms.

Brexit will further remove EU procurement rules designed to eliminate bias in favour of home firms. The UK (and EU Member States) will still be subject to WTO rules on state subsidies and public procurement under the WTO Agreement on Subsidies and Countervailing Measures. This agreement prohibits export subsidies, aid contingent on the use of domestic over imported goods, or the affording of special treatment to individual businesses. It also contains a category of 'actionable' subsidies where they have an adverse effect on the interests of another WTO Member.<sup>92</sup> Nevertheless, the WTO system works very slowly, and there are levels of transparency and enforcement powers within the EU State aid regime, including

89 See eg European Commission, 'State Aid: Ireland gave Illegal Tax Benefits to Apple Worth up to €13 billion' (Press Release, 30 August 2016) <[http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm)> accessed 8 March 2017.

90 There may also be other political reasons why inefficient State aid is granted. For example, the lobbying incentive is greater for inefficient firms, so it is not that government policy picks losers, but the 'losers' who pick government policy; see Richard E Baldwin and Frédéric Robert-Nicoud, 'Entry and Asymmetric Lobbying: Why Governments Pick Losers' (2007) 5(5) *Journal of the European Economic Association* 1064. Also, politicians may want to signal their commitment to constituents despite the cost; see Mathias Dewatripont and Paul Seabright, '"Wasteful" Public Spending and State Aid Control' (2006) 4(2-3) *Journal of the European Economic Association* 513.

91 Similar concerns used to be raised in connection to monetary policy before governments across the world realized that a more stable economy could be achieved by putting monetary policy in the hands of an independent central bank. Independent decision-making by competition agencies such as the CMA provide another important example of designing institutions positively to limit short term political discretion.

92 For a comparison between EU State aid Rules and WTO rules on subsidies, see Claus-Dieter Ehlermann and Martin Goyette, 'The Interface between EU State Aid control and the WTO Disciplines on Subsidies' (2006) 5(4) *European State Aid Law Quarterly* 695.

appeal to the CJEU, that far exceed anything that can be achieved by the WTO. This undoubtedly leaves the UK with much greater discretion over public procurement policy post-Brexit, but also potentially more vulnerable to protectionist procurement elsewhere.

It is likely that the UK will want to avoid the sorts of damaging subsidy policies described above, which shield inefficiency from competitive pressures or risk the country entering a subsidy war with a rival economy. Indeed, if we look at the current volume of EU State aid cases, we find the UK is clearly a net beneficiary. The European Commission investigates around five hundred cases per annum and this takes up half the resources available to enforce its overall competition regime.<sup>93</sup> State aid given by UK is responsible for only around twenty-five of these cases per annum,<sup>94</sup> so the vast majority of State aid enforcement work can be seen as protecting UK firms from unfair (subsidised) competition rather than *vice versa*. Indeed, as the UK is one of the main voices against the use of wasteful subsidies in the EU, its withdrawal from the Union, coupled with new measures to support British industry, could incentivise some remaining EU members to push for looser EU State aid rules.<sup>95</sup>

Thus, after Brexit, the UK will have an interest in receiving continued protection from EU State aid and, reciprocally, the EU will not want the newly independent UK to exercise an interventionist industrial strategy built around subsidies or tax competition. This raises the prospect of the UK being required to continue abiding by EU State aid rules as part of any preferential trade deal with the Single Market. While this outcome makes economic sense for the reasons identified above, we once again run into problems relating to the political imperatives surrounding Brexit. As the dominant partner in any trade arrangement, the EU may insist that the UK continues to apply State aid rules in accordance with the jurisprudence of the CJEU, as well as the frameworks and guidance of the European Commission.<sup>96</sup> This may be a sticking point in trade negotiations between the UK and the EU, because it would mean no clean break from the EU (though there may be ways to disguise the ultimate reliance on the CJEU).<sup>97</sup> Alternatively, there may be a CETA<sup>98</sup> or TTIP<sup>99</sup> type arrangement,

93 Data compiled from the DG Competition website; European Commission, 'State aid Cases' <[http://ec.europa.eu/competition/state\\_aid/register/](http://ec.europa.eu/competition/state_aid/register/)> accessed 8 March 2017.

94 UK banks took up a much greater share of State aid enforcement work during the financial crisis.

95 See Sir Philip Lowe, 'The Implications of Brexit for UK and EU Competition Policy and Law Enforcement' (Response to BCLWG Issues Paper, 22 November 2016) <[www.bclwg.org/contribution/implications-brex-it-uk-eu-competition-policy-law-enforcement](http://www.bclwg.org/contribution/implications-brex-it-uk-eu-competition-policy-law-enforcement)> accessed 8 March 2017; see also: Jose Luis Buendia Sierra, 'Brexit', a Stress Test for State Aid Control?' (2016) 15(3) European State Aid Quarterly 331.

96 The example of Article 262 of the Association Agreement between the EU and Ukraine is discussed by George Peretz and Kelyn Bacon, 'Paper on post-Brexit options for State aid' (*UK State Aid Law Association*, 16 November 2016) <<http://uksala.org/paper-on-post-brex-it-options-for-state-aid/>> accessed 8 March 2017; George Peretz, 'A Star is Torn: Brexit and State Aid' (2016) 15(3) European State Aid Quarterly 334; see also David Unterhalter and Thomas Sebastian, 'AFTER BREXIT: State Aid under WTO disciplines' (*Monckton Chambers Brexit Blog*, 15 September 2016) <[www.monckton.com/wp-content/uploads/2016/09/AFTER-BREXIT.pdf](http://www.monckton.com/wp-content/uploads/2016/09/AFTER-BREXIT.pdf)> accessed 8 March 2017.

97 See previous footnote and Vincent JG Power, 'Competition Law Post-Brexit' (2016) 23(7) *Commercial Law Practitioner* 193.

98 EU–Canada Comprehensive Economic and Trade Agreement (CETA).

99 Transatlantic Trade and investment Partnership (TTIP).

where there is no explicit prohibition on subsidies, but where WTO anti-subsidy rules and mechanisms for notification are required.<sup>100</sup> This would circumvent the political imperative but at the greater risk of allowing damaging State aid strategies by the UK and competing economies. A danger also exists in relation to trading arrangements with new partners, such as China and the USA. The UK will be at a negotiating disadvantage due to its relative size and so may be forced to accept state subsidies (as well as other factors such as lower environmental standards, use of hormones in feed, etc) that disadvantage UK suppliers.

We have so far focused on the underlying issues that will affect any UK government. We next turn to a brief examination of the current Government's emerging approach to industrial intervention in the immediate post-Brexit era. This was first outlined in a speech given by the Prime Minister in November 2016, when she said the Government would,

'rebalance the economy across sectors and geographical areas in order to spread wealth and prosperity around the country [...] This won't be about propping up failing industries or picking winners – that is the job of competition and free markets'.<sup>101</sup>

More detail is revealed in the January 2017 Green Paper on *Building our Industrial Strategy*,<sup>102</sup> which confirms that the Government wishes to be more interventionist and hopes to avoid repeating failed 'national champions' policies where a single firm was chosen for preferential treatment. The 'ten pillars' of the proposed industrial strategy are: investment in science, skills and infrastructure; supporting SMEs; encouraging trade and inward investment; delivering affordable energy and clean growth; cultivating world-leading sectors; ensuring growth in the regions; and developing supportive institutions. Several of these may involve public funding for firms, of a sort which would fall under the current State aid rules (eg encouraging inward investment) but the most direct proposal is the cultivation of world-leading sectors through 'sector deals'. The Green Paper's vision of sector deals is essentially government support for business-led institutions to facilitate collaboration between businesses in the same sector.<sup>103</sup>

Although the explicit focus is on supply chains and R&D, where there are potential efficiency reasons to justify some cooperation, sector deals are fundamentally about collaboration and this should raise serious concerns about the balance between cooperation and competition. The sector focus is apparently designed to avoid championing individual firms, but this may be difficult in practice as a large individual firm has the incentive to lobby for a deal that is consistent with its own business

100 Peretz and Bacon (n 96).

101 Theresa May, 'Prime Minister's Speech' (Lord Mayor's Banquet, London, 14 November 2016).

102 Department for Business, Energy and Industrial Strategy, *Building our Industrial Strategy* (January 2017).

103 The arguments in the following three paragraphs are based on Bruce Lyons and Ioannis Pappous, *CCP Response to BEIS Green Paper on 'Building our Industrial Strategy' – Question 32: How can the Government ensure that 'sector deals' promote competition and incorporate the interests of new entrants?* (Consultation Response, 14 April 2017) <<http://competitionpolicy.ac.uk/documents/8158338/16525214/Lyons+and+Pappous+response+on+the+new+industrial+strategy.pdf>> accessed 23 April 2017.

strategy—SMEs do not have the resources to press for a deal to their specific advantage. A further concern is that the formation and implementation of sector deals create meeting opportunities and a stable institutional environment which may facilitate collusion in pricing and product development.

These concerns may be reduced if all sector deals (i) have special representation for SMEs and new/potential entrants, (ii) are required to provide an explicit and transparent explanation of the specific market failures that exist and of how the proposed deal will address them, and (iii) involve an independent competition analysis from an early stage in their development. There also needs to be very careful sector selection so there is sufficient competition to drive an efficient response.<sup>104</sup>

It might be thought that rent seeking and sector deal capture by large individual firms can be constrained, but this is not easy. The October 2016 assurances given to Nissan prior to a major investment decision remain secret at the time of going to press. However, a freedom of information request by a BBC journalist indicates that Nissan had written to the Government highlighting that it was ‘the global leader in electric cars’ and noting a number of policies that would make the UK more attractive for a major investment in electric cars.<sup>105</sup> Several of these suggestions were announced as government initiatives in the following weeks. These may or may not be good initiatives, but the point is that sector deals are likely to be tweaked towards the advantage of individual large firms with a strong negotiating hand (ie sector deal capture).

Government funding channelled through sector deals is not the only emerging post-Brexit issue in State aid. The UK has a complex system of devolution that gives various spending powers to the Scotland, Wales and Northern Ireland assemblies. This system is likely to get even more complex with more spending powers proposed for some English regions. Pre-Brexit, these are all covered by the EU State aid rules. Post-Brexit, the potential for anticompetitive subsidies would be reduced if an independent body was tasked with fulfilling the State aid scrutiny role currently undertaken in Brussels.<sup>106</sup> An additional benefit would be that, whichever administrative level proposes a subsidy that benefits specific firms, the requirement to justify before the scrutiny body why those firms should not fund a project themselves provides a useful discipline to deter wasteful subsidies. It would be natural for the CMA to take on this scrutiny function, but it will need additional funding to do this.<sup>107</sup>

Overall, there are two key issues surrounding State aid after Brexit. The first is that an independent UK will be less able to limit competitively damaging State aid subsidies in other countries as effectively as the EU. The second is that relatively

104 For example, innovation can be promoted in high-growth sectors if incentives are created for all firms in that sector to compete through innovation, rather than to take the easier option of product differentiation to avoid competition; see Philippe Aghion and others, ‘Industrial Policy and Competition’ (2012) NBER Working Paper No 18048.

105 Chris Cook, ‘What did Ministers Discuss with Nissan?’ (*BBC News*, 24 March 2017) <<http://www.bbc.co.uk/news/uk-39387439>> accessed 28 April 2017.

106 This point is also made in the BCLWG Issues Paper (n 38) para 4.2, where it states ‘it would be appropriate for the UK to create an “internal” discipline on subsidy policy’.

107 We have no space to consider appropriate guidelines that would be necessary to provide clarity and certainty. While the current EU guidance and practice could certainly be improved (see Verouden and Werner (n 83)), it provides a natural starting point.



unconstrained UK governments are unlikely to have the self-discipline to replace the credibility of the European Commission in dealing with UK firms and industries lobbying for subsidies. Political self-discipline is very hard to sustain, especially in times of political or economic crisis, and the remaining EU members will be reticent to allow free access to the single market without very strong safeguards against distortionary UK State aid. They will also be less concerned if their own subsidies harm UK rivals. In short, the freedom from European State aid control is likely to come at considerable cost and it would be wise to find politically acceptable ways to commit to limit that freedom. This might require legislation that not only enforces self-discipline, but does this in a transparent way that is visible to trade partners. In the spirit of the Great Repeal Bill White Paper,<sup>108</sup> a natural first step would be for the Government to adopt clear rules consistent with current EU practice for the control of State aid. An appropriately funded CMA could be asked to enforce this transparently.

#### IV. ANTITRUST ENFORCEMENT

Antitrust is another area of UK competition policy that has previously been shaped by public interest tests. Cartel agreements were once subject to mandatory public registration, and could be referred to the Restrictive Trade Practices Court if they appeared to operate against the public interest.<sup>109</sup> A similar test was applied to various forms of exploitative and exclusionary behaviour.<sup>110</sup> Certain cartel agreements were exempted from the registration process where they were deemed to be of significant importance to the UK or where their main purpose was to increase efficiency.<sup>111</sup> Few enforcement powers were available during this period and many industries avoided registration by relying on informal cartel arrangements that fell short of an explicit agreement.<sup>112</sup> When the UK joined the European Community in 1973, cartel arrangements with a Community dimension became subject to punitive penalties, but the UK's domestic enforcement regime retained the registration system for domestic agreements.<sup>113</sup> This was out of step with how cartel arrangements were increasingly being viewed by the wider academic and policymaking communities.<sup>114</sup>

The Competition Act 1998 finally replaced the public interest regime, introducing new investigatory powers and penalties that brought the UK into line with the anti-trust laws of the EU and many other jurisdictions. Indeed, the UK went a step further, making it a crime for an individual to dishonestly agree to enter a cartel arrangement.<sup>115</sup> It is one of only a handful of jurisdictions to have imposed custodial

108 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9446, 2017).

109 Restrictive Trade Practices Acts of 1956 and 1968. Referrals were made by the Registrar and later the Office of Fair Trading.

110 Roger Clarke, Stephen Davies and Nigel Driffield, *Monopoly Policy in the UK: Assessing the Evidence* (Edward Elgar 1998) 16.

111 Michael O'Kane, *The Law of Criminal Cartels: Practice and Procedure* (OUP 2009) 1–43.

112 See GC Allen, *Monopoly and Restrictive Practices* (Allen & Unwin 1968) 145.

113 Restrictive Trade Practices Act 1976.

114 See Wilks (n 24) 24.

115 Enterprise Act 2002, s 188.



sentences on individuals for general cartel behaviour.<sup>116</sup> Chapters I and II of the Competition Act 1998 mirror Articles 101 and 102 TFEU and the relationship between EU and national antitrust enforcement is governed by Regulation 1/2003.<sup>117</sup> As with merger control, infringements with an EU dimension are generally investigated under the exclusive competence of the European Commission on behalf of all Member States.<sup>118</sup> However, where the CMA initiates proceedings in a case that is not investigated by the Commission, but which may also affect trade between Member States, it is under an obligation to apply either Article 101 or 102 TFEU, in addition to the Competition Act 1998.<sup>119</sup> Chapter I of the Act cannot prohibit agreements that would not amount to infringements of Article 101(1) or which would fulfil the conditions of the Article 101(3) exception.<sup>120</sup> Chapter II, on the other hand, can be stricter than Article 102. Within UK law, consistency between domestic and EU competition law is ensured by Competition Act 1998, section 60. This requires that ‘so far as is possible . . . , questions arising [in relation to the investigation and enforcement of UK competition law] are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community Law’. Taken together, these provisions provide a strong constraint on the UK’s ability to shape and exercise its antitrust laws. Upon leaving the EU, the UK will be released from the obligations of Regulation 1/2003 and have the freedom to forge a new path if it sees fit.

Although the Great Repeal Bill should ensure UK and EU administrative antitrust laws are entirely consistent at the time of Brexit, there are good reasons to believe that the UK’s competition laws may then begin to diverge from those of the EU.<sup>121</sup> The first is that a central objective of EU competition law—the *functioning of the Single Market*—will no longer be relevant to the UK. Competition policy was included right from the inception of the Community in 1958, to facilitate the objective of European economic integration.<sup>122</sup> This has influenced the development of CJEU case law,<sup>123</sup> as well as competition law practice, for example by leading to the treatment of export bans within the EU as having the ‘object’ of restricting

116 See generally Andreas Stephan, ‘Four Key Challenges to the Successful Criminalisation of Cartel Laws’ (2014) 2(2) *Journal of Antitrust Enforcement* 333. In many jurisdictions there are separate criminal offences for bid-rigging. See for example, Florian Wagner-von Papp, ‘What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011).

117 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

118 *ibid.*, art 3(1).

119 *ibid.*, art 11(6).

120 *ibid.*, art 3(2).

121 This article does not explore the significant procedural challenges that must be overcome to ensure a smooth transitional arrangement as part of Brexit. For detailed insight on these, see the roundtable discussions and responses to the Issues Paper published by the Brexit Competition Law Working Group (BCLWG), available at < [www.bclwg.org](http://www.bclwg.org) > accessed 8 March 2017.

122 See discussion in Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (5th edn, OUP 2014) 38–40.

123 eg Case C126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, para 36; *ibid.* 39.

competition (and therefore assumed to be unlawful).<sup>124</sup> This is arguably a political goal that has little to do with competition, as export bans do not generally produce any effects on final consumers and, in fact, can be pro-competitive—for example in allowing companies to charge a lower price in lower-income Member States and by helping new products successfully launch on the market.<sup>125</sup> In any case, the Single Market will simply no longer be relevant to a newly independent UK.

The second reason for divergence is that, while EU competition law is fairly settled on what constitutes a hard-core horizontal cartel agreement, there are many other areas where there is considerable uncertainty and scope for disagreement on policy grounds over time. These include: (i) how we reliably determine what distinguishes an Article 101 infringement ‘by object’ from one that should be subject to an effects analysis,<sup>126</sup> within which the relationship to (and application of) the efficiency exception in Article 101(3) is also of relevance; (ii) the extent of the safe harbour created by a block exemption to vertical agreements and, for example, whether a more flexible approach to minimum resale price maintenance is needed;<sup>127</sup> and (iii) the extent to which dominance rules under Article 102 should interfere in non-pricing matters, such as firms’ conduct in the market or the exercise of intellectual property rights, or be more economic effects-based.<sup>128</sup> Without the ability to shape the development of policy in each of these areas within the EU, it would be sensible for the UK to prioritize its own interests and needs in regulating agreements and the abuse of dominance.

The third reason for divergence brings us, once again, back to the political imperatives surrounding Brexit. While there are good reasons why the UK might wish to remain closely aligned to EU competition law (discussed below), this would require conferring some form of special status on the jurisprudence of the CJEU, post-Brexit, and would both be politically unpopular (no ‘clean break’) and create legal difficulties. The Government’s Brexit White Paper states that,

124 Joined Cases C-501/06 P, 513/06 P, 515/06 P and 519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, paras 59–62; Jones and Sufrin (n 122) 40; Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, art 4.

125 On the first example, parallel imports can arbitrage differences in prices so as to limit the possibilities for price discrimination by a Member State. The result might be that a firm charges its highest price across the EU, when it would otherwise sell at a lower price in Member States where consumer income is lower. See Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar 2013) 17–19. Although, the European Commission does attempt to characterize competition and market integration as serving a common goal; see European Commission, ‘Guidelines on the application of Article 81(3) of the Treaty’ [2004] OJ C101/07, para 14.

126 See eg Andreas Stephan and Morten Hviid, ‘Cover Pricing and the Overreach of ‘Object’ Liability under Article 101 TFEU’ (2015) 38(4) *World Competition* 507.

127 Alison Jones, ‘Completion of the Revolution in Antitrust Doctrine on Restricted Distribution: *Leegin* and its Implications for EC Competition Law’ (2008) 53(4) *Antitrust Bulletin* 903.

128 Pinar Akman, ‘The European Commission’s Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?’ (2010) 73(4) *MLR* 605; John Vickers, ‘Abuse of Market Power’ (2005) 115(504) *The Economic Journal* 244.

‘the preserved law [under the Great Repeal Bill] should continue to be interpreted in the same way as it is at the moment. This approach is in order to ensure a coherent approach which provides continuity’.<sup>129</sup>

While it is tempting to draw from this some inference that CJEU case law will continue to shape UK law after Brexit, this statement is more likely to refer to the corpus of case law up to the date of Brexit. Indeed, the Great Repeal Bill will need to explicitly state that pre-Brexit CJEU case law will continue to be binding, as the effect of Brexit will be for all binding CJEU precedent (present and future) to fall away. So what then will the status of CJEU case law be? The answer is that, in law, it will be very weak. For example, the basis for the Human Rights Act 1998 is that the UK is a signatory to the European Convention of Human Rights. Under section 2 of the Act, domestic courts must ‘take into account’ the relevant decisions of the European Court of Human Rights in Strasbourg. Unless the UK is required to follow some EU rules (such as State aid) as part of a preferential trade agreement, there may be no basis in international law for CJEU case law to be given a special status. As already explained, the politics of Brexit make such a concession unlikely. However, even without any legislative basis for a continued role for CJEU jurisprudence, the fact the practice of the CMA and case law of the UK’s Competition Appeal Tribunal (CAT) are currently in line with EU competition law, means that CJEU judgments will continue to be *strongly persuasive* for some years to come.<sup>130</sup> The persuasive and instructive nature of precedent from other jurisdictions is not something that is alien to the Law of England and Wales. Indeed, UK courts occasionally even adopt a precedent from the judgments of other common law jurisdictions, even though there is no obligation to do so.<sup>131</sup>

Although CJEU case law will continue to be strongly persuasive in the short term, the UK may decide to exercise its new freedom to make substantive changes to its antitrust laws. It is very unlikely that anyone would advocate a return to the pre-Competition Act treatment of cartels, especially as its worst forms have been criminalized. However, its current cartel enforcement regime represents an awkward compromise to accommodate criminalization, while protecting the integrity of EU competition law. Criminalization came about on the premise that corporate fines alone were ineffective at deterring cartel behaviour.<sup>132</sup> In 2001, the UK Government was ‘concerned to ensure that introducing a new criminal offence [did] not cause

129 Brexit White Paper (n 6) 10.

130 EU competition law jurisprudence guides judicial decision-making around the world because so many competition prohibitions are based on those of the EU. See, for example, Erdem Büyüksagis, ‘The Impact of EU Law on Swiss and Turkish Regulation of Competition – With Specific Consideration Given to Abuse of Dominant Position Cases’ in Franz Werro, Başak Baysal and Lukas Heckendorn Urscheler (eds), *L’influence du droit européen en Turquie et en Suisse* (Schulthess 2015) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2579698](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579698)> accessed 8 March 2017.

131 For example, *Chester v Afshar* [2004] UKHL 41, which followed the Australian High Court decision in *Chappel v Hart* (1998) 195 CLR 232. See Neil Duxbury, ‘The Law of the Land’ (2015) 78(1) MLR 26.

132 See Department of Trade and Industry, *A World Class Competition Regime* (White Paper, Cm 5233, 2001) para 7.33. For a discussion of the justifications for cartel criminalisation, see Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (CUP 2014); and Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (OUP 2014).

significant divergence from European law'.<sup>133</sup> There were fears that aligning the criminal offence with Article 101 (then Article 81 EU) would risk entangling the criminal process with the administrative work of the European Commission. There were also fears that it complicated the enforcement process by requiring juries to first determine whether there was a breach of Article 101(1), including the possibility of an efficiency exception under Article 101(3).<sup>134</sup> It was therefore decided to create a separate stand-alone offence under the Enterprise Act 2002 that would apply only to individuals who *dishonestly* agreed to enter into hard-core cartel arrangements. This is in contrast to the approach taken in the Republic of Ireland, for example, where the EU cartel prohibition was essentially criminalized and extended to individuals under domestic law.<sup>135</sup>

One odd consequence of Article 101 TFEU being a purely administrative prohibition is that criminal sanctions within Member States can only, in effect, be applied to local infringements and not to the most damaging international cartels dealt with by the European Commission. There is no mechanism through which a Member State can hold up a Commission investigation pending the conclusion of criminal proceedings under national law.<sup>136</sup> It is also questionable whether the CMA can even prosecute the cartel offence where a domestic case also has an EU dimension, thereby triggering the requirement for Article 101 to be applied alongside 'national competition law'.<sup>137</sup>

Leaving the EU will allow the UK to apply the criminal offence as it sees fit, but there are benefits to abandoning the current hybrid civil/criminal model in favour of full criminalization. The US experience has shown the benefit of having an entirely criminal process, where the businesses and individuals accused of the offence are investigated together. Often the desire by those businesses to settle their liability at the earliest opportunity spurs on cooperation by the individuals, albeit usually within the context of the US plea bargaining system.<sup>138</sup> Parity in treatment by the law also addresses the criticism that it is unfair to label the individuals as criminals, while the same conduct by the corporation is simply a civil or regulatory wrong. It would also address the ways in which the UK's current two-strand regime appears to work against itself. For example, in 2007 British Airways (BA) agreed, in principle, to pay

133 Department of Trade and Industry, *Modernisation – a consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998* (White Paper, 2003) para 7.24.

134 *ibid*, paras 7.32–3.

135 See Mark Furse, *The Criminal Law of Competition in the UK and the US: Failure and Success* (Edward Elgar 2012) 166–74.

136 The only exception to this, the case of *Marine Hoses*, involved the arrest by the US Department of Justice of three UK nationals, who subsequently agreed to plead guilty to the UK cartel offence under a negotiated plea agreement with the US authorities. The case was concluded before the Commission proceeded with its investigation. See Andreas Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) 6 *Crim LR* 446; and *Marine Hoses* (Case COMP/39.406) [2009] OJ C168/6.

137 This is pursuant to Regulation 1/2003, art 3(1). For an assessment of the procedural viability of this, see Stephan (n 7) 354–59, discussing DTI White Paper (n 136) para 7.44. In such circumstances, the UK has long maintained that the cartel offence does not constitute 'national competition law' and is therefore not under an obligation to also apply Article 101; see DTI White Paper (n 136) para 10.16; confirmed by the English Court of Appeal in *IB v The Queen* [2009] EWCA Crim 2575.

138 Andreas Stephan, 'The Bankruptcy Wildcard in Cartel Cases' (2006) 5 *JBL* 511.

a fine of £121.5m for its involvement in fixing passenger fuel surcharges.<sup>139</sup> As a result, the civil case was put on hold while four BA executives were charged under the criminal cartel offence. The criminal trial ultimately collapsed,<sup>140</sup> and as a consequence BA felt the level of fine they had initially agreed was excessive.<sup>141</sup> Some six years after the investigation was originally launched, the Office of Fair Trading (a predecessor of the CMA) agreed to a fine of a much reduced £58.5m figure.<sup>142</sup> The resource-intensive and risky nature of criminal enforcement—as illustrated in the BA case—may also have had a chilling effect on the frequency of criminal cases, as compared to civil cases.<sup>143</sup>

One interesting model the UK may wish to follow is that of Australia. Unlike the US, where all serious cartel infringements are treated as criminal, Australia has a ‘dual proceedings’ model under which criminal and civil sanctions can be imposed against businesses and individuals. The authority can therefore choose whether to pursue a criminal or civil process in a given case, while ensuring both the businesses and individuals responsible face some level of punishment.<sup>144</sup> Indeed, in principle, the Australian Competition and Consumer Commission (ACCC) could have two bites at the cherry, by attempting a criminal case in the first instance and then falling back on a civil case if it fails, although this has been criticized as amounting to double jeopardy.<sup>145</sup>

It should, however, be noted that independence from EU competition law and the new freedoms this brings come at a significant cost in three respects. The first relates to the exchange of information between the CMA and its European partners. It currently enjoys membership of the European Competition Network (ECN), which facilitates case allocation and information exchange between national competition authorities and with the European Commission. This includes confidential information which can be used as evidence in both Article 101/102 cases and their domestic equivalents under national law (with the exception of leniency documents).<sup>146</sup> Although that information cannot be used for evidence in a criminal prosecution that could result in a custodial sentence, the receiving authority can use it to

139 Office of Fair Trading, ‘British Airways to pay record £121.5m penalty in price fixing investigation’ (OFT Press Release 113/07, London, 1 August 2007).

140 Office of Fair Trading, ‘OFT withdraws criminal proceedings against current and former BA executives’ (OFT Press Release 47/10, London, 10 May 2010).

141 Alistair Osborne, ‘Watchdog to press for BA fuel-fix fine’ *The Telegraph* (London, 8 November 2011) <[www.telegraph.co.uk/finance/newsbysector/transport/8877464/Watchdog-to-press-for-BA-fuel-fix-fine.html](http://www.telegraph.co.uk/finance/newsbysector/transport/8877464/Watchdog-to-press-for-BA-fuel-fix-fine.html)> accessed 8 March 2017.

142 Office of Fair Trading, ‘British Airways to pay £58.5 million penalty in OFT fuel surcharge decision’ (OFT Press Release 33/12, 19 April 2012).

143 See generally Stephan (n 138).

144 Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (CUP 2011) para 9.3.3.

145 *ibid.*

146 Regulation 1/2003, art 12; European Commission, *Notice on cooperation within the Network of Competition Authorities* [2004] OJ C101; discussed in Stephen Blake and Dominik Schnichels, ‘Leniency following Modernisation: Safeguarding Europe’s Leniency Programmes’ (2004) 2 EC Competition Policy Newsletter 7 <[http://ec.europa.eu/competition/publications/cpn/2004\\_2\\_7.pdf](http://ec.europa.eu/competition/publications/cpn/2004_2_7.pdf)> accessed 8 March 2017.

**Table 1. EU Cartel Fines 1990–2017 (not adjusted for General Court and CJEU judgments)**

Year	Amount in EUROS (€)
1990–94	539,691,550
1995–99	292,838,000
2000–04	3,462,664,100
2005–09	9,414,012,500
2010–14	8,712,512,674
2015–February 2017	4,159,116,000
Total	26,580,834,824

Source: European Commission, ‘Cartel Statistics’ <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 8 March 2017.

guide its own criminal investigation.<sup>147</sup> After Brexit, the CMA will have to replace its ECN membership with bilateral agreements on cooperation and the exchange of information.<sup>148</sup> This includes many such agreements currently entered into by the European Commission on behalf of EU Member States, either explicitly on competition or as part of trade agreements. While these arrangements can be very effective for informal communication and merger clearance, they do not generally allow for the exchange of any confidential information without the consent of the relevant parties.<sup>149</sup> Consequently, the CMA is likely to receive less information from its European partners about potential infringements.

The second cost is that this hindrance to obtaining useful information from European partners will come at a time when the CMA needs to significantly increase its enforcement activities to replicate the work currently undertaken by the European Commission on the UK’s behalf. This is another area where the CMA will need significant additional resources to cope with its enhanced role after Brexit. What is more, these additional resources are perfectly justifiable given the deterrent effect of cartel enforcement and the need for HM Treasury to continue benefiting from the very significant level of corporate fines recovered by the European Commission in cartel cases. As Table 1 above illustrates, around €26.5 billion in fines have benefited EU Member States (including the UK) since 1990.

Given the financial uncertainties posed by Brexit, this is a source of revenue the UK can ill afford to lose. The simplest way of continuing to recover the UK’s share of these fines is to stay closely aligned to the enforcement regime of the EU, retaining the civil enforcement regime under the Competition Act 1998, so as to limit the scope for cartels punished in the EU escaping their liabilities to the UK.

147 O’Kane (n 111) paras 7.04–7.07. Regulation 1/2003 (n 117) arts 12(2) and (3).  
148 For a list of bilateral agreements currently entered into by the European Commission, see DG COMP, ‘Bilateral Relations on Competition Issues’ (European Commission, 2 October 2015) <<http://ec.europa.eu/competition/international/bilateral>> accessed 8 March 2017.  
149 European Union, *Improving International Co-Operation in Cartel Investigations* (Contribution to OECD Global Forum on Competition, 9 February 2012) <[http://ec.europa.eu/competition/international/multilateral/2012\\_feb\\_cartels.pdf](http://ec.europa.eu/competition/international/multilateral/2012_feb_cartels.pdf)> accessed 8 March 2017.



The third and final cost relates to the regulatory burden on firms. While hard-core infringements will continue to be unlawful in both the UK and EU, any divergence in policy relating to conduct at the fringes of Articles 101 and 102 will create uncertainty for firms wishing to operate in both jurisdictions. If, for example, the UK decided to take a different approach to the EU's vertical block exemption, this may cause problems for large undertakings with complicated distribution arrangements and could discourage them from operating or investing in the UK, especially if the UK wanted to be more restrictive, at a cost to competition and growth.<sup>150</sup>

## V. CONCLUDING REMARKS

The analysis in this article suggests it would be unwise to substantially amend competition policy in the UK, as part of its withdrawal from the European Union. The current regime provides a high degree of predictability and transparency to businesses operating and investing in the UK. A continued commitment to this regime would help mitigate some of the great uncertainties surrounding the UK's future relationship with the EU and would likely facilitate more open trade agreements.

The most pressing priority will be to ensure the CMA is afforded sufficient funds to deal with the significantly increased workload that will accompany withdrawal from the EU. This will include the average of six pan-European antitrust cases opened by the European Commission every year, a significant proportion of the 300 qualifying merger notifications received annually and the introduction of some form of monitoring system for State aid. We estimate this will result in around 80 extra cases per year, which would at least double the current CMA workload and will have knock-on effects for the CAT. It is imperative that these issues are addressed in order to ensure that all mergers are assessed as to their effects on UK markets, as well as to continue deterring cartels (and benefiting from cartel fines).

Brexit will provide the UK with an opportunity to be more interventionist in domestic industries, but an industrial policy based on more frequent public interest interventions in mergers, in addition to State aid without independent scrutiny, makes policy susceptible to lobbying, subjective decision-making and short-term political point scoring. History has shown that it is better to be cautious with such interventions and that an economics-based merger control system, administered by an authority that is independent of political interference, is the most effective approach. The current merger regime already allows for public interest considerations, but only in exceptional circumstances (national security, media plurality, and stability of financial markets). Following Brexit, the UK Government will be able to employ these existing considerations in any merger where there is a political need to protect UK firms from foreign acquisitions *on these grounds*. Any move to introduce an expanded public interest test alongside the competition test, risks dragging the UK back to the patchy and inconsistent policy of the past. In fact, it may be better to legislate to make the extension of public interest grounds more difficult.

150 Anneli Howard, 'Brexit: Exit Stage Left for Competition Damages?' (2016) Competition Law Journal: Brexit Special Online Edition 4, 7–8 <[http://www.jordanpublishing.co.uk/practice-areas/competition/news\\_and\\_comment/brexit-exit-stage-left-for-competition-damages#.WMBN8BKLTgE](http://www.jordanpublishing.co.uk/practice-areas/competition/news_and_comment/brexit-exit-stage-left-for-competition-damages#.WMBN8BKLTgE)> accessed 8 March 2017.

A broader application of industrial policy also has the potential to be counterproductive. The UK was one of the strongest voices for constraining the use of State aid within the EU and was clearly a net beneficiary of EU State aid rules. Without a seat at the table, any moves to be more interventionist or protectionist in relation to UK markets could be reciprocated by the residual EU. In particular, leaving the EU means the UK is free from EU State aid rules, but will no longer have a seat at the table to prevent those rules being used for ends that may disadvantage UK businesses. More active use of State aid would also weaken the UK's negotiating position in reaching a trade agreement with the EU or retaining some form of preferential access to the Single Market. The challenge is how to ensure the UK and its EU trading partners continue to be constrained in their ability to grant State aid (for their mutual benefit), while also respecting the political imperative from the EU referendum, ie that there should be no continued supremacy of EU rules or oversight by EU institutions. This may require 'self-restraining' legislation that limits the ability of the UK and its devolved nations from granting State aid that is not clearly justified by specified externalities.

Antitrust law is probably the area of competition policy with the greatest scope for divergence from the EU. Indeed, this divergence is inevitable given that market integration and other EU-centric policy objectives will no longer be relevant to the UK. In the medium and long-term, there may also be benefits in moving towards a fully criminalized enforcement regime against cartels—similar to that of the US or Australian regimes—and possibly with the ability to pursue businesses and individuals responsible for cartel conduct, either under a criminal or civil enforcement process. However, in the short-term, it is better for the UK to remain broadly aligned with the EU and for the UK courts to treat CJEU case law as strongly persuasive. This will provide continuity and certainty for businesses until the process of Brexit and the new relationship with the EU becomes settled. It will also provide stability for the CMA while it finds its feet as one of the world's major antitrust enforcement authorities, and ensure the UK continues to benefit from the significant level of cartel fines currently recovered by the European Commission on the UK's behalf.

Overall, continuity in UK competition policy will ensure the regulatory burden on firms operating in the UK is kept to a minimum. Policy shifts that compound Brexit uncertainties risk long-term damage to the efficiency, flexibility, and dynamic success of UK firms and markets. Perhaps the biggest risk to this success comes from the fact that modern EU competition law has—to a significant extent—been shaped by the UK. Without its presence, EU competition law may very well take a direction of its own, becoming more formalistic and possibly more interventionist.<sup>151</sup> A move in this direction by the UK would only make such an outcome more likely.

151 See Lowe (n 95) 4.