Devolution of competition policy under the Scotland Act 2016 after Brexit

Straining at the edges of the current settlement?

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1. Introduction

The purpose of this paper is to examine the challenges that Brexit brings for the devolution of certain aspects of competition policy to Scotland. This area was heavily influenced by European Union law both as regards the substance of the Competition Act 1998 and in relation to the way in which competition cases are investigated. While the Scotland Act 2016 did not affect the competition enforcement function, which remains conferred exclusively to the Competition and Markets Authority, it did devolve certain aspects of competition policy to the Scottish authorities. According to Section 63 of the Act Scottish Ministers can ask the Competition and Markets Authority (CMA) to carry out a phase 2 market investigation after having sought the agreement of their Westminster counterparts. It is acknowledged that Brexit will have a more visible and immediate impact on the CMA powers. However, its consequences will also be felt more broadly in the context of the determination and exercise of the UK's competition policy powers, taken as a whole.

This paper will explore these consequences by placing the discussion against the broader background of the relationship existing between the central and devolved governments in the UK, with a particular emphasis on Scotland. After summarising the status quo as regards competition policy in the UK pre-Brexit, the paper will analyse the nature and scope of the powers that have been devolved to the Scottish Government against the background of the rules governing the relations between this and the UK Government. Thereafter, the paper will examine the impact of Brexit on competition policy both in general and for the aspects that have been devolved to the Scottish Ministers under the 2016 legislation.

It will be argued that the current system for the management of the inter-governmental relations between Westminster and Edinburgh may not be able to withstand the challenges brought by Brexit in this area. The paper will suggest that as the UK exits the EU, the UK Government is likely to acquire greater discretion in a number of areas, since it will no longer be subjected to the constraints placed on it by the Treaty on the Functioning of the European Union (e.g. in the area of state aid). It will also be illustrated that as the CMA's antitrust enforcement remit is going to expand, it may become difficult to make arguments in favour of prioritizing cases affecting "local" markets in Scotland. Brexit is also going to put the UK merger review regime under strain, thus prompting questions as to whether, first of all, a mechanism of compulsory notification should be introduced and, second, whether the UK Government's public interest intervention powers should be exercised in a way that involves also the devolved administrations.

The paper will conclude that Brexit has exposed how the current framework for intergovernmental relations may not be suitable to the demands of new forms of devolution that are

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not predicated upon the distinction between reserved and devolved matters, but depend on the joint decision-making between the UK and the Scottish governments. Thus, unless Section 63 of the Scotland Act 2016 is to remain ineffective, it may become necessary to rethink the current ways in which Scottish and UK minister interact in areas where devolution means co-decision as opposed to one government "giving way" to the other.

2. Brexit and competition law in the UK: separating two closely knitted realities…

2.1. The enforcement of competition law in the UK and the EU—summary remarks

The enforcement of the UK competition rules has been closely intertwined with the application of the antitrust, merger and state aid rules enshrined in the EU Treaties since the UK accession to the EEC. From a substantive standpoint, the Competition Act 1998 mirrors exactly Articles 101 and 102 TFEU in its prohibition of cartels and other collusive behaviour and of the abuse of a dominant position.[1] Importantly, Section 60 of the Act ensures that the domestic provisions are read consistently with the EU rules, by imposing an obligation on UK courts and authorities, including the CMA, to resolve any competition questions arising from the application of the Act in accordance with the EU acquis. As part of its broad competition brief and in parallel with the enforcement of the competition rules in respect of individual cases, the CMA also enjoys the power to conduct "market investigations", in accordance with Part 4 of the Enterprise Act 2002.[2] Thus, it can, either proprio motu or upon a reference from a UK Minister, conduct an in-depth investigation of a certain market upon a suspicion that competition on that market may have been distorted.[3]

Thanks to EU membership, competition enforcement in the UK and in the Union have existed in a symbiotic relationship, with the CMA and the Commission enjoying a close and quasi-hierarchical relationship in the way in which they each fulfil their functions of protecting rivalry on markets.[4] Thus, in respect of antitrust enforcement, this relationship manifests itself both in procedural terms, thanks to the functioning of the ECN and to the support it has provided to the CMA in its investigations, and substantially, since Section 60 of the Competition Act 1998 ensures full consistency between national and EU antitrust law. Having regard to merger control, the Commission has so far retained exclusive jurisdiction in respect of concentrations having a "Union dimension", as set out by Article 1 of the EU Merger Regulation. Furthermore, Articles 107 to 109 of the TFEU have ensured that the member states, including the UK, would not intervene financially to support industries and undertakings in a way that was detrimental to the overall competitiveness of the internal market.

There are several differences between the EU and the UK regimes. In respect of merger control it should be emphasised that the Enterprise Act 2002 set up a voluntary framework for the domestic scrutiny of 'merger situations'. The CMA is responsible for "surveying" markets with a view to identifying any change in the control of undertakings that might have an adverse impact on competition. The undertakings that contemplate to merge, however, are not obliged to notify the transaction.[5] Furthermore, the CMA can investigate whole markets or industries in order to identify anti-competitive behaviour that may harm consumers. According to Section 131 of the Enterprise Act

[1] See Chapters I and II, Competition Act 1998; see also Section 60 of the Act.
[2] Enterprise Act 2002.
[3] Section 131, Enterprise Act 2002.
[4] See e.g. Cengiz, "Multilevel governance in European competition policy: the European Competition Network", (2010) 35(5) ELRev 660.
[5] Part 3. Enterprise Act 2002; see especially Sections 22 ff and 42 ff.

2002 the CMA can either proprio motu or upon a reference made by a Ministers, initiate an investigation of specific markets. For this purpose it enjoys wide powers of inquiry and is obliged to issue a report at the end of the investigation. If the CMA finds that the market operates against the public interest, on the ground that competition on it is distorted, it will also indicate what actions should be taken to address the anti-competitive effects. Finally, it should be emphasised that the UK competition law provides for criminal sanctions for certain infringements of the antitrust rules.

In light of the forgoing it is clear that competition law and policy in the UK have developed in a near-symbiotic relation vis-à-vis the EU rules and approach to enforcement. It should be noted that while competition policy remains reserved to Westminster, the Scotland Act 2016 transferred some limited aspects of it to the Scottish Ministers. The next section will explore some of the implications of this transfer for the existing UK competition framework.

2.2. Competition policy in the UK and devolution: new powers, old arrangements?

The previous section sketched out the frameworks within which competition law is enforced at EU and UK level and highlighted the strong interdependence existing between Union and UK law and policy in this area. The purpose of this section is to discuss the scope of the powers devolved to Scottish Ministers in respect of competition policy by the Scotland Act 2016.

According to the final report of the Smith Commission, which was established after the 2014 Independence Referendum, the transfer of some form of competition policy function to the Scottish authorities reflected a commitment to "delivering prosperity, a healthy economy, jobs and social justice".[6] In the course of the Commission's discussions many options were mooted. These ranged from transferring to the Scottish Ministers oversight powers over the CMA[7] to conferring on the government in Edinburgh more limited powers, such as involving the Scottish Government more closely in the discussions about and the adoption of a decision to refer a market to the CMA for investigation.[8] Strictly linked to these issues was the debate on how the Scottish Government could be involved more closely in discussions and decision-making concerning broad issues of competition policy, the debate concerning the role of the state in the UK economy and any decision concerning the UK Government's intervention in merger cases on the basis of public interest considerations.[9]

The Scotland Act 2016 provided only a limited answer to these questions. According to its Section 63 Scottish Ministers can ask the CMA to initiate an in-depth investigation of a specific market, in accordance with Section 139 of the Enterprise Act 2002. To the extent that an investigation reference allows the CMA to conduct and in-depth and impartial examination of a specific market, it represents a very effective tool for Scottish ministers, since it can lead to the in-depth inquiry into Scottish markets and to the imposition of any remedies that are necessary to address distortions of competition. However, Scottish Ministers cannot issue a notice to the CMA themselves, but must seek the agreement of UK Ministers. In addition, the Scotland Act 201 did not transfer other powers to the

[6] Smith Commission, Final Report for further devolution of powers to the Scottish Parliament, available at: http://webarchive.nationalarchives.gov.uk/20151202171059/http://www.smith-commission.scot/smith-commission-report/, p. 18.
[7] Id., Evidence analysis, available at: http://webarchive.nationalarchives.gov.uk/20151202171041/http://www.smith-commission.scot/resources/analysis/, p. 1-2.
[8] Id., p. 2.
[9] CMA Response to the Smith Commission, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383589/Smith_commission_CMA_response.pdf, p. 16.

Scottish Ministers, for instance in the field of merger control. Nor did the Act resolve the question of how this joint power should be exercised or in which context the discussions between UK and Scottish Ministers as regards a possible reference should take place.

The reforms also failed to deal expressly with the overarching question as to the extent to which this form of joint decision making could be compatible with the overarching devolution settlement, which has so far been predicated upon the dichotomy between "reserved" and "devolved" matters.[10] On this point, it is unclear how the new Section 63 power can "fit" within this dichotomy. Recent studies have highlighted that this provision, on the one hand, widens the scope of devolved powers. However, on the other hand, it makes the exercise of these new powers dependent on interaction and agreement between the Scottish and UK governments.[11] In addition it does not seem to make any allowance for the need to harness the technical expertise that is required in the examination of the complex legal and especially economic issues that characterise competition policy.[12]

Against this background, it is legitimate to query whether the current approach to the relations between the Westminster and the devolved governments, and especially the Scottish Government, are suitable to the joint exercise of the powers enshrined in Section 3 of the Scotland Act 2016.[13] While the limited remit of this paper does not allow for any detailed consideration of this document and of the agreements appended to it, it is indispensable to recall the basic features and objectives of the Memorandum of Understanding between the UK, the Welsh Executive, the Scottish Government and the Northern Irish Executive.[14] The Memorandum of Understanding is a non-binding document, but a "statement of political intent" laying out basic principles and procedures affecting the interaction between central Government and the devolved executives.[15] A key feature of the intergovernmental relations (IGR) framework laid out by it is the Joint Ministerial Committee (JMC), which provides a forum for ministerial contact and discussion between the central government and the ministers of the devolved administrations.[16]

The JMC is called regularly throughout the year and is constituted by Ministers that are competent for the subject matter being discussed at each meeting, when coordination between central and devolved administrations may be required, to consider non-devolved matters that may have an impact on devolved competences and devolved matters whose management may affect reserved issues. The Committee also allows the administrations to discuss devolved matters that may be beneficial to consider jointly.[17] Furthermore, the JMC offers a forum within which any conflicts concerning the exercise of devolved and reserved matters should be resolved, in accordance with a procedure set out in a Supplementary Agreement to the Memorandum.[18] It is suggested that the MoU aims to engender a cooperative and less conflictual relation between administrations, especially in situations where competences overlap or when their joint exercise is beneficial to both levels of

[10] McEwen and Petersohn, " Between autonomy and interdependence: the challenges of shared rule after the Scottish Referendum", (2015) 86(2) Political Quarterly 192, p. 199
[11] Id., p. 196-197.
[12] Id., p. 196; see also p. 200.
[13] Id., p. 199
[14] Memorandum of Understanding and Supplementary Agreements between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf, see e.g. pp. 4-6.
[15] Id., p. 4.
[16] Id., p. 9-10.
[17] Id., p. 13.
[18] Id., pp. 17 ff.

government.[19] However, it is apparent that these arrangements tend to be inspired by a pragmatic and problem-solving approach whose focus lies primarily in addressing disagreements[20] in a broader context where divergences tend to be occasional and where joint decision-making is limited.[21] In similar circumstances, the relations between central and devolved governments could be managed in a relatively "piecemeal and contractual manner" (for instance via infrequent meetings of the JMC).[22]

It is concluded that whether these arrangements are suitable to accommodating the negotiations leading to a joint decision under Section 63 of the Scotland Act 2016 remains open to question. It is argued that the nature of the subject matter, which calls for technical expertise and for wide-ranging and evidence-based discussions would not be best served by political negotiations on the Joint Ministerial Council, due to its political nature and for the occasional cadence of its meetings.[23] It is further argued that given the consequences that a Market Investigation Reference could have on the companies active on the affected markets, it would be difficult to justify shielding these decisions from scrutiny, whether judicial or parliamentary.[24]

3. Brexit and competition policy in the UK: all change?

3.1. Exit from the EU and antitrust enforcement—cutting the ties between the Union acquis and internal legal principles

The previous sections discussed the framework for UK competition policy and enforcement and illustrated how the these arrangements have evolved toward giving the Scottish ministers some limited decision-making as regards market investigation references. This section turns to the main changes that leaving the EU is going to have in respect to competition law, first in the UK as a whole and thereafter in respect of these limited powers that have been transferred to the Scottish Government. The future relation between the UK and the EU might look like post-Brexit remains in a state of flux. Following the December 2019 General Election, it seems very likely that the UK will leave the EU on 31 January 2020 and by then, therefore, issues relating to the "divorce" such as, inter alia, a financial settlement and the determination of a transition period will have to be addressed. [25] It is also probable that such a period will run until 31 December 2020: in this time, a new agreement concerning the future relation between the UK and the EU will have to be negotiated and concluded. At this stage, however, it is still not clear how this relationship will work in practice and in particular how it will shape UK policies that have so far been subjected, wholly or in part, to EU action.

Thus, while it is expected that there will be a "clean break" between Britain and the EU, the form that their reciprocal commitment to mutual cooperation in many areas remains uncertain. This

[19] See e.g. Poirier, "The function of intergovernmental agreements: post-devolution concordats in a comparative perspective", (2001) PL 134, pp. 139-140.
[20] Rawlings, "Concordats of the Constitution", (2000) LQR 257, pp. 263-264.
[21] Ibid.
[22] Id., pp. 279-281.
[23] See inter alia, mutatis mutandis, McEwen and Petersohn, " Between autonomy and interdependence: the challenges of shared rule after the Scottish Referendum", (2015) 86(2) Political Quarterly 192, pp. 198-200.
[24] Ibid.
[25] See e.g. Article 16, Part IV, 2018 Withdrawal Agreement; see also Statement from HM Government, 6 Jul 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF. See also, most recently,

uncertainty is going to affect competition policy significantly. Form a substantive standpoint, Articles 101 and 102 TFEU will no longer be applicable in the UK. Furthermore, the CMA will be excluded from the ECN, thereby being deprived of its cooperation and coordination mechanisms. Brexit is also going to have very significant consequences for competition litigation since it will lead to the inapplicability of the EU common rules governing the determination of jurisdiction and on the recognition of judgments in civil and commercial matters, provided by the Brussels Regulation.[26]

Brexit will also have profound consequences on the way in which competition law is interpreted in the UK because it will bring to an end the commitment to ensuring "synchronicity" in the interpretation of the UK rules vis-à-vis the EU acquis concerning Articles 101 and 102 TFEU which has so far been guaranteed by Section 60 of the Competition Act 1998.[27] Thus, in respect of public competition enforcement, it is expected that the CMA's workload will increase since the agency will become competent to investigate infringement that up to the day of exit from the EU had fallen within the jurisdiction of the EU Commission. However, this will not spell the end of the Commission's jurisdiction on prima facie restrictive practices involving UK companies.

The Commission will remain competent to investigate and sanction anti-competitive behaviour having its "centre of gravity" in the Internal Market and regardless of where the undertakings concerned hold their seat.[28] As a result, parallel proceedings between the Union and UK authorities are likely to occur without however the possibility to rely on the same information, coordination and cooperation mechanisms that the ECN provides.[29] For instance, Article 23 of the Draft Withdrawal Agreement agreed by the Prime Minister Theresa May in 2018 enshrined a mutual commitment to cooperate in the course of competition investigations. However, the forms in which such cooperation should have taken place did not appear to be equivalent to those provided as part of ECN membership. For instance, Article 23(3) referred to a generalised ability to exchange information on "current enforcement activities and priorities", a far cry from the power to exchange and use as evidence information and documents that is provided by Article 12 of Council Regulation No 1/2003. [30]

The tone of the agreement negotiated by Prime Minster Boris Johnson in October 2019 appears to dilute these commitments even further. This more recent Agreement[31] did away with the formal obligations to maintaining a "level playing field" as regards, inter alia, state aid and competition policy.

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[26] Regulation No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters, [2012] OJ L351/1. For commentary see e.g. Andreangeli, "The consequences of Brexit for competition litigation: an end to a success story?", (2017) 38(5) ECLR 228.

[27] See inter alia Lyons, Stephan, Reynolds, "UK Competition policy post-Brexit: taking back control while resisting siren calls", (2017) 5(3) Journal of Antitrust Enforcement 347, p. 366-367.

[28] See inter alia Roth, "Competition law and Brexit: the challenges ahead", (2017) CLJ 5, p. 8. See e.g. case 48/69, ICI v Commission, [1972] 619, especially paras. 120 ff.; for commentary see inter alia, most recently, Prete, "On implementation and effects: the recent case law on the (extra-) territorial application of the EU competition rules", (2018) 9(8) JECL & Pract 487.

[29] See inter alia Lyons et al., cit. (fn. 27), pp. 367-368.

[30] Article III, Agreement between the Government of the United States of America and the Commission of the European [Union] regarding the application of their competition laws, [1995] OJ L95/47.

[31] New Withdrawal Agreement, 19 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf.

In their place, the Political Declaration accompanying the agreement contains "less specific, non-binding" commitments to the competitiveness and openness of the UK economy.[32]

Against this background, it is doubted whether the CMA will be able to rely on standards of cooperation post Brexit that are comparable with those available under the ECN. It is argued that "losing out" on the possibility, for instance, of exchanging and using as evidence documents gathered in other jurisdictions, as per Article 12 of Council Regulation No 1/2003, might impair the agency's ability to investigate transnational cartels.[33]

As for the future development of substantive competition law in the UK, it is very likely that the removal of Section 60 of the Competition Act 1998 may have a number of as yet not fully understood consequences. According to the Competition (Amendment Etc) (EU Exit) Regulation 2019, this section will be replaced by another provision, Section 60A, which sets out a number of principles that after Brexit will govern the resolution of questions of EU competition law.[34] Thus, the CMA and the other sector regulators enjoying competition powers and the UK courts will remain obliged to interpret the Competition Act provisions consistently with the EU competition acquis as it stands on exit day.

However, they can depart from the approach adopted under the TFEU and the relevant case law on the issue in those cases where "they consider it appropriate to do so", subject to a number of conditions. Thus, a departure from the Union competition acquis is possible if, inter alia, there are objective differences between EU and UK markets or there have been novel developments in the nature of the economic activities being affected since the adoption of a specific measure or judicial decision.[35] Section 60A also allows public bodies to take decisions inconsistent with Union law on the basis of a consideration of "generally accepted principles of competition analysis" or of the particular circumstances of the case at hand. In any case, the UK courts and authorities will no longer be obliged to follow EU precedent if a departure from it is justified in light of an intervening UK judgment.[36]

It is acknowledged that Section 60A aims to provide much needed legal certainty in the process of UK's exit from the EU, since it lays out a relatively clear set of circumstances in which UK authorities may depart from the Union competition rules post-Brexit. However, it is difficult to foresee how often and in which types of cases the British authorities are likely to rely on Section 60A to depart from existing EU precedent. It is submitted that this is not only due to the flexibility that characterises the list of conditions provided in Section 60A(7). Other factors that are inherent to the procedural rules governing competition investigations, decisions and appeals in the UK are also likely to exacerbate the risk of future inconsistency. Demetriou suggested that "matters of economic analysis" such as, inter alia, market definition, could be decided according to different approaches in the UK vis-à-vis the EU, due, for instance to the existence of domestic law constraints on the courts' discretion in appreciating

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[32] Political declaration setting out the framework for the future relationship between the United Kingdom and the European Union, 19 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf, Part II, Section 77; see also sections 17 and 21. For commentary see House of Commons Library, "The EU/UK Withdrawal Agreement", published on 18 October 2019, available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8713#fullreport, especially pp. 7, 31 and 48.

[33] See inter alia Lyons et al., cit. (fn. 27), pp. 367-368; see also, mutatis mutandis, Botta, "Testing the decentralisation of competition law enforcement: comment on Toshiba", (2013) 38(1) ELRev 107, pp. 109-110.

[34] See Competition and Markets Authority, Draft guidance on the effect of a "no-deal" exit from the European Union on the functioning of the CMA", [2019] available at:

[35] Id., sections 4.13-4.14.

[36] Id., sect. 4.14-4.15.

the evidence.[37] This commentator observed that whereas the General Court lacks the power to review competition decisions on the merits, the CAT can hear new arguments and examine fresh evidence in the course of an appeal and on that basis can overturn and remake the CMA decisions. [38]

Accordingly, it was argued that as a result of this "on the merits" review, the Tribunal might adopt decisions diverging from EU precedent since it can consider proof that had not been available during the CMA inquiry.[39] In Demetriou's view, "(…) the inherent and profound differences in our judicial procedure and that of the European courts will (…) become much more liable to lead to divergent outcomes in the enforcement of EU and UK competition law".[40] Thus, it might be expected that a chasm may begin to open between UK and EU competition law much sooner than expected, in light of these differences and of the flexibility built in Section 60A(7) of the Competition Act 1998.[41]

In light of the forgoing analysis it is concluded that Brexit will have a pervasive impact on the current framework for the application of the antitrust rules in the UK. It is expected that the CMA will be subjected to increasing workload as it faces the challenge of applying domestic law to prima facie infringements that had hitherto fallen within the jurisdiction of the EU Commission. The exit from the Union is also going to have consequences for the development of substantive competition law. Although the general commitment to maintaining a degree of harmony between UK and EU law is to be welcome, it is expected that due to the differences in how competition cases are decided in the two jurisdictions, the UK competent authorities might start diverging from the pre-Brexit EU acquis sooner than initially thought.

3.2. Brexit and merger control: heralding major change?

The previous section analysed the impact of the UK's exit from the EU for the application of Articles 101 and 102 TFEU and of Chapters I and II of the Competition Act and highlighted several consequences of leaving the EU for the role of the CMA, the function of the civil courts, including the CAT, and the evolution of substantive law in Britain more generally. This section will move on to discuss Brexit's impact on merger control and state aid. As was anticipated in Section 2.1, the EU Merger Regulation has established a compulsory notification system for all concentrations having a "Union dimension".[42] The UK, by contrast, has in place a voluntary notification system, with the CMA being responsible for monitoring merger activities. Thus, merging company can, but do not have to, notify the fact that they are merging. The competition agency is in charge of keeping an eye on markets and identifying "relevant merger situations", in light of the rules contained in the Enterprise Act 2002,[43] and will prohibit any merger that results in a substantial lessening of competition.[44]

Brexit will bring the "one-stop-shop" mechanism that has so far led to many concentrations being assessed in Brussels, to an end. It is expected that large concentrations likely to impact on competition in the UK and in the Internal Market will be subject to scrutiny both in London and in

[37] Demetriou, "The future is a foreign country: they do things differently there - the impact of Brexit on the enforcement of competition law", (2018) 39(3) ECLR 99 at 102.
[38] Ibid.
[39] Ibid.
[40] Id., p. 105.
[41] Id., p. 106.
[42] See Articles 4-5, EU Merger Regulation.
[43] Section 22 ff., Enterprise Ac 2002.
[44] Sections 35-35, Enterprise Act 2002.

Brussels.[45] As a result, the merging parties might not just have to notify in both jurisdictions, but will also be subject to distinct proceedings which could lead to inconsistent outcomes.[46]

In light of the forgoing, it is suggested that Brexit is likely to herald an era of uncertainty for undertakings engaging in mergers and acquisitions. On this point, the CMA Guidance concerning its post-Brexit practice is especially important. This document indicated that the CMA would consider whether to take action in respect of those mergers on which, despite having been notified to the EU Commission, no decision has been taken as to 29 March 2019. Accordingly, the advice for the merging parties is that they should consider engaging in pre-notification talks, especially when the concentration is likely to have an impact on competition.[47] This position was by and large reiterated in the Guidance issues in March 2019 and relating to the future of the CMA's functions in the event of a no-deal exit.[48] It was stated that come Brexit day and unless an agreement was reached to deal with the transition from the EU to the domestic merger regime, the CMA would be entitled to review all mergers, even those already notified to (but not decided upon by) the EU Commission.[49]

As to mergers occurring post-Brexit, the Guidance confirms the competence of the UK regime. However, bearing in mind the likelihood of parallel proceedings, it recognises that "there are substantial benefits to the parties and to the competition authorities (…) from encouraging communication and cooperation" between the CMA and other authorities, including the Commission.[50] For this purpose the Guidance expressed a commitment to "endeavour[ing] to coordinate merger reviews relating to the same or related cases with the Commission" and to obtain consent as to the transmission of relevant evidence from the affected parties, should such exchange not be possible under existing legislation.[51]

Against this background, it is clear that the decision of the CMA to scrutinise a merger that also falls within the competence of the EU Commission will not affect the latter's ability to review the transaction. As long as the "Union dimension" thresholds are met, UK companies will be obliged to make a notification in accordance with the EU Merger Regulation. The CMA, on its part, will acquire the power to carry out its own investigations as regards the same concentrations that fall within the EU Commission's remit.[52] Accordingly, it is expected that Brexit will have significant consequences for the UK's merger control system. The CMA's workload is likely to increase.[53] Furthermore, since parallel proceedings in the EU and the UK are going to be potentially more frequent, uncertainty is

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[45] Roth, "Competition law and Brexit: the challenges ahead", (2017) 6(1) Comp L J 5, p. 6.
[46] Ibid.
[47] CMA's role in mergers if there is no Brexit deal, issued on 30 October 2018, available at: https://www.gov.uk/government/publications/cmas-role-in-mergers-if-theres-no-brexit-deal/cmas-role-in-mergers-if-theres-no-brexit-deal.
[48] Guidance on the functions of the CMA in the event of a 'no-deal' exit from the EU, CMA106, October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf.
[49] Id., para. 3.2; see also para. 3.7.
[50] Id., para. 3.18.
[51] Ibid.
[52] See Communication of 30 October 2018, available at: https://www.gov.uk/government/publications/cmas-role-in-mergers-if-theres-no-brexit-deal/cmas-role-in-mergers-if-theres-no-brexit-deal.
[53] See e.g. Commercial Bar Association, written evidence submitted to the House of Lords Select Committee on the European Union, Inquiry on Brexit: competition and state aid, session 2017-2019, HL Paper 69, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-competition/written/70972.html; see also Report, para. 54-55 .

bound to increase for the undertakings concerned, due to the different procedural and substantive standards that apply in each jurisdiction.

For instance, from a procedural standpoint, the EU Merger Regulation, on the one hand, prescribes that a decision on a merger that does not raise significant issues for competition shall be taken within 25 working days of the initial notification.[54] If instead the concentration appears capable of restricting competition, it will be subjected to an in-depth examination and a final decision be adopted within 90 working days, which can be extended to 105 in certain circumstances.[55] On the other hand, Part 3 of the Enterprise Act 2002 not only enshrines a voluntary system for the clearance of concentrations meeting certain turnover criteria. It also lays out different deadlines within which a decision must be adopted. For notified mergers, the CMA has up to 40 working days to examine a notified merger which does not prima facie raise serious issues for competition. However, if the notified merger does raise serious issues, the CMA will move to an in-depth investigation by appointing a panel, which has up to 24 weeks to issue a final report.[56]

Significant differences also exist between the standards of review employed, respectively by the CMA and the EU Commission. Whereas in accordance with the EU Merger Regulation mergers that result in a significant impediment to effective competition being impaired are going to be prohibited, UK legislation relies on the "substantial lessening of competition" test. As a result, it is suggested that parallel proceedings could lead to potentially divergent outcomes,[57] thereby creating significant uncertainty for the merging parties, along with subjecting them to a de facto obligation to make two distinct notifications.[58] It is submitted that a possible response to these concerns could lie in the UK and the EU agreeing, as part of their future relationship deal, to the creation of a mechanism for the coordination of proceedings and for mutual cooperation designed to avoid, as far as possible, conflicting outcomes.[59]

It is however difficult to forecast how these issues could be resolved. On this point, it may be reminded that Article 23 of the Withdrawal Agreement negotiated by Theresa May in 2018 enshrined a generic obligation to cooperate in the course of competition and merger cases. It is submitted that this provision could have plausibly provided a basis for agreeing rules governing parallel action.[60] However, as was anticipated in section 3.1, the Political Declaration agreed by Prime Minister Johnson in October 2019 lacks any specific commitment in this area and speaks generically to the need to preserve a "level-playing field" in this context. Accordingly, it is open to question whether, once the UK exits the EU even with a Free Trade Agreement in place, there might be a "ready-to-go" arrangement to deal with parallel merger cases.[61]

The possibility for UK Ministers to intervene in order to refer to the CMA mergers that have either not been notified or upon which no decision has been taken, on public interest grounds, in

[54] Council Regulation No 139/2004 on the control of concentrations between undertakings, [2004] OJ L24/1, Article 10(1).
[55] Article 10(3).
[56] For a summary of these procedures, see the CMA Merger Guidance, CMA2, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf; see especially Chapters 7 and 11-14.
[57] Inter alia, see Kidane and MacGregor, "Post-Brexit scenarios for UK competition policy and public enforcement: the EEA model v complete independence", (2016) 22(4) Int T L R 81 at 88-89.
[58] See e.g. Lindsay, "UK merger control developments in Q1 2017", (2017) 38(7) ECLR 301 at 302.
[59] See e.g. Kidane et al., cit. (fn. 57), p. 83.
[60] See Withdrawal Agreement, cit. (fn 25), Part IV, Article 23.
[61] See Political Declaration, cit. (fn. 25), Section 77.

accordance with Section 42 of the Act[62] is also likely to have an impact on both the standards of review of individual concentrations and on the time required to have the latter scrutinised in the UK. Political involvement in merger review is not allowed under the EU Merger Regulation, according to which the EU Commission is the sole decision-maker.[63]

It is acknowledged that the possibility for ministers to intervene in merger cases is regarded as exceptional and is confined within the narrow limits of the "public interest test". However, it is legitimate to query whether post-Brexit the possibility for such intervention might become greater. It is submitted that this question is relevant for two reasons. First of all, because it interrogates the issue of whether more frequent interventions might lead more often to diverging decisions in the EU and the UK. Secondly, because it feeds into a broader debate as to whether, following Brexit, the UK Government may take a more proactive role in the scrutiny of certain mergers in light of non-economic criteria. It should be emphasised that this concern appears all the more significant in light of recent statements made by UK Government Ministers, according to which foreign takeovers of UK companies might be subjected to an as yet not well defined "heightened" degree of scrutiny as to whether such transactions serve the UK national interest in certain sectors that are seen as having a strategic significance.[64]

It is legitimate to query, therefore, whether after exiting the EU the public interest test might be relied on more frequently as part of this commitment to subjecting takeovers in, for instance, the defence industry or the "anxious review" that this heightened scrutiny is likely to entail could extend to mergers affecting other markets.[65] It is argued that a more generalised shift in this direction could have significant drawbacks on the UK's merger regime, since it might lead not only to foreign takeovers being blocked, with adverse effects on foreign direct investment. It could also allow the UK authorities to promote the emergence of "national champions", thereby making it more difficult for new competitors (foreign or indigenous) to attempt entry into British markets.[66] It is emphasised that a similar move could also have significant and as yet unpredictable consequences for the relations with the EU. It is argued that the EU might be cajoled into taking a more "protectionist stance" in favour of EU-based firms and against UK competitors.[67] Ultimately, it is argued that if the recourse to the public interest test became more frequent, it would potentially lead to the very notion of "level-playing field" being undermined. It is concluded that Brexit is very likely to have significant consequences for merger scrutiny in the UK. These are likely to range from an increase in workload

[62] Id., pp. 6-7.

[63] For the role of the Advisory Committee, see Article 19((3) and (4), Council Regulation No 139 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L24/1. See also, inter alia, Ragolle, "Schneider Electric v Commission: the CFI's response to the Green Paper on merger review", (2003) 24(5) ECLR 176, e.g. p. 180; also Berg and Ostendorf, "The reform of EC Merger control: substance and impact of the proposed new procedural rules", (2003) 24(11) ECLR 9, e.g. p. 600-601.

[64] See e.g., mutatis mutandis, "Government upgrades national security investment powers", 24 July 2018, available at: https://www.gov.uk/government/news/government-upgrades-national-security-investment-powers; see also, more generally, among others, Jim Pickard, "Foreign takeovers of UK companies face increased scrutiny", Financial Times, 23 July 2018, available at: https://www.ft.com/content/edbdc8a0-8e9a-11e8-bb8f-a6a2f7bca546. See also, less recently, "UK Government should help companies targeted by foreign bids", The Guardian, 15 March 2017, available at: https://www.theguardian.com/business/2017/mar/14/unilever-british-companies-foreign-bids-marmite-kraft-heinz.

[65] Id., p. 8.

[66] Ibid.

[67] Id., p. 10.

for the CMA to the more frequent parallel proceedings vis-à-vis the EU, with corresponding uncertainty for the merging parties, to a weakening of the economic-based and "non-political" approach to merger review that is currently in existence.[68]

3.3. Exiting the EU and state aid: new powers and new challenges for the CMA

The previous sections discussed some of the implications of the UK's exit from the EU for antitrust and merger proceedings. The purpose of this section is to consider the implication of exit for state aid scrutiny. As was outlined earlier the EU Commission enjoys the power to scrutinise the compliance of financial assistance given to undertakings by public authorities within the EU with the EU Treaty and for prohibiting aid that puts the recipient at a competitive advantage vis-à-vis its competitors and distorts the functioning of the EU internal market.[69] In 2017 Reader and Stephan illustrated that EU state aid control has on the whole benefitted UK-based businesses, by protecting them from the anti-competitive effects that state intervention in the economy, occurring in other member states, might have had on their competitive position. These commentators highlighted that of around 500 aid cases that the EU Commission examines each year only around 25 concern aid given by the UK Government.[70] On that basis, they suggested that without the EU Commission's scrutiny, it would have been more difficult for British businesses to penetrate other EU markets where indigenous commercial entities might have been in receipt of public resources.[71]

The UK's exit from the EU, however, will mean that UK-granted aid will no longer be subjected to scrutiny on the part of the EU Commission.[72] Thus, at least in principle the UK is going to acquire greater discretion as to how and to what extent public funding should support specific industries, albeit within the constraints imposed on the UK by the WTO Chapter on Subsidies. [73] It is argued, however that any proposal that the UK should become more "proactive" in supportive domestic businesses should be treated with great caution for a number of reasons. First of all, because any move in this direction could damage Britain's reputation as a "business-friendly" jurisdiction.[74] Second, because the adoption of a similar stance could be regarded by the EU as being inconsistent with the commitment to a "level-playing field" which is going to be at the basis of a future relation between the Union and the UK.[75]

Against this background, it is submitted that the UK Government's commitment to give the CMA the power to scrutinise financial assistance addressed to individual firms or economic sectors after Brexit is to be welcomed. It is submitted that entrusting it with an independent, statutory agency is going to reduce the possibility of "irrational subsidies" being doled out just as a result of the "electoral cycle" or of other forms of political pressure.[76] In addition, empowering the CMA to scrutinise aid is

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[68] Id., p. 11. Cf. Speech given by Michael Greenfell (CMA's Executive Director), on 16 May 2018, available at: https://www.gov.uk/government/speeches/a-view-from-the-cma-brexit-and-beyond.
[69] Article 107 TFEU. See, inter alia, case C-493/15, Identi, judgment of 16 March 2017, nyr, para. 26-27; also case C-270/15 P, Commission v Belgium, [2016] ECR I-498, para. 31-32.
[70] Lyons et al., cit. (fn. 27), p. 17.
[71] Ibid.
[72] Lyons et al., cit. (fn. 27), p. 14.
[73] Ibid.; see also Withdrawal Agreement, Article 16(1).
[74] See HM Government Guidance on a no-deal Brexit, "State aid if there is no Brexit deal", available at: https://www.gov.uk/government/publications/state-aid-if-theres-no-brexit-deal/state-aid-if-theres-no-brexit-deal.
[75] Lyons et al., cit. (fn. 27), p. 15.
[7676] Id., p. 15-16.

going to help to achieve consistency with the obligations imposed on the UK by the World Trade Organisation (WTO) regime which, inter alia, imposes a ban on granting "special treatment" of individual companies, including the giving of export subsidies.[77]

In light of the forgoing it is suggested that the creation of a UK state aid regime is going to provide safeguards against undue political intervention in the economy (whether via the provision of subsidies or through preferential fiscal treatment for specific firms). It must however be emphasised that the scrutiny of the CMA is not going to protect UK firms from the competitive pressure coming from non-UK companies that may be receiving aid from the public authorities of the country where they are established. It is argued that to the extent that this outcome is contingent upon the EU Commission's state aid function, only the continuation of the EU state aid framework in this area can guarantee against EU Member States' subsidisation and its non-competitive effects vis-à-vis British-based firms.[78]

It can be concluded that Brexit is going to have a significant and as yet difficult to predict impact on the continued protection of competition from subsidies that distort the good functioning of UK markets. As was discussed above, while the perspective of greater flexibility in boosting national industries that could follow from exiting the EU could seem alluring, it should be emphasised that engaging in financial interventions to the benefit of UK firms could be detrimental to the UK's standing as a "pro-business" jurisdiction as well as to maintaining positive trade relations with the EU.

3.4. Competition policy, Scotland and Brexit: giving with one hand, taking away with the other?

The previous sections illustrated the key consequences of Brexit for the competition policy landscape in the UK. It was argued that the consequences of the UK's exit from the EU will not only be felt by the CMA, which will see its antitrust and merger jurisdiction expand and at the same time will lose access to the ECN's cooperation and coordination mechanisms. Brexit could also have concrete repercussions for the overall competitiveness of the UK economy, since it could potentially pave the way for the UK authorities to embark in more "interventionist" economic and industrial policies, whether via the granting of subsidies or by scrutinising mergers in light of "public interest" considerations. How are these changes going to influence the manner of exercise of the devolved competition powers enjoyed by the Scottish Ministers? It was illustrated in Section 2.2 that the Scottish Ministers have now the power to refer a market to the CMA for an in-depth investigation, jointly with their UK counterparts. Brexit, however, will change dramatically the legal, institutional and policy landscape against which the (albeit limited) devolution of these competition powers had originally been thought through. Consequently, it is legitimate to query to what extent the consequences of the UK's exit from the EU will affect the power of the Scottish Government to make a reference to the CMA jointly with its UK counterparts and its role as competition advocate. [79]

It was illustrated in section 3.1 that the Scotland Act 2016 remained silent on the issue of how and where the Scottish Ministers could discuss whether to ask the CMA to carry out a phase-2 market investigation with their UK counterparts. It is suggested that this question is even more relevant in light of the nature of the mechanisms that allow the interaction between the UK and the Scottish

[77] Id., p. 16.
[78] Id., p. 14-15.
[79] See e.g. HM Government, Frameworks analysis, published on 9 March 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL__Frameworks_analysis_for_publication_on_9_March_2018.pdf.

Governments to occur and which in principle should govern the exercise of these powers.[80] Section 2.2 argued that these arrangements are episodic in nature and lacking in transparency, thereby potentially placing in jeopardy the new powers enjoyed by the Scottish Ministers in light of Section 63 of the Scotland Act 2016.

How is Brexit going to affect this status quo? It is submitted that once the CMA's remit expands, it is queried whether it may become more difficult for the Scottish Ministers to make a case for the investigation of a "typically Scottish" market, both with their UK counterparts and with the CMA. In other words, it might be argued that, as the UK jurisdiction expands and resources remain limited, Scottish Ministers could face additional hurdles as they seek to articulate a case in favour of investigating a market that may be markedly regional with their UK counterparts, whose concerns may instead lie on prima facie restrictive practices impacting UK-wide markets and consumers.

The end of the compulsory notification system, inherent to EU merger control, is also likely to impact on the Scottish Government's new powers in respect of competition policy. Section 2.2 illustrated that the voluntary merger regime provided by the Enterprise Act in this area may not "cope" as well as it has done so far once the EU Commission's exclusive jurisdiction in respect of mergers having an "EU dimension" comes to an end. In addition, the expansion of the scope of application of the UK regime, to the extent that it allows for UK ministers' input in public interest cases, may hinder the position of Scottish Ministers as advocate for competition in Scottish markets. As was illustrated in section 2.2, Part 4 of the Enterprise Act 2002 allows UK Ministers to intervene in merger proceedings on the basis of public interest considerations and can even allow an otherwise anti-competitive merger to go ahead if the "(…) anti-competitive outcome (…) is justified by one or more than one public interest consideration which is relevant."[81]

Scottish Ministers, however, do not enjoy the same power; nor are they afforded any possibility to participate in discussions leading to the decision of their UK counterpart to make a public interest intervention under Section 42 of the Enterprise Act, even when mergers are going to have an impact on local, Scottish markets. It is also unclear whether and how the existing IGR mechanisms could be deployed to facilitate the adoption of these decisions. Just as with Section 63 of the Scotland Act 2016, it can be doubted whether the mechanisms enshrined in the MoU could provide an appropriate forum for the discussion of highly technical and fact-based matters such as the issues arising from a merger.[82]

Moving away from the state aid mechanisms enshrined in the EU Treaties could raise additional questions as to the future effectiveness of the competition powers provided by the Scotland Act 2016. It is acknowledged that the future conferral to the CMA of state aid powers is going to provide much needed scrutiny as regards the legality of direct economic intervention by all UK public bodies.[83] However, it is argued that, once again, the lack of bespoke, well-suited channels of communication between Edinburgh and London ministers could affect the way in which aid may be designed and, after CMA approval, implemented.[84] Accordingly, it is submitted that as UK state aid processes are

[80] See Memorandum of Understanding between the UK and the Scottish Government, the Welsh Ministers and the Northern Ireland Executive Committee, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf . Supra, section 2.2.
[81] Section 45(4), Enterprise Act 2002.
[82] See inter alia McEwen et al., cit. (fn. 10), pp. 198-200.
[83] Speech by Juliet Esner, "Post-Brexit state aid rules in the UK", available at: https://www.gov.uk/government/speeches/post-brexit-state-aid-in-the-uk.
[84] Ibid.

designed, the Scottish Ministers should be recognised a formal role in the proceedings, ranging from a right to make submissions to the CMA to direct involvement in the implementation of financial assistance affecting Scottish markets.

It is concluded that Brexit is going to have a number of unforeseen but significant effects on the powers devolved to the Scottish authorities in the area of competition policy. It was illustrated that the expanding jurisdiction of the CMA, taken together with the potential increase of the UK ministers' discretion, especially in merger cases, could have an adverse impact on the powers conferred to the Scottish Ministers under Section 63 of the Scotland Act. It is argued that until such time as appropriate communication and discussion mechanisms are put in place to allow for competition policy discussions to take place at ministerial level, there is a significant risk that the Scotland Act 2016 reforms in this area might remain ineffective.

4. Where to now? Competition policy and devolution post-Brexit—moving forward in a very uncertain landscape?

The previous sections outlined the key consequences of Brexit for competition policy in the UK and on that basis looked at how these changes could impact on the exercise of the competition powers that have been devolved to the Scottish authorities under the Scotland Act 2016. It was argued that due to the characteristics of the current frameworks for the intergovernmental relations between the UK and the Scottish Governments, there is a concrete risk that the 2016 reforms in this area might remain ineffective.[85] The purpose of this section will be to consider what options might be available to protect the integrity of devolved competences in relation to competition policy.

Section 3.3 discussed the likely implications of Brexit for merger review and argued that as the CMA is more likely to scrutinise transnational mergers in parallel with the EU Commission, it could equally become more probable that UK Ministers could make an intervention in the public interest in individual cases. The UK Ministers' position can be compared with that of the Scottish Ministers. They do not only lack similar powers in this area, but they are very likely to be relegated to the role of "bystanders", even in cases where a merger could have a substantial impact on Scottish markets, since they have no formal consultation rights in the course of the proceedings. Consequently, it is argued that the new powers enshrined in the Scotland Act 2016 could lose much of their effectiveness unless the Scottish Minsters were allowed a more active role in discussions leading to a public interest intervention decisions, in cases affecting Scottish markets.

Section 3.3 illustrated that one of the key changes in the UK competition regime post-Brexit will be the conferral to the CMA of the power to scrutinise state aid granted by UK public bodies. This is undoubtedly a positive development since it will ensure expert and impartial assessment of the compatibility of aid with the competition rules. However, it is not clear whether the Scottish ministers will be granted any right to be heard in the course of the assessment proceedings. It is expected that should the Scottish Government be the "aid originator", the Scottish Government State Aid Team will be allowed to make representations to the CMA.[86] However, it is difficult to foresee whether a similar role will also be recognised to Scottish ministers when the CMA examines the legality of aid granted by UK-wide public bodies: in other words, will the Scottish Government State Aid Team be asked to

[85] Supra, para. 3.1.; see McEwen et al., cit. (fn. 10), pp. 199-200.

[86] See CMA, Draft procedural guidance on state aid notification and reporting, 4 March 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783233/Draft_guidance_on_state_aid_notifications_and_reporting.pdf, p. 6-7.

provide an assessment of the financial assistance's impact on Scottish markets, especially if the latter are "sufficiently distinct"?

Against this background, it is legitimate to ask what can be done to prevent that the powers acquired in the area of competition policy become ineffective. One option could, of course, be to take no action in this area. As a result, it is expected that decisions under Section 63 of the Scotland Act 2016 and any discussion concerning the legality of and opportunity to invoke the "public interest test" in merger cases or to intervene in the economy by means of aid would be taken by means of the "traditional" forms of inter-governmental relations. However the analysis conducted so far indicates that relying on the status quo would not be appropriate to the joint nature of the powers conferred on the Scottish Ministers as regards market investigations. It is argued that since the current framework for inter-governmental relations focuses on conflict resolution and is based on occasional interactions between members of the two Governments it does not provide an appropriate space for discussion and joint-decision making as regards complex economic matters,[87] and consequently lacks a direct channel of communication between Scottish and UK Ministers.

An alternative option might be the negotiation of a new Concordat detailing arrangements for the mutual communication and coordination in matters of competition policy between the UK and Scottish Governments, perhaps along the lines of the one governing foreign policy matters.[88] It is acknowledged that foreign affairs are instead reserved to Westminster.[89] However, it is clear from the Concordat on International Relations that the parties have recognised the joint nature of the respective roles in the implementation of international obligations. Consistently with the mutual nature of their interests in this area, the UK and the Scottish governments have pledged to cooperate closely when fulfilment of international duties impact on devolved policies. [90] This objective is achieved through "full and detailed working level contacts" in this area and to meeting once a year and at the request of either party to review these cooperation arrangements.[91] Also, any conflict is to be dealt via bilateral consultations between the responsible officials. If such conflict cannot be resolved at "working" level, the matter will be taken up by the First Minister for Scotland and the UK Foreign Secretary to the Joint Ministerial Committee only after "an ample opportunity has been allowed for consultation and discussion"[92] between the parties.

It is argued that the Concordat on International relations could offer a model against which to fashion a framework within which to discuss competition policy matters of mutual interest to the UK and the Scottish Government since it provides an explicit basis for working-level contacts through which discussions can continue, along with the occasional high-level discussions occurring in the JMC. It is suggested that a similar framework would allow both administrations to exchange views and, if required, to adopt joint decisions on the basis of the consideration of the relevant evidence and in light of the appropriate expertise. It is therefore suggested that these discussions would provide the Scottish Government with a clear "voice" especially when the UK Government is planning either to

[87] See, mutatis mutandis, McEwen, "Still Better Together? Purpose and Power in Intergovernmental Councils in the UK", (2017) 27(5) Regional & Federal Studies 667, especially pp. 682 ff.
[88] See Memorandum of Understanding between the UK and the Scottish Government, the Welsh Ministers and the Northern Ireland Executive Committee, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf, pp. 43-44.
[89] Id., p. 43.
[90] Ibid.
[91] Ibid.
[92] Id., pp. 43-44.

invoke the "public interest exception" in merger cases or to adopt industrial policy measures that may affect markets north of the border. Thus they would ensure that before any formal decision is taken by Westminster would ensure that all legitimate interests are appropriately taken into account and any complex evidence is assessed ahead of a final determination. It is acknowledged that the Scottish Government can neither require UK ministers to ask for a phase-2 market investigation nor petition the CMA directly to initiate one,. However, it is argued that greater continuity in and a predetermined pathway for these exchanges could enhance accountability and transparency in the way in which the powers enshrined in Section 63 are going to be exercised.

A further alternative model for the adoption of decisions under Section 63 can be found in the Social Security Joint Ministerial Working Group. While the remit of this paper does not permit an in-depth examination of the issues surrounding the devolution of powers in the area of social security, it may be noted that this is another area in respect to which the Smith Commission had called for devolution to the Scottish ministers. Thus, Sections 22 to 35 of the Scotland Act, in giving effect to the Commission's proposal, confer to the Scottish Parliament the power to regulate a number of social security benefits, such as, among others, benefits for the disabled and for carers and payment owed to victims of industrial accidents.[93]

Devolution, however, was limited in respect of other benefits: for instance, the regulation of Universal Credit remains a reserved matter, thereby affecting the Scottish Parliament's ability to intervene in the determination of the rules concerning, for instance, housing benefit.[94] The financing of devolved payments is equally complex and evidences similar linkages.[95] To ensure effective coordination both at policy level and in the administration of individual benefits in specific cases, the inter-governmental relation system in this area was improved and expanded with the creation of a Joint Ministerial Working Group on Social Security.[96] The Working Group provides a forum for discussion and coordination at ministerial level, by acting as a framework for the exchange of information and for the resolution of any "contentious or challenging issues" arising from the transfer and the exercise of powers in this area.[97]

It is suggested that the Joint Working Group provides a potentially promising model for the discussion of complex matters arising from the devolution to the Scottish authorities of policy areas that nonetheless remain interlinked with issues still reserved to Westminster. It is submitted that to the extent that its membership draws from among Scottish and UK ministers and is complemented by officials at the respective offices for Work and Pensions, the Joint Working group can provide much needed space for informed discussion in areas within its remit and not just for the resolution of conflicts between the UK and the Scottish governments.[98] It therefore seeks to avoid any adverse spill-over effects and ensures the observance of principles such as the "no-detriment" principle", set out by the Smith Commission.[99]

In light of the forgoing analysis, it is legitimate to query whether the Joint Working Group model discussed above may represent a blueprint for the creation of a framework within which complex

[93] Scotland Act 2016, Section 22; see also Explanatory Notes to Section 22, para. 164-165.
[94] See e.g. Mullan, ""Devolution of social security", (2016) 20 Edin L Rev 382, p. 384-385.
[95] For a summary of the Budget for 2019/2020 see Derek McKay's Budget Statement 2019/20, 12 December 2018, available at: https://www.gov.scot/publications/budget-statement-2019-20/.
[96] Ibid.
[97] See: https://www.gov.scot/groups/joint-ministerial-group-welfare/.
[98] See e.g. ibid.; see also, mutatis mutandis, and by comparison, Birrell, "Intergovernmental relations and political parties in Northern Ireland", (2012) 14 BJPIR 270, pp. 278-279.
[99] Mullan, cit. (fn. 94), p. 387.

discussion of competition policy matters could take place, especially with a view to exercising the joint decision-making powers enshrined in Section 63 of the Scotland Act 2016. It is acknowledged that in the case of social security the boundaries between devolved and reserved matters was altered by the Scotland Act 2016, with powers in this area being transferred in a number of important respects to the Scottish authorities.[100]

By contrast, Section 63 of the same Act envisages a "new" form of devolution where power is jointly exercised by ministers in London and Edinburgh and as such, it is more limited. However, it is argued that many of the demands that the Joint Working Group framework seeks to address, such as, inter alia, the need for coordination and for a space for informed discussion on complex matters straddling between the jurisdiction of the UK and Scottish authorities,[101] are also present in the context of Section 63 decisions and, more generally, of competition policy discussions especially post-Brexit. Accordingly, it is submitted that the creation of a forum akin to the Social Welfare Joint Working Group could provide a further alternative to the "traditional" IGR frameworks in the decision-making in this area, due to the regular nature of its meeting, its less "conflict-focused" outlook and the breadth of its membership.

The discussion conducted so far has attempted to identify an alternative to the existing IGR mechanisms that could be a "better fit" for joint decision-making between the Scottish and UK ministers, especially when invoking Section 63 of the Scotland Act 2016. However, it is clear from this discussion that none of the options presented answers a further question, namely whether and how the Scottish authorities should build official relationships with the CMA. As was highlighted in section 2.2, UK ministers enjoy a number of powers vis-à-vis the competition authority, ranging from the power to refer a market for investigation to it to the possibility of intervening in merger proceedings for public interest reasons. By contrast, the Scottish ministers can only seek out the CA's intervention in the investigation of specific markets with the agreement of their Westminster counterparts. Furthermore, they lack the power to intervene in merger cases on the basis of public interest considerations.

It is suggested that the above questions should not be considered in isolation but should be linked to a broader debate concerning, on the one and, the role of the CMA post-exit and on the other hand, the proposed creation of a consumer body for Scotland, Consumer Scotland. In respect of the former issue, in February 2019 the Chair of the CMA issued a set of recommendations for future reform of the functions of the agency. He called for the creation of a duty to treat consumers' interests as paramount in the exercise of all of the CMA's powers.[102] Furthermore he proposed that the CMA should have more efficient powers when conducting market investigations, such as the power to impose interim remedies in the interest of consumers.[103]

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[100] See inter alia McEwen, Welfare Interdependence and Intergovernmental Relations after Further devolution, evidence to the Scottish Parliament Welfare Reform Committee inquiry into the Future Delivery of Social Security in Scotland, available at: http://www.parliament.scot/S4_Welfare_Reform_Committee/Inquiries/Nicola_McEwen.pdf, p. 3.

[101] See e.g. Birrell and Gray, "devolution: the social, political and policy implications of Brexit for Scotland, Wales and Northern Ireland", (2017) 46(4) Jnl Soc Pol 76, especially pp. 773-774.

[102] Letter of Lord Tyrie to Andrew Clark MP, Secretary of State for Business, Enterprise and Industrial Strategy, 21 February 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf; see especially p. 9-11.

[103] Id., pp. 13-16.

The latter question refers to parallel developments in Scotland, where the Scottish Government initiated legislation[104] in the Scottish Parliament with a view to creating a new body responsible for championing the interests of consumers through the exercise of investigative powers[105] and the provision of guidance to Scottish public bodies as to how they should fulfil their obligation, also envisaged by the Bill, to take consumers' interests into due account in their functions.[106]

It is acknowledged that the above reforms have yet to take effect. However, the proposed expansion of the Scottish Government's consumer protection agenda and, in parallel, the calls made by the CMA to acquire a broader responsibility vis-à-vis consumers in all its work raise important questions as to how the relationship between the CMA and the new Scottish agency should evolve, in the broader context of the framework enshrined in the Competition Act 1998, the Enterprise Act 2002 and the Scotland Act 2016. It is argued that it is likely to be necessary to create official channels of communication and discussion between the Scottish Government, Consumer Scotland and the CMA so as to avoid duplication of work and ensure efficient coordination, especially in the course of market investigations and studies.[107] It is submitted that in whatever form this objective is attained, it will be indispensable to secure transparency and accountability and overall effectiveness in the way in which consumers' interests are considered and placed at the heart of promoting competition and improving the functioning of markets.

In light of the forgoing analysis, it is concluded that, as the UK exits the EU, enhancing the efficacy of the mechanisms for inter-governmental relations between the Scottish and UK Governments and creating channels for the communication between the CMA and the Scottish ministers will be essential for the powers enshrined in Section 63 of the Scotland Act 2016. It was argued that in a post-Brexit scenario it may become indispensable to design new channels for communication and discussion between UK and Scottish Ministers that are less conflict-driven and more collaborative as well as less occasional.

5. Conclusions: the future of the competition policy powers devolved with the Scotland Act 2016—a reality or just an idea?

It is still difficult to gauge the impact of Brexit on the functioning of the UK framework for the application of the competition rules. This paper sought to identify some of the possible implications of the UK's exit from the EU for the way in which the antitrust and merger rules and enforced and more generally for the way in which genuine rivalry is preserved in the UK. It was submitted that as the scope of the domestic competition law and associated arrangement expands, UK ministers could see their ability to intervene in competition decision-making widen. This might be the case in relation to the review of mergers, where ministerial involvement is already possible via the public interest test.

The conferral to the CMA of state aid scrutiny powers is welcome since it subjects public financial intervention that impacts on competition within the UK to independent scrutiny. Nonetheless, it is still unclear how aid is going to be assessed. More generally, legitimate doubts could

[104] Consumer Scotland Bill, introduced on 6 June 2019, available at: https://www.parliament.scot/S5_Bills/Consumer%20Scotland%20Bill/SPBill49S052019.pdf.
[105] See sections 2-4; see also sections 8-12 of the Bill.
[106] See sections 20-22 of the Bill.
[107] See e.g., mutatis mutandis, the model offered by the Partnership on Health and Safety in Scotland: http://www.hse.gov.uk/scotland/partnership.htm. See also Memorandum of Understanding, available at: https://www.gov.scot/groups/joint-ministerial-group-welfare/.

still be raised as to whether the arrangements proposed by the CMA itself for the assessment of aid, especially procedurally, might be fully consistent with tenets of independence on its part.

This paper also investigated the question of whether and how Brexit might affect the recently acquired, limited powers that the Scotland Act 2016 conferred to Scottish Ministers as regards market investigation references. It was argued that the role of the Scottish Ministers could actually be very weak in a number of circumstances: in relation to the UK Secretary of State's power to make a public interest intervention in relation to a merger affecting Scottish markets, because no formal role is recognised for Scottish Ministers. In the context of the new state aid function that is going to be performed by the CMA, since it is not at all clear whether Scottish Government members might have a say in the course of the proceedings leading to the approval of UK aid affecting the Scottish economy.

It was acknowledged that it is still unclear how the face of UK competition policy might evolve after Brexit. However, it was argued that the exit from the EU is going to be a watershed moment for the existing competition arrangements, since it will lead to a substantial transformation of the CMA's remit and approach to decision-making. It will also very likely to affect the existing devolution settlement and the way in which the UK and the Scottish authorities could interact in this field. The paper illustrated how the current arrangements governing intergovernmental relations between Edinburgh and London are put under significant strain by a "new generation" of devolved powers, of which the new competition policy competences form part.

Accordingly, it was argued that new IGR rules and processes may be required to accommodate the reality of these new powers, such as the power provided by Section 63 of the Scotland Act 2016, which do not "fit neatly" with the reserved/devolved dichotomy and, as a result, with the conflict-focused nature of the existing approach to IGR. It was suggested that in the area of competition policy it might be necessary to more to a different type of intergovernmental interaction based on coordination and consultation and on continuing discussion between the UK and the Scottish ministers. Models such as the one offered by the Concordat between the UK Government and the devolved administrations on Foreign Policy or by the Interministerial Working Group on Social Welfare may provide a solution to these questions, to the extent that they are less conflict-focused and provide a venue for more continuous discussion.