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The construction of a competition law framework in the United Kingdom and the future of competition policies after Brexit

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MINI MÉMOIRE

THE CONSTRUCTION OF A COMPETITION LAW FRAMEWORK IN THE UNITED KINGDOM AND THE FUTURE OF COMPETITION POLICIES AFTER BREXIT

INTRODUCTION

1. Is competition a reality or just science fiction? A while before, Warren Hough, an American investigative journalist, published an article in which he reported that in November 1992, Brian Shepard, an FBI agent who had been investigating a case of corporate espionage and sabotage, had secretly wired the offices of Archer Daniels Midland (ADM), an American conglomerate and one of the world's leading food manufacturers. 'What we're looking for is a mole', Shepard was quoted as saying. What they found was more like 'a viper's nest of fraudulent schemes, price fixing and consumer fraud involving most of the world's major food companies'. After four years of investigation, ADM pleaded guilty to the criminal offence of price manipulation and paid a fine of approximately $100 million. However, the surrender of ADM was only 'the first thread in a global web of multinational corporations that tout and value "free trade" while joining forces against their customers in cartels and conspiracies to manipulate prices,' according to a former New York state prosecutor quoted by the reporter.

2. A variety of economists have tried to theorise competition: Adam Smith was one of the first to propose a law of 'supply and demand', which is supposed to balance the price of a product or service. In response to that praise of competition, John Stuart Mill, a true advocate of utilitarianism, leads us to consider that competition is not always profitable for everyone. When competition fails or is distorted, it can lead to the destruction of jobs and the monopolisation of resources by a small number of people. In this case, the State must interfere to put an end to what we would call today an 'abuse of dominant position'. We will not be able to dwell on the fascinating theses of Schumpeter, Milton Friedman or Galbraith, which have nourished the doctrine of competition policy.

3. It must be said that the United Kingdom was quite pioneering on the issue of resource hoarding in the past in the form of conspiracies and monopolies. Yet the economic power of the US has proved to be both a driving force for the country and a potential hindrance; the risk of monopoly going hand in hand with the development of companies large enough to take over an entire market.

4. The Americans took a decisive lead in this field with the first federal law, known as the Sherman Act of 1890, which is still in force, prohibiting cartels and abuses of a dominant

position. Its application, reinforced in 1914 by the Clayton Act, which instituted merger control, and by the Federal Trade Commission Act, proved to be highly irregular: – from waves of intense investigations at the beginning of the 20th century, with the first large-scale dismantling of giants (trusts), such as American Tobacco; a hiatus after the 1929 crash until the end of the Second World War; then a new surge from the 1960s until the Reagan years, where IBM was in the spotlight; Clinton took on Microsoft and the big cartels; Bush II tempered ardently; Obama weighed cautiously; before 'America first' and who knows.

5. While it is commonly believed that the United States leads the way in antitrust control, it would be wrong to assume that the European Union is not also a great source of law for competition law. With big, industrialised countries like Germany, the UK, Italy, Spain and France, competition litigation is abundant. With Brexit, the European Union loses a major source for establishing its competition case law. Much uncertainty remains as to the path the UK will take in defining its competition policy in the coming years. In the first chapter, I will outline the development of a national competition law, which was quickly followed by a progressive integration of the European law and jurisprudence. I will then address a more juridical approach to the situation by outlining retained EU law following Brexit and trying to outline the short and medium-term future for competition policy in the UK. I will conclude that, as a result of its good integration of EU competition rules, the UK will not immediately shift course, but rather remain consistent with what has been done over the last thirty years. Rather, the uncertainties are about competition policy over the next ten years, which appears to be very business-centric, at the expense of the consumer.

Chapter I — The Development of a Modern competition Law in the United Kingdom

6. In Europe, Competition law emerged throughout the twentieth century. The early stages of its development have been influenced by the American experience – although the first legal texts that came into force were adapted to respond to the concerns and threats prevailing on the old continent.

7. The competition between companies is assessed with regard to a geographical element and a temporal element, called ‘market’. The detention of a monopoly, of any kind, represents a risk for the sector not to evolve. Other restrictions on competition also exist, in particular anti-competitive agreements. Their nature can be diverse and: they may concern price fixation, conditions of sale, distribution or even manufacturing.

Section A — From Monopoly Prevention to an Active and Regulation Role

8. Quite early on, questions arose about whether the government should intervene actively in the market regulation process. This challenges the cliché that merchants, traders and other 'entrepreneurs' as we call them today, once enjoyed absolute and unhindered freedom, at the great expense of the consumer.

9. By the eleventh century, when financial giants were not even existing and petroleum was still under the soil, market regulation was mainly focused on the speculation some merchants might undertake by buying commodities and then selling them back in time when they had increased in value: this practice was known as 'forestalling'. The earliest responses were therefore mainly directed at price regulation. King Henry VIII had indeed insisted on the risk for his subjects of suffering from fluctuations in the price of products.[1]

10. A second step in the development of competition law in the UK came from the awareness that monopolies can be harmful for consumers and, more generally, for the national economy. Much of this awakening can be attributed to the American experience.

11. Whilst the United Kingdom may not have been the first country to introduce antitrust legislation, there is no doubt that England's view of trade and the market influenced the drafting of the *Sherman Antitrust Act 1890.*[2] This act provided an answer to the growing fears of Americans, and most particularly the United States federal government. Trusts, or the abuse of substantial market power, were gaining such prominence that the government seemed to be losing control of the market, and more generally of its legislative framework.

[1] Wendell Herbruck, 'Forestalling, Regrating and Engrossing' (1929) 27 Michigan Law Review 365, 365.
[2] George J Stigler, 'The Origin of the Sherman Act' (1985) 14 The Journal of Legal Studies 1, 7.

12. But the first modern developments of competition law in the UK – through dedicated statutes – took time. Furthermore, both the genesis and the philosophy behind the legislation are very different from what inspired the Sherman Act. The Great Depression of the 1930s, and the Government's post-war price control policy, had led to a concentration of certain industries, including cement, which prevented the emergence of other actors by controlling the upstream distribution chain.[3]

In light of this situation, the *Monopolies and Restrictive Practices (Inquiry and Control) Act* was introduced in 1948.[4] It gave the Government the power to refer to a commission to investigate situations of 'a) monopolies as generally understood (i.e. monopolies of scale) in the supply of specific goods, (b) restrictions in the supply of specific goods, and (c) general restrictive practices in the supply of goods'.

This commission, which underwent numerous name changes (became known as the *Monopolies and Merger Commission* – MMC – and later the CMA – *Competition & Markets Authority* – since 2014) played a significant role in producing reports and guidelines that served to raise public awareness of the need to regularise markets and control monopolies. Many commentators at the time thought that the Act did not have the desired effect, for two reasons. The first being that the legislation did not, from its entry into force, make it possible to regulate mergers between companies. Therefore, controlling abuse of dominant positions or even monopolies in advance was not possible until the law was amended in 1965. Besides, and this might make people smile nowadays given the profusion of such processes, investigations carried out by an administrative body were considered to be too arbitrary. Thus, the act itself was drafted in very vague terms, leaving this administrative body in charge to define key concepts such as 'monopoly' and 'public interest'.

13. In 1956, the *British Restrictive Trade Practices Act* was introduced. While its content was not groundbreaking, it brought into English law a procedure for controlling and monitoring markets which was quite innovative for its time. The Act provided for a continuous and extremely powerful check over agreements between companies for the supply of goods. All agreements referring to specified matters between persons carrying on business for the

[3] William J Brown, 'Monopolies and Restrictive Trade Practices in the United Kingdom' (1959) 14 The Business Lawyer 504, 504,505.

[4] Some authors argue the Act also contained a social justice objective. It is true that, at the time, competition law was widely seen as a genuine way to achieve full employment – see Andrew Scott, 'The Evolution of Competition Law and Policy in the United Kingdom' (London School of Economics and Political Science, Law Department 2009) SSRN Scholarly Paper 6 <https://papers.ssrn.com/abstract=1344807> accessed 5 April 2022.

production or supply of goods have to be registered to a public register.[5] In 1973, the *Fair Trading Act* extended this registration requirement for business-to-business agreements to cover services, introduced the *Office of Fair Trading* (OFT) and defined the 'public interest' test, still used by the CMA in its analysis of anti-competitive practices.

14. However, 1973 will not be particularly noted for this, essentially, ordinary Act. The same year saw a new revolution and unprecedented modernisation of competition law, as the United Kingdom joined the European Communities.

15. The principles of free movement and free competition are the 'two pillars of the common market'.[6] As a core component in the construction of the European Union, competition law pursues two objectives.
The first is consistent with what UK competition law has always sought to achieve, namely, to ensure the proper functioning of the market so that effective competition can take place. Competition law aims to ensure that prices are set freely (or at least as a result of open competition), and that entry and exit from a market are unrestricted.
Lastly, European competition law claims to pursue a policy of market integration towards the constitution of the single European market.[7]

16. As in France, Germany and other highly industrialised countries, EU law has had considerable influence on competition policies in England. By joining the European Communities on 1 January 1973, EU competition rules were given direct effect.[8] In international and European law, the British legal system is a dual system. In competition law, this resulted in establishing two 'parallel' competition regimes.

17. European competition law is mostly articulated on articles 85 and 86 of the Treaty of Rome (1957), which became 81 and 82 with the Treaty establishing the European Community, then 101 and 102 of the TFEU.

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[5] SR Dennison, 'The British Restrictive Trade Practices Act of 1956' (1959) 2 The Journal of Law & Economics 64, 66.
[6] *Mélanges en hommage à Michel Waelbroeck. (2 vol.)*, vol II, p 1477 (Bruylant) <https://www.lgdj.fr/melanges-en-hommage-a-michel-waelbroeck-2-vol-9782802712527.html> accessed 24 April 2022.
[7] Marie Malaurie-Vignal, *Droit de la concurrence interne et européen* (Sirey 2019) para 52.
[8] Jeremy Lever, 'The Development of British Competition Law: A Complete Overhaul and Harmonization' (Wissenschaftszentrum Berlin für Sozialforschung (WZB) 1999) WZB Discussion Paper FS IV 99-4 22 <http://hdl.handle.net/10419/51159>.

Article 86 prohibits '*agreements […] and concerted practices which may affect trade between Member States and which directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*'. Article 86 prohibits all forms of abuse of a dominant position.

18. This 'dual system' of competition was seen by the former Labour government of Tony Blair as inconsistent and as detrimental to the competitiveness of the UK internal market.[9] While the European Commission had exclusive authority to grant exemptions under these articles, the UK national courts were able to apply the rules of articles 85 and 86, for instance, by invalidating agreements between companies which violated the Treaty provisions.[10]

19. Still, the European rules on competition have brought valuable perspectives to the British market, which was in the process of transforming itself into a highly structured economy based on services, especially in the field of finance.[11] Perhaps the most important contribution of EU law to UK competition policy has been the preventive approach to competition violations.
The Treaty confers exclusive competence to the European Commission in merger control. For instance, if a merger or takeover of a company by another company arises and has a European dimension, the Commission will have to assess the merger *ex-ante*. Naturally, where there is a threat to national security, the domestic regulator (in this case, the Merger Control Regulation) may object to the merger and take appropriate actions. Until then, the United Kingdom's merger control regime was not very efficient. It left much room for political discretion, as merger reviews were initiated at the request of the Secretary of State.[12] Lastly, the reviews were always carried out *ex-post*, i.e. once the transactions had been completed, which virtually eliminates

[9] Ali Shalchi and Federico Mor, 'The UK Competition Regime' (2021) s 2.1 <https://commonslibrary.parliament.uk/research-briefings/sn04814/> accessed 28 November 2021.
[10] Lever (n 8) 22.
[11] Office for National Statistics, 'Changes in the Economy since the 1970s' (Office for National Statistics 2019) fig 4 <https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/changesintheeconomysincethe1970s/2019-09-02#output-by-sector> accessed 24 April 2022.
[12] Scott (n 4) 11.

the possibility of opposing a merger that is harmful to competition.
Besides, European law uses a significantly different approach to the detection of anti-competitive behaviour, as it does not focus on the technical aspects of the contentious behaviour (such as their form), but rather on their consequences on the market or their desired purpose. As discussed in section 14, through the example of the British Restrictive Trade Practices Act, the control of anti-competitive practices was based on the legal nature of agreements rather than on their effects.[13]

20. The Competition Act 1998 became one of the first pieces of legislation passed by the Labour government of Tony Blair.[14] It enshrined the modernisation of British competition law, partly facilitated by European law and its extensive case law. The two main provisions, Chapter 1 and Chapter 2, contain the same prohibitions as Articles 101 and 102 TFEU, which makes it, in a certain sense, a law of transposition and harmonisation of national law with European standards.

21. It also grants extensive powers to sector regulators (telecoms, electricity, public transport, etc.), making them now competent not only to obtain information, but also to initiate administrative investigations, and to impose penalties for alleged breaches of competition rules. This change is in line with a general trend in Europe to make market control more reactive and efficient with the help of administrative authorities. The heaviness of Common Law and the judicial route may, it is true, seem totally incompatible with the swiftness of markets imposed by spectacular globalisation.[15]

[13] Lever (n 8) 23; Michael Utton, 'Going European: Britain's New Competition Law Foreign Antitrust' (2000) 45 Antitrust Bulletin 531, 533.
[14] Shalchi and Mor (n 9) s 2.1.
[15] Nor are these powers free from criticism. On the procedural side, the extensive powers have been the subject of concern by many commentators. Moreover, enforcement of Chapters I and II of the Competition Act 1998 by the authorities remains rare. This may in part be explained by the risk of "over-enforcing" competition law, and harming competition in the long run – see Giorgio Monti, 'Utilities Regulators and the Competition Act 1998' in Barry Rodger, *Ten years of UK competition law reform* (2010) para 7 <https://www.biicl.org/files/4599_utilities_regulators_and_the_competition_act_1998_final.pdf>.

Section B — European Construction and National Market Transformation

22. Starting in the 1970s, the composition of the British market changed substantially. As industry began to lose importance, the service sector began to play an increasingly important role in the national GVA (Gross Value Added), rising from 56% in 1970 to 80% in 2016.[16] The United Kingdom will fully embrace this change. With its strong innovation capacity in the fields of healthcare, automotive, financial services, information technologies and energy, Britain's economic power has been firmly grounded in the European Union. As Britain forms part of the 'big four', alongside France, Germany and Italy, its vision of competition will influence the European Union's, and reciprocally.

23. During the 2017 French presidential campaign, Emmanuel Macron, who was then a candidate, was frequently attributed similar intentions to those of Margaret Thatcher, notably on privatisation.[17] It should be acknowledged that the multiple privatisation carried out by the British government in the eighties left their mark, and seems to constitute a guide to everything that should not be done in other European countries.[18] In fact, maybe to such an extent that a reversal seems to be on the way.[19]

24. In what is for many people the culmination of wild liberalism and destruction of public service, competition law, in its British manifestation, has played a key role in achieving those various privatisation.[20]

25. On the one hand, because these privatisation has always been justified by a competitive factor of the companies and the market in question.[21] In most instances, these companies were alone in carrying out their activities in the market. In addition, even when the market was said

[16] Office for National Statistics (n 11) fig 4.
[17] Matthieu Pechberty, 'Emmanuel Macron a des privatisations dans ses cartons' *BFM BUSINESS* (Paris, France, 10 May 2017) <https://www.bfmtv.com/economie/entreprises/emmanuel-macron-a-des-privatisations-dans-ses-cartons_AN-201705100136.html> accessed 21 February 2022; Amine Bakhti, 'Quelles privatisations sous la présidence Macron ?' (*Vendredis de la Colline - Les Echos*, 21 June 2017) <https://www.lesechos.fr/idees-debats/cercle/quelles-privatisations-sous-la-presidence-macron-1010852> accessed 24 April 2022.
[18] Jacques Freyssinet, 'Quels enseignements de la privatisation du rail ?' (2020) 169–170 Chronique Internationale de l'IRES 30.
[19] 'New Public Body to Take over All Trains and Track in Biggest Reforms since Privatisation' (*The Independent*, 20 May 2021) <https://www.independent.co.uk/news/uk/politics/great-british-railways-privatisation-trains-b1850207.html> accessed 25 April 2022.
[20] 'United Kingdom Global Forum: The Role of Competition In Privatisation' (1998) 26 International Business Lawyer 508, 508.
[21] 'Privatisation: The Good, the Bad, and the Ugly' *The Guardian* (12 April 2013) <https://www.theguardian.com/politics/2013/apr/12/privatisation-good-bad-ugly> accessed 25 April 2022.

to be open, it was so under conditions that made it materially impossible for real competitors to emerge from the monopoly companies. Finally, those privatisation has encouraged the creation of sectoral regulatory bodies, which many academics consider to be a true 'English model' of utility regulation.

26. In 1984, the Telecommunications Act opened up the telecommunications market and initiated the privatisation of British Telecom. This shift in the telecommunications sector also saw the creation of an independent economic regulator, *Oftel*, which was exclusively dedicated to the sector. Surprisingly, the design of these regulators is based on a customer-centric approach.[22]

Regulators are also keen to stimulate competition in the markets they regulate, since otherwise extra-dominance would become unavoidable. Such administrative bodies also offer a strong asset in infrastructure dependent markets (the so-called *essential facilities* or *essential infrastructure* theory).[23] Quite often, cost-effective access to this infrastructure (e.g. internal telephone exchanges, gas or electricity distribution network) is key for competitors to emerge. A good illustration of this was the forced break-up of British Gas in 1997. By then, British Gas had already been privatised, but still held control over gas transportation and storage. Several companies interested in the retail gas supply market argued that British Gas was unwilling to provide them with a level of service that was necessary to ensure the supply of gas, not to mention at a reasonable price. Unquestionably, the position of British Gas was not compatible with the open market situation sought by the Government; as the company was in both the transport and sale business, it became necessary to divide the two activities.[24]

[22] Utilities Act 2000, s 6(3)(4)
[23] Malaurie-Vignal (n 7) para 642; European Commission, 'Essential Facility - Concurrences' <https://www.concurrences.com/en/dictionary/essential-facility> accessed 24 April 2022.
[24] 'United Kingdom Global Forum: The Role of Competition In Privatisation' (n 20) 510.

Chapter II —The Brexit Crisis

27. The late 2010s brought a major shake-up in Western European economies. They were hit, among other things, by a massive and wild '*Uberisation*' of certain parts of the tertiary sector. These were also the years when public authorities realised how tech giants such as Apple, Google, Amazon or Facebook were powerful, both in our economies and in our democracies.

28. These two movements have taken up much of the debate in all EU member states, including the European Commission.

29. Nevertheless, to say that the Brexit has not been widely discussed in the media would lack common sense. But as often occurs, it seems that competition law issues have been of little interest to commentators and the general public. Quite often this area, which affects our living conditions, our buying power, and our relationship with businesses, is left to the economists and lawyers. Nevertheless, it is clear that the UK has made 'major contributions' to EU law, particularly in the areas of taxation, but especially in merger control.[25]

30. From a European standpoint, the United Kingdom's withdrawal is a watershed. Despite its geographical distance making it a special member in the minds of many, the European Union is losing a great contributor of ideas – we will certainly be losing in vitality of EU law. As for the British, how much will they lose when they leave? Or rather, what will they keep in terms of competition law from their 47 years of membership of the European Union?

[25] Giorgio Monti, 'The United Kingdom's Contribution to European Union Competition Law 2017 Symposium Issue' (2016) 40 Fordham International Law Journal 1443, 1465.

Section A —Retained E.U. Law and its Influence

31. The UK did not leave the EU abruptly, nor did its integration. As we saw in above the philosophy of the European Union has gradually been implemented and the case law of the Court of Justice of the European Union has also been followed most of the time.

32. When the Brexit was discussed, the agreements between the European Union and the United Kingdom frequently featured issues regarding trade, customs, free movement of goods and, of course, free movement of persons. Yet, competition law has not been a major topic for the Commission; there is little reason for the EU to be concerned about the competition policy the UK chooses to adopt in the next few years.

33. The 1998 Competition Act is closely aligned with the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Therefore, as the provisions of EU law have been transposed into national law, there is currently no risk that these articles will disappear or lose their useful effect.

34. But, like many acts transposing EU law into national law, the Competition Act 1998 contained provisions for the interpretation of competition rules by judges. Section 60 of the Act required judges to apply the UK competition rules in a manner consistent with EU case law. However, this obligation ended on 1 January 2021, with the entry into force of The Competition (Amendment etc.) (EU Exit) Regulations 2019. In addition, judges can no longer refer questions of interpretation to the Court of Justice of the European Union, which used to be the second most important source of EU competition law. Paradoxically, this great loss has been little documented in the reports and papers published about the Brexit. As for case law, the addition of a subsection 60(a) to the Competition Act 1998, which gives judges the ability to deviate from EU competition case law is a small revolution.

35. Given the similarity between the wording of Articles 101 and 102 of the TFEU and that of Chapter 1 and Chapter 2 of the Competition Act 1998, some common sense was required to avoid a ‘revolution’ in competition law sought by the supporters of a ‘hard Brexit’. For all intents and purposes, it is worth remembering that such a situation is anything but desirable,

both from a consumer and a business perspective.[26] Such a scenario would only result in major uncertainties and instabilities in interpreting and applying the law, and would have required a 'transition period' – should it be called such – of several years before a progressive stabilisation.

36. I think that, in the view of many commentators, it is preferable, in the short term, for the UK jurisdictions to retain some consistency with the work that may have been done during the United Kingdom's membership of the European Union.[27]

37. Another factor of legal certainty concerns block exemptions. Block exemptions are a mechanism in Community law that allows for the exemption of contracts, and more broadly any agreement between companies that would normally fall under the scope of Article 101 TFEU. To do so, such agreements need to meet certain conditions or deal with specific areas.
Government confirmation of its intention to retain existing block exemptions was hardly a surprise: there were no concerns about the Brexit on this point.[28] For it seemed, in any case, rather unlikely that the block exemptions would (or even could) be abolished almost overnight. Indeed, it seemed unlikely that the UK would adopt an even stricter competition policy after leaving the EU; all commentators logically expect the opposite to happen.
And finally, because the abolition of these agreements would have a significant effect on the UK economy. Some industries, notably transport, motor vehicle distribution and even technology transfer, have been built on the basis of these block exemption regulations. Removing them would be tantamount to cutting them off and imposing on them huge transformation and restructuring costs, or even endangering the activities concerned, which depend on the existence of such block exemptions.

[26] Martin Kettle, 'This Is No Normal Transition of Power. It's a Hard Brexit Coup' *The Guardian* (25 July 2019) <https://www.theguardian.com/commentisfree/2019/jul/25/power-brexit-boris-johnson-radical-conservative-party> accessed 25 April 2022.
[27] 'Implications of Brexit on UK Competition Law | Perspectives & Events | Mayer Brown' <https://www.mayerbrown.com/en/perspectives-events/publications/2021/04/implications-of-brexit-for-uk-competition-law> accessed 30 November 2021.
[28] The draft for the *Vertical Agreements Block Exemption Order* (VABEO) was recently published by the CMA and aims to replace European VBER instrument. While the guidance is still pending, commentators fear potential "difficult" divergences. The CMA launched a consultation on the guidance to accompany businesses in this transition – see 'Mind the Gap: New UK Rules on Vertical Agreements Confirm a Departure from the EU Approach | LinkingCompetition | Blog | Insights | Linklaters' <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/february/mind-the-gap_new-uk-rules-on-vertical-agreements-confirm-a-departure-from-the-eu-approach> accessed 25 April 2022.

38. As for merger supervision, which was once a quasi-exclusive competence of the European Commission, it now falls to the CMA, which is now responsible for all anti-competitive practices that affect the national market and consumers.[29]

39. As far back as 2017, the idea that new responsibilities could be given to the CMA was already raising questions and even puzzling the authors of a report on competition law after Brexit.[30]

40. In the words of the CMA's chairman, Lord Tyrie, the authority is sailing somewhat blindly, and does not really know where this large allocation will take them: 'In a steady state post Brexit, with or without a deal, that will probably enable us [the additional £20 the CMA had been given] to function to a level that would be acceptable to this Committee, Parliament and the public. […] This is uncharted territory; we cannot be absolutely sure.'[31]

41. Even today, it is too early to say whether the CMA has the material capacity to absorb these new missions. It would be harsh to assume that one can predict the fate, but this situation is similar to the one of the telecom regulator. In 1983, a report estimated its annual operating budget at £1.5 million, with a staff of 50 full-time people. Only a few years later, it had more than 230 people working for it, with an operating budget of nearly £8 million.

42. Hence, for the short term, we know that the UK is expected to maintain some consistency with EU law. This is comforting: first, for individuals, who will not see the market suddenly deregulated. On the other hand, for businesses, which will not be forced to adapt their commercial practices abruptly – which would entail a transformation cost, which will de facto be felt by the final consumer.

43. Nevertheless, future of competition policies in the UK lie in the medium to long term.

[29] Shalchi and Mor (n 9) 3.
[30] Sir John Vickers, 'Conclusions and Recommendations' (Brexit Competition Law Working Group 2017) para 10.6 <https://www.bclwg.org/BCLWG-Conclusions-and-Recommendations-Final.pdf>.
[31] Lord Tyrie, Oral evidence: Work of the Competition and Markets Authority 2019 28 Q31; Shalchi and Mor (n 9) para 2.3.

Section B — The Brexit Aftermath

44. It is unclear where the UK is heading in terms of competition. The Brexit process, although completed, now leaves room for a period of adjustment, made difficult by the Covid-19 crisis, and then by the geopolitical turmoil that Europe is experiencing. Times are therefore more complicated than Brexit supporters could have imagined in 2016.

45. But in attempting to predict the future of competition law and policy in the UK, two elements must be taken into consideration. The first is the economic composition of the UK. In these times of uncertainty, any government will tend to favour the industries that are already in place. Therefore, this will be a good indicator to analyse the market structure that the UK Government will seek to preserve through its competition law reforms. The second element to take into account is a cross-border element. Although the UK has left the European Union, it is still close to Europe. As a result, Europe will remain a privileged market for British companies, which already have a massive presence throughout the continent. It is therefore likely that the UK will draw on the successes, but also the failures, of EU governments in setting future competition policies.

46. First, regarding the market structure, the UK is the most advanced country in Europe when it comes to the creation of digital start-ups.[32] UK unicorns, as they are called, have penetrated the European market exponentially: Revolut, Checkout.com, Deliveroo, JustEat, Skyscanner, Transferwise, and other lesser-known start-ups for professionals.[33]

47. Recently, the Commission, as well as national competition authorities, have apparently been focused on the regulation of digital platforms. Proof of this is the *Digital Market Act* recently passed by the European Parliament. This text, which is the result of several years of work, aims to regulate the power of the digital giants. It takes a preventive approach and requires large platforms to interoperate with each other in order to limit the abuse of dominant

[32] Robert Lea Industrial Editor, 'British Digital Start-Ups "Are Worth $1 Trillion"' <https://www.thetimes.co.uk/article/british-digital-start-ups-are-worth-1-trillion-9xzl0wqft> accessed 25 April 2022; Nadeem Badshah, 'More than a Third of Europe's Fastest-Growing Tech Firms Are in UK – Study' *The Guardian* (10 June 2019) <https://www.theguardian.com/technology/2019/jun/10/more-than-a-third-of-europes-fastest-growing-tech-firms-are-in-uk-study> accessed 25 April 2022.

[33] The statistics exclude the European headquarters of the tech giants (Facebook, Google, Uber, IBM), which are generally located in London.

positions.[34]

48. In any case, the UK will not go down this road. In the short to medium term, the UK's economy and international standing depend on the digital economy. It would be very difficult and potentially damaging to the UK economy to impose such a restrictive legislation that leaves too little room for flexibility.

49. Conversely, the Government wants to replicate the same strategy for digital companies that was applied to the energy, transport and telecommunications sectors in the 1970s and 1980s, with the introduction of a dedicated regulator.

50. The CMA has therefore created the *Digital Market Unit* (DMU) internally, which, for the moment, has no powers, as the attribution of these requires dedicated legislation. This choice is, however, rather surprising. It could take the form of a "task force" integrated into the CMA's teams, dedicated to the regulation and investigation of competition infringements emanating from digital platforms. However, the intentions are quite clear and leave little room for doubt as to the posture of the future DMU. Unlike a dedicated law, such as the DMA in the European Union, it allows for more flexibility in the way the market is approached.

51. For example, the DMU will be developed with the owners of the platforms in a collaborative approach.[35] This may be a legitimate concern from the perspective of consumers and smaller economic operators. There are major concerns here that the DMU will be a reasoning chamber for the large platforms rather than a regulatory body; this risk is directly attached to such regulatory bodies.[36]

52. Beyond the digital platform market, moreover, the question of the need to reform arises. Is there a need to reform competition law in the UK? It seems that the current system works well and is well suited to the UK consumer and economic model.

[34] Kari Paul, 'EU Agrees Sweeping New Digital Rules in Effort to Curb Big Tech's Power' *The Guardian* (25 March 2022) <https://www.theguardian.com/technology/2022/mar/25/european-union-big-tech-googld-facebook-meta> accessed 25 April 2022.
[35] 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' (*GOV.UK*) <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel> accessed 25 April 2022.
[36] Jon Stern, 'The British Utility Regulation Model: Its Recent History and Future Prospects' 14 <https://www.city.ac.uk/__data/assets/pdf_file/0003/236370/CCRP-JS-Paper-WP-23.pdf> accessed 12 February 2022.

53. Then come the political considerations: should competition law be reformed or, more precisely, should the opportunity offered by Brexit be used to adopt a more business-friendly competition policy in order to promote economic development?
It is still too early to tell, and it would seem that, paradoxically, the issue is not a priority for the Government, which is busy with other tasks arising from Covid.

CONCLUSION

In England, market regulation has always existed. European Union law, through its extensive case law and the single market objective it pursues, has led to a significant modernisation of British competition law. In return, the UK influenced perceptions of competition in other EU member states, not least through the British Utility Regulation model, which stemmed from the privatisations of the 1980s. Whilst the Brexit generated uncertainty from the moment it was announced, it is now clear that there is nothing to fear in the short term. The government has been committed to maintaining consistency with the competition law practices of the last thirty years. There is therefore no revolution in sight for the years to come. But today's structure of the UK economy makes it clear that future competition policies will be shaped to boost a growing sector.

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