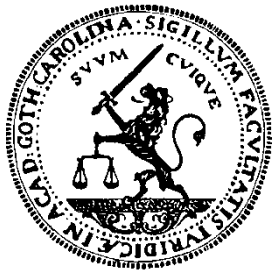

FACULTY OF LAW
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Merger Control Post-Brexit

An Analysis of the Future EU-UK Relationship and the Potential Effects on UK Merger Control

JAEM03 Master Thesis

European Business Law
30 higher education credits

Supervisor: Julian Nowag
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Contents

Preface

It has been almost six years since I began studying law at the faculty of Lund University. Relocating from London to Sweden and starting a new phase in my life. Six years of change, growth and experiences.

When I began studying I was unsure of law as a subject. Rather than having a calling, I considered my legal studies to be a stepping stone to something else. It was only after my fourth year and my incredible term abroad at Bucerius Law School in Hamburg, Germany, that I discovered my love for law and more specifically business law and competition law. To be able to return to Lund and go on to study the European Business Law Master Program at my alma mater has been an extraordinary experience. I am truly thankful to both these Universities. I would like to express my utmost gratitude to my supervisor the associate professor Julian Nowag, who has not only been a great support this spring but also taught me that sometimes all that is needed is a well-versed bollplank. I would also like to thank my parents, Camilla and Michaël Persson, for their love, support and humour which has been indispensable. You have taught me that the world is larger and more filled with wonders than I will ever know. Lastly, thank you Niclas Tauson, for believing in me, loving me always and for bringing those wonders into my life every day.

With this phase of my life ending, and the imminent transition into adulthood, I step out into the summer warmth with the hope that this next phase will be even more glorious than the last.

Gothenburg, 24th of May 2018,

Amanda Persson

Abstract

After the Brexit referendum on the 23rd of June 2016 it is evident that the UK might be leaving the EU. In light of EU law, and the leave-campaign, the question of what will happen to UK merger control post-Brexit is especially riveting due to the internationality of merger control and the high impact of EU-control on competition law. Thus, the purpose of this thesis is to examine what would be the best Brexit solution regarding merger control.

There are multiple scenarios that depict the possible outcomes for UK merger control after the UK leaves the EU. The first scenario is a membership in the EFTA and the EEA. This scenario would mean the least change for UK merger control, due to the continued effect of the one-stop-shop principle and the Commission-ESA relationship. The second scenario is a membership in only the Customs Union, much like the Turkey membership. A Customs Union membership would not oblige the UK to keep its merger control harmonised with the EU, but considering how Turkey has amended its merger control it may be implied that harmonisation is a long-term objective. The third scenario is an AA, an agreement which mainly provides a framework for further bilateral agreements. Though the AA is mainly a framework, one can draw parallels to the EU-Ukraine AA with its long-term aims at harmonisation. The fourth scenario is an FTA, either an EU-Swiss version or a CETA version. Both models rely on Cooperation Agreements to collaborate in the field of merger control, which enhances information exchange but not much else. The fifth, and last, scenario would occur if the EU and the UK fail to come to an agreement at all. The EU-UK relationship would have to rely on guidelines by International Organisations, which provide competition law guidance but do not provide a collaborative framework.

Ultimately, this thesis argues that an AA with an added second-generation Cooperation Agreement would be the best scenario for the EU-UK post-Brexit relationship. It would ensure a lasting collaboration between the parties through the AA framework, while simultaneously protecting the fundamental exchange of information between the agencies in merger control.

Sammanfattning

Efter folkomröstningen om Brexit den 23 juni 2016 kommer Storbritannien förmodligen att lämna EU. En viktig fråga är vad som kommer hända med Storbritanniens kontroll över företagskoncentrationer. Frågan är speciellt intressant med tanke på EU-rätt och den brittiska lämna-EU kampanjen, utifrån att företagskoncentrationer ofta har en internationell dimension och affekterar konkurrensrätt på en nationell nivå såväl som i EU. Frågan denna uppsats söker att besvara blir därvid vilket scenario som skulle kunna vara det bästa för Storbritannien med hänsyn till den brittiska lagstiftningen rörande företagskoncentrationer.

Det finns flertalet scenarion som beskriver hur Storbritanniens företagskoncentrations-kontroll kan komma att se ut efter Brexit. Det första scenariot är ett medlemskap i EEA. Detta scenario skulle innebära den minsta förändringen för Storbritannien, på grund av den fortsatta tillämpligheten av one-stop-shop principen och ESAs koppling till kommissionen. Det andra scenariot är ett medlemskap i tullunion i ungefär samma tappning som Turkiets medlemskap. Ett medlemskap i tullunionen skulle innebära att Storbritannien inte behöver harmonisera sin kontroll över företagskoncentrationer för att matcha EU lagstiftningen, men med tanke på hur Turkiet har anpassat sin lagstiftning så kan det antyda att harmonisering är ett långsiktigt mål. Det tredje scenariot är ett AA, ett avtal som främst skapar en struktur för framtida avtal mellan EU och en motpart. Trots att ett AA främst skapar en mall för samarbete, så kan en genom att titta på EU-Ukraina avtalet se att harmonisering är ett långsiktigt mål även här. Det fjärde scenariot är ett FTA, antingen EU-Schweiz versionen eller CETA versionen. Båda dessa versioner använder sig av Cooperation Agreements för att samarbeta inom området för kontroll av företagskoncentrationer, en modell som främjar utbyte av information men inte mycket annat. Det femte, och sista, scenariot aktiveras om EU och Storbritannien inte kan komma överens om ett avtal. Relationen mellan dem kommer i så fall underbyggas av internationella organisationer, som i och för sig ger viss vägledning för

konkurrensrättsligt samarbete men som inte tillhandahåller en struktur för samarbetet.

Slutligen framhåller denna uppsats att det bästa scenariot för ett samarbete mellan EU och Storbritannien efter Brexit skulle vara ett AA som inkluderar ett second-generation Cooperation Agreement. Ett sådant avtal skulle säkerställa framtida kollaboration mellan parterna samtidigt som det skulle bevara informationsutbytet mellan myndigheter på ett konkurrensrättsligt plan.

Abbreviations

AA	European Union Association Agreement.
Brexit	A merge of the words "British" and "exit", used to describe the UK exiting the EU.
CA98	The UK Competition Act from 1998, Ch. 41.
CAT	The UK Competition Appeals Tribunal.
CETA	Comprehensive Economic and Trade Agreement [between EU and Canada].
CJEU	Court of Justice of the European Union.
CMA	The UK Competition and Markets Authority.
Commission	European Commission.
Council	Council of the European Union.
DCFTA	Deep and Comprehensive Free Trade Area.
EA02	The UK Enterprise Act from 2002, Revised in 2016, Ch. 12.
EEA	European Economic Area.
ESA	The EFTA Surveillance Authority.
EU	European Union.
EUMR	Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings. OJ L 24, 29.1.2004. [the EU Merger Regulation].
FTA	Free Trade Agreement.
GATT	The WTO General Agreement on Tariffs and Trade, 33 I.L.M. 9 (1994) (December 1993 text)
GATS	The WTO General Agreement on Trade in Services, 33 I.L.M. 44 (1994) (December 1993 text).

ICN	The International Competition Network.
Mergers	In this thesis the term Merger refers both to Mergers and Acquisitions unless otherwise specified.
MFN	The Most Favoured Nation status under the WTO.
NCA	National Competition Authority.
OECD	The Organisation for Economic Cooperation and Development.
Resolution	European Parliament Resolution 'Guidelines on the framework of future EU-UK relations'
SIEC	Significant Impediment to Effective Competition.
Switzerland	The Swiss Confederation.
TEU	Treaty on European Union, OJ C 326, 26.10.2012.
TFEU	Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.
TRIPS	The WTO Agreement on Trade Related Aspects of Intellectual Property, 33 I.L.M. 81 (1994) (December 1993 text).
UNCTAD	United Nations Conference on Trade and Development.
UK	The United Kingdom of Great Britain and Northern Ireland.
US	The United States of America.
WTO	The World Trade Organisation.

1 Introduction

1.1 Background, Aim and Purpose

Many questions have arisen in regard to what will happen with the United Kingdom of Great Britain and Northern Ireland (the UK), when it has left the European Union (the EU), as a consequence of Brexit after the 2017 referendum. From a legal perspective, the questions have ranged from problems with the Irish border to the problems faced by investors when left without passporting rights. One of the most interesting perspectives, is the change that may occur within competition law – and more specifically merger control. Merger control is an national instrument that has international bearings; with international companies and international mergers come international cooperation and enforcement methods to control the mergers. The EU itself contains a number of companies that have specialised themselves on a broader EU market rather than a national market, meaning that EU Member States need to cooperate accordingly. The UK has previously taken part in this international cooperation through the benefits created by the EU. Through exiting the EU, the UK will face consequences in merger laws and merger enforcement – merger control for short.

This thesis addresses the scenarios that the UK merger control will inevitably have to face if the UK leaves the EU. The different scenarios are described, put into perspective and analysed in order to hopefully give a complete view of the possibilities the UK has after Brexit and what these possibilities would entail for UK merger control. Due to the novelty of Brexit there are a number of materials on the issues that UK merger control might face in a worst case scenario. This thesis aims to include not only the worst case scenario, but actually encompass all possibilities the UK has at present and what the outcome may be in the available scenarios.

1.2 Research Questions

This thesis aims at examining the EU and the UK relationship from the perspective of merger control considering the implications of Brexit. In order to achieve this, the thesis is focused on three questions of research:

1. What are the different scenarios for the UK relationship with the EU post-Brexit?
2. What do these different scenarios entail in the light of merger control?
3. What would be the best Brexit solution regarding merger control?

1.3 Delimitations

In chapter two, a brief summary of Brexit is given as this is not a thesis with a political purpose but rather focuses on a legal issue. A lot more could be said about the historic reasons for Brexit and the current political situation in the UK. That would however fall outside of the objective of this thesis and, however interesting, would not aid in the understanding of Brexit and merger control.

In the third chapter five scenarios are presented, seven if you count sub-scenarios. There are of course a myriad of possible scenarios where the UK and the EU negotiate a new individual scenario or model their relationship on a country that this thesis has not mentioned. However, this thesis has to stay within the conforms of a European Business Law master thesis, it would be impossible to mention all possible scenarios. Nevertheless, the thesis presents the most likely scenarios according to established scholars and it intends to give the most exhaustive view possible. For example, there are a number of Free Trade Agreements (FTAs) that have been concluded between the EU and another country. This thesis examines the CETA (the Comprehensive Economic and Trade Agreement between EU and Canada) and the EU-Switzerland FTA, as these agreements are the most inclusive and the most likely or probable scenarios for the UK.

The fourth chapter describes the EU and UK merger control. Though general competition law is of course an important aspect of merger control, this thesis will mention competition law only in the sense that it is connected

to merger control but will not delve further into the numerous issues UK competition law will face after Brexit.

The thesis will not discuss consequences for cases currently investigated by the CMA or the Court of Justice (the CJEU) and how those will be solved, such as which agency will have jurisdiction over such cases or who will handle any commitments that have been imposed on the mergers. It will also not discuss the transitional period more than necessary, as this thesis focuses on the UK merger control *after* Brexit, rather than during the process.

Please note that all options presented are the ones that are most likely available to the UK. These options may seem more inconvenient to the UK than a continued EU-membership, however they are most likely scenarios which is what is important for this thesis.

1.4 Research Method and Theory

This thesis combines a description of the current situation in the UK after the Brexit referendum with the legal situation in the EU, as well as in the UK, along with the possibilities for the UK to have a relationship with the EU post Brexit. Therefore this thesis contains some descriptive parts, to ensure that the reader understands the situation at hand both from a government perspective and from the perspective of the legal doctrine method. The legal doctrine method provides a systematic analysis of a certain legal field through examination of principles, rules and concepts. The method systematises law, while at the same time acknowledging new legal developments in the light of changes in society.[1] In this way the thesis not only finds and analyses present legislation but also combines the legal perspective with a critical method and perspective to examine how Brexit might impact UK merger control.

Because of Brexit naturally affecting EU law, the EU legal method has also been applied. The method is applied to understand and interpret EU law, establishing the general principles of EU law as well as the hierarchy of

[1] Smits, Jan M., (2015), *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, Maastricht European Private Law Institute Working Paper No. 2015/06, September 2015, Available at: http://ssrn.com/abstract=2644088. Pages 6-7.

norms. Two factors are of the utmost importance when applying the EU legal method, the CJEU application of EU law and the mechanisms that control and enforce EU law in Europe. The method interprets legislative provisions while considering the aim, purpose, values, economic, social and legal aspirations of the EU.[2] According to AG Maduro the interpretation refers to the "particular systemic understanding of the EU legal order that permeates the interpretation of all its rules".[3] This thesis has through the examination of the Brexit scenarios, the discussion regarding merger control and the application of these two to conclude includes the interpretation of the situation from an EU legal method standpoint.[4]

1.5 Materials

The amount of research on Brexit and merger control has increased substantially in recent years and during the writing of this master thesis. Due to the political aspects of the UK leaving the EU there is in a way a lack of substantial materials, but rather a large number of articles presenting the personal views of the authors instead of a more objective view of Brexit.

Another complication is the lack of research in what might be called "the grey area" between a Brexit agreement that includes all the EU rights the UK already holds (EEA scenario) and an agreement that would strip the UK of all its EU rights (WTO scenario). This is presumably due to the heightened interest for the extreme situation the UK may have put itself in, rather than the likelihood of such a scenario. Thus, this thesis is one of its kind in presenting all viable scenarios from a merger control perspective.

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[2] Korling, Fredric & Zamboni, Mauro (red.), (2013), *Juridisk metodlära*, 1. ed., Lund: Studentlitteratur. Pages 109-115.

[3] Maduro, Miguel Poiares, (2007), *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, European Journal of Legal Studies, Vol. 1, Issue 2, December 2007, Available at: http://www.ejls.eu/current.php?id=2. Page 5.

[4] Maduro, Miguel Poiares, (2007), *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, European Journal of Legal Studies, Vol. 1, Issue 2, December 2007, Available at: http://www.ejls.eu/current.php?id=2. Pages 4-5.

1.6 Outline

Chapter two presents a brief introduction to Brexit, the situation at hand and how this situation has developed in the UK. The chapter describes the situation first from a historical perspective, explaining how the UK has systematically distanced itself from the EU. The chapter ends by illuminating the chain of events pertaining to Brexit.

The third chapter demonstrates the different scenarios for the relationship between the UK and the EU after Brexit. The chapter begins with an introduction and an overview of the scenarios. It continues to describe the scenarios from a general governmental and legal perspective. The scenarios are as follows: 1. Membership in the EEA, 2. Membership in the Customs Union, 3. Association Agreement, 4. FTA (which in turn describes two different FTAs) and 5. WTO.

Chapter four explains EU and UK merger control. The chapter begins with demonstrating the international importance of a universal merger control and the cooperation between states and summarises both EU and UK merger control. Lastly, the chapter examines the effect on UK merger control in a situation where the UK will have no EU influence.

The following five chapters present the scenarios from the perspective of merger control, these examinations are done in 5 different separate chapters. Each chapter includes introductory notes on the scenario, how the scenario interplays with EU merger control and lastly how the scenario would affect UK merger control.

Through discussing the best case scenario for the EU and the UK respectively concerning a future relationship, the tenth chapter presents an overarching analysis based on the previous chapters. The thesis ends with a conclusion.

2 A Brief Summary of Brexit

Brexit. A shock for Europe and a shock for the UK. At the time of the leave or remain campaign, out of roughly 600 academics, journalists and pollsters almost 90% predicted that the UK would remain in the EU.[5] However, in some ways, an EU without the UK ought not to have been such a shock. At the time of inception for the Coal and Steel Community, when former Prime Minister Sir Winston Churchill endorsed European integration after World War II, Churchill regarded the UK as a "friend and sponsor" of Europe rather than actually a part of it.[6] Frankly, the Coal and Steel Community was viewed as a European mainland project. Moreover, the UK has always considered themselves winners of World War II, and thus the EU is not only a mainland project but also a peace project the UK has no need for.[7] In combination with the times of hardship in 2008/2009 during the financial crisis, which resulted in a retaliation on the globalisation that has shaped the European society, and the surge in support of UKIP[8] – it is not entirely unfathomable that the UK does not want to be part of the EU.[9] Furthermore, there has been a shift in the meaning of globalisation – with the President of the United States of America, Donald Trump, and the 'America First' perspective, a withdrawal from regionalism and multilateralism is apparent. Rather than praising globalisation, a fear of worldwide integration is now more common in both the US and the UK, along with an aim for restrictions on immigration and labour mobility.[10]

On the 23rd of June 2016, a majority consisting of 51.9% of voting UK citizens opted for leaving the EU. Though it was only an advisory referendum,

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[5] Clarke, Harold D., Goodwin, Matthew J. & Whiteley, Paul, (2017), *Brexit: Why Britain Voted to Leave the European Union*, Cambridge. Page 3.
[6] Winston Churchill speech on Europe, in Zurich the 19th of September 1946.
[7] Welfens, Paul J.J., *An Accidental Brexit: New EU and Transatlantic Economic Perspectives*, Cham, 2017. Pages 264-265; MacShane, Denis, (2016), *Brexit: How Britain Left Europe*, Revised edition, London: I.B. Tauris. Pages 30-34.
[8] A UK political party that is right-wing populistic and Eurosceptic.
[9] da Costa Cabral, Nazaré., Renato Gonçalves, José. & Cunha Rodrigues, Nuno (red.), (2017), *After Brexit: Consequences for the European Union,* [Electronic resource], Cham. Page 18. Clarke, Goodwin & Whiteley, (2017). Page 5.
[10] Da Costa, Renato Gonçalves & Rodrigues, (2017). Page 12.

it prompted the almost immediate resignation of the former Prime Minister David Cameron.[11] This in turn triggered a leadership election in the Conservative Party and Theresa May was elected Prime Minister.[12] Despite challenges by the UK government regarding the legality of the referendum, a letter triggering Article 50 in the Treaty on European Union (TEU),[13] declaring the UK's aim to leave the EU was delivered on the 29th of March 2017.[14]

The leave campaign focused on sovereignty, control, laws and immigration, while the remain campaign focused on the economic and security aspects of the EU. As the referendum ended with a majority of leave votes, the UK negotiations with the EU will primarily focus on these issues.[15] In January 2017, Prime Minister Theresa May stated that "Brexit means Brexit", where she guaranteed that Brexit negotiations would end in a hard Brexit – stating that the UK would no longer be a member of neither the Internal Market nor the Customs Union, and not be captured by the CJEU jurisdiction. Thereby honouring what leave voters were promised during the leave-campaign. However, Prime Minister Theresa May defined access to only the Internal Market as the main goal – presumably through a Free Trade Agreement (hereinafter FTA) – a goal which was later consolidated in a UK Government Policy Paper.[16] The negotiations between the UK and the EU began on the 19th of June 2017, discussing the possibilities of a soft, semi-soft or hard Brexit. A soft Brexit meaning an access to the EU which is comparable to Norway through an European Economic Area (EEA)

[11] Staiger, Uta & Martill, Benjamin, (2018), *Brexit and Beyond: Rethinking the Futures of Europe*, [Electronic resource], UCL Press. Page 89.
[12] Welfens, (2017). Pages 34-35.
[13] Article 50 is the paragraph in the TEU describing the procedure for a Member State wishing to leave the EU.
[14] Staiger & Martill, (2018). Page 6.
[15] Green, Jane, Mellon, Jon & Prosser, Chris, (2016), *What mattered most to you when deciding how to vote in the EU referendum?*, British Election Study Team, 11th of July 2016, Available at: http://www.britishelectionstudy.com/bes-findings/what-mattered-most-to-you-when-deciding-how-to-vote-in-the-eu-referendum/#.WvatqNOFPL9.
[16] Policy Paper, The United Kingdom's Exit From, and New Partnership with the European Union White Paper, Department for Exiting the European Union, Updated 15 May 2017. Available at: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2#contents; Staiger & Martill, (2018). Page 6; Welfens, (2017). Page 35.

membership. A semi-soft Brexit is comparable to the exchange that Turkey or Ukraine have with EU. A hard Brexit is comparable to the Canadian scenario.[17] As of yet, the negotiations have not come to a conclusion, meaning that all options are still theoretically possible.

No matter the circumstances; after a withdrawal agreement enters into force, or if no such arrangement can be reached within the pre-set time of two years after triggering Article 50[18], the EU treaties will no longer apply to the UK. Thus, to cope with the lack of an EU-membership and lack of applicability of EU-regulations, there must be some sort of agreement on what an EU-UK relationship will look like.[19]

Regardless of how anticipated Brexit may be, it is not going to be easy. In part, the referendum will have an impact on the EU, as the UK is the second largest and the third most populated state in the EU. In part, it will affect the UK, as the EU is undeniably present not only in the political and economic life of the UK, but also the judicial part.[20] To examine the legislative consequences for merger control of the UK leaving the EU, one must first look at the possible scenarios that the UK could face in Brexit.

[17] These scenarios are further explained in chapter 3.
[18] This is unless all EU Member States agree to grant an extension unanimously, see Article 50(2) TEU.
[19] Lehmann, Matthias & Zetzsche, Dirk, (2016), *Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK*, 27 European Business Law Review, Pages 999–1027, 20th of September 2016. Page 1.
[20] Staiger & Martill, (2018). Page 1-2.

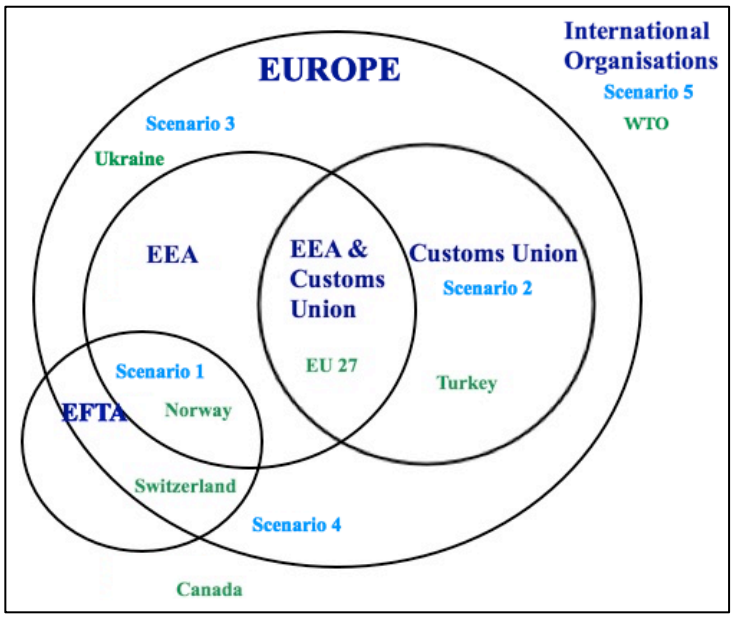
3 UK and EU Relations Post Brexit

3.1 Introducing the Scenarios

A wide range of scenarios may be found for the EU-UK relationship after the UK leaves the EU.[21] These scenarios differ widely depending on which direction the agencies decide to take during negotiations – which way they will choose to relate to each other and if there will be any kind of relationship between them at all. In theory, the prospects range from a full membership in the EEA to trading under World Trade Organisation (WTO) rules as an external country.[22] This chapter focuses on five different scenarios on the relationship between EU and UK after Brexit. Each scenario will be described more generally, and the chapter ends with an analysis of all five scenarios.

The figure below gives an overview of the different scenarios:

Figure 1[23]



The different scenarios:
1. Membership in the EEA.
2. Membership in the Customs Union.
3. Association Agreement.
4. Free Trade Agreement.
5. International Organisations.

[21] Cambridge Econometrics, (2017), *Preparing for Brexit*: *Final Report*, Cambridge Econometrics, Cambridge UK, January 2017. Pages 17-19.
[22] Lehmann & Zetzsche, (2016). Page 1.
[23] Modelled on figure in the Cambridge Econometrics Paper (2017). Page 18.

3.2 Scenario 1: Membership in the EEA

The first scenario would put the UK into a situation which is similar to the situation held by an EEA and EFTA country, such as Norway.

In the event of this first scenario, during the transitional period[24], the UK would join the EEA as an independent state. The EEA Agreement stipulates that to join the EEA, a country needs to be part either of the EU or EFTA – thus the UK would have to reapply to EFTA before applying to join the EEA.[25] In a way, the EEA Agreement expands the Internal Market beyond the bounds of the EU to include EEA countries.[26] Thus, through the EEA the UK would continue to be a part of the Internal Market, but not of the Customs Union.

Through a membership in the EEA the UK would have the possibility to negotiate trade deals with countries outside the EEA – a main objective in the leave campaign. However, the four fundamental freedoms would still apply to the UK, and the UK would obligated to keep contributing to the EU budget and be affected by any EU Acts that the EEA Joint Committee refers to or that are mentioned in the EEA Agreement.[27] Furthermore, the EEA competition rules correlate with the EU rules, and apply to all undertakings in the EEA area.[28] In a sense, the UK would almost be a part of the EU – but with the exception for taking part in any EU negotiations, and with the freedom of movement still in place, two things that the leave voters most probably did not have in mind.[29]

Another option for the UK is to try to obtain a status as an 'EEA minus State'. This status would entail that the EU would extend voting rights to

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[24] The transitional period is the time after the UK leaves the EU and before the final agreements start to apply. The time of the transitional period depends on what the EU and the UK are able to agree upon during negotiations. If it is agreed upon, the transitional period will last between 20 to 24 months.

[25] Fabbrini, Federico (red.), *The law & politics of Brexit*, Oxford, 2017. Page 3.

[26] Broberg, Morten P., (2013), *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers*, 4. ed. Alphen aan den Rijn: Kluwer. Page 206.

[27] McSmith, Andy, *Issue: Brexit*, SAGE Business Researcher, SAGE Publishing, Inc., 15th of August 2016. Page 8; Lehmann & Zetzsche, (2016). Page 2.

[28] Official Website of EFTA, *Competition,* http://www.efta.int/eea/policy-areas/goods/competition-aid-procurement-ipr/competition Accessed 2018-02-28.

[29] Lehmann & Zetzsche, (2016). Page 2.

include a non-EU State (the UK) on the subject of the EU Internal Market. The UK would then presumably use these voting rights to restrict the free movement of persons and labour – limiting the number of EU citizens migrating to the UK.[30] Such a limit is currently held by Lichtenstein, where the number of citizens from Iceland, Norway and the EU allowed to take residence is restricted to a yearly increase of 1.75% residents per year. However, this limitation is based on the small size of Lichtenstein and would probably not be available to the much larger UK.[31] Furthermore, it is unlikely that the EEA minus solution would be passable in the UK post Brexit for two additional reasons. Partly due to that the limited immigration of 1.75% is allegedly more than British citizens seem willing to accept[32] and partly due to that the EU would be unwilling to grant the UK a right to pick and choose from the four freedoms – as the EU has long viewed the freedom of labour as a main aspect of the Internal Market.[33]

3.3 Scenario 2: Membership in the Customs Union

In the second scenario any transition period would be followed not by a membership in the EEA but rather a membership in the Customs Union. A scenario which is similar to the situations currently held by Turkey, Andorra and San Marino. [34]

A model for the possibility of a membership in the Customs Union, may be found in the EU-Turkey Customs Union.[35] The EU-Turkey Customs Union includes among other things free movement of goods and commercial

[30] Lehmann & Zetzsche, (2016). Page 3; Blockmans, Steven, (2016), *Brexit, Globalisation and the Future of the EU*, Intereconomics; Hamburg, Vol. 51, Issue 4, Pages 182 – 183, Hamburg Germany, July 2016. Page 2.
[31] Lehmann & Zetzsche, (2016). Page 3.
EEA Agreement: Annex VIII on the Right of Establishment.
[32] Lehmann & Zetzsche, (2016). Page 3.
[33] Blockmans, Steven, (2016). Page 2.
[34] The Customs Union agreement with Turkey is the most extensive one of the three scenarios mentioned, and thus the closest to a scenario which would be plausible for the UK to strive towards. This thesis will therefore not go into the situations in Andorra and San Marino.
[35] See the Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC).

policy on all products except agricultural, coal and steel products, elimination of custom duties and charges with equivalent effect as well as the elimination of quantitative restrictions and measures with equivalent effect.[36] Turkey also has two preferential agreements to complement the Customs Union agreement, one for trade in agricultural products[37] and one for trade in coal and steel products.[38] Exceeding the mentioned implications of the above EU-Turkey Customs Union, an approximation of laws is also included in the Union – for example customs law, intellectual property, taxation law and competition law.[39] As a part in the Customs Union, the UK would be free to negotiate bilaterally with countries that the EU has free trade or preferential agreements with. It is not unlikely that the UK could thereby retain the same preferential agreements as are readily held by the EU.[40] In the absence of such agreements the UK would continue to apply the Common External Tariff (CET) for imports from external countries.[41] However, a membership in the Customs Union does not include the possibility of creating FTAs with countries that the EU has not already made trade deals with.[42]

From the information that has been elaborated above, it would seem unlikely that this is an arrangement that UK (and leave voters) would be satisfied with. Although there are benefits of a membership in the Customs Union, such as that exports would continue to flow from inside the EU and the UK without limitations by custom controls or being subject to 'rules-of-origin' documentation.[43] The scenario would also mean no membership in the EEA, meaning that the UK would have control over its own migration

[36] The exceptions to the agricultural, coal and steel products are limitations simply due to their originating status – the products are instead subject to preferential agreements as can be seen below. For reference see: Decision No. 1/95, Article 2 and Article 3 as well as Chapter I, Section II.
[37] See Decision No 1/98 of the EC-Turkey Association Council of 25 February 1998 on the Trade Regime for Agricultural Products. OJ L 86, 25.2.1998.
[38] Agreement between the European Coal and Steel Community and the Republic of Turkey on trade in products covered by the Treaty establishing the European Coal and Steel Community, Protocol 1 on rules of origin.
[39] Decision No 1/95, Chapter IV.
[40] Emerson, Michael, (2016), *Which model for Brexit?*, CEPS Special Report, No. 147, October 2016. Page 5.
[41] Harrison, Glenn W., Rutherford, Thomas F. & Tarr, David G., (1997), *Turkey's Customs Union with the EU: Economic Implications for Turkey of a Customs Union with the European Union*, European Economic Review 41, Pages 861 – 870, 1997. Page 862.
[42] Cambridge Econometrics. Page 19.
[43] Emerson, Michael, (2016). Page 5.

policies. However, the members of the EU and EEA would have the possibility of restricting the migration from the UK into their own territories.[44] Moreover, considering Turkey, the EU-Turkey arrangement creates tension as the Customs Union agreement establishes restraints on the state's trade policy, something which is undesirable for the UK.[45]

3.4 Scenario 3: Association Agreement

An Association Agreement (henceforth an AA) is an agreement that creates a link between the EU and a non-Member State. Originally, the agreements were conceived to prepare countries for an accession to the EU. Since then the AAs have gotten a more expansive usage, such as the improvement of trade between the EU and an extraterritorial country. For example, in 2016, agreements where made with Georgia, Moldova and Ukraine that are much more broadly structured. The agreements include three out of four freedoms, excluding the free movement of persons. These new generation AAs include most of the EU competences in a new way, more specifically foreign and security policy, justice, freedom and security policy, trade and trade-related matters, economic and sector cooperation, financial cooperation and institutional provisions.[46] An AA is in a way a version of a FTA, and the agreements with Georgia, Moldova and Ukraine are also known as Deep and Comprehensive Free Trade Agreements (DCFTA).[47]

On the subject of an AA, on the 14th of March 2018 the European Parliament published *Guidelines on the framework of future EU-UK relations*[48] (henceforth referred to as the Resolution) on how the future relationship between the UK and the EU – an assessment of the relationship

[44] Cambridge Econometrics, (2017). Page 19.
[45] Emerson, Michael, (2016). Page 5.
[46] Emerson, Michael, (2016). Page 6-7.
[47] So to more easily be able to differentiate between the AAs and the less comprehensive FTAs brought up in chapter 3.5, the thesis will continue to use the term AA instead of the term DCFTA.
[48] Guidelines on the Framework of Future EU-UK Relations, European Parliament Resolution of 14 March 2018 on the Framework of the Future EU-UK relationship (2018/2573(RSP)).

made by the Brexit Steering Group.[49] According to Guy Verhofstadt,[50] speaking on behalf of European Parliament, an AA between the UK and the EU would be broader and more detailed than any of the previous AAs mentioned above. What the European Parliament is proposing through this scenario, is a much more consistent relationship than for example the one held with Switzerland.[51] An AA would, according to the European Parliament, give a broad framework for the EU-UK relationship with different elements of cooperation. The relationship could for example be based on four pillars: trade and economic relations, foreign policy, internal security and thematic cooperation.[52] Furthermore, the European Parliament has made clear that while the AA would provide a flexible framework which allows different degrees of cooperation – it is of the utmost importance for the EU to protect its own citizens living in the UK, any agreement it has with third countries and will not allow a sector-by-sector approach to the four freedoms. Among other further conditions, any relationship under AA would also be related to the UK continued adherence to legislation and policies in the fields of fair and rules-based competition.[53]

The probability that this is a form of agreement that could structure the relationship between the UK and the EU is unclear. On the one hand, it seems to be a favourable framework that the parties could rather easily be able to prepare and establish after the UK has left the EU. It would require an amount of negotiating, but the AA would at least grant some kind of minimum rights to both parties to stand on during negotiations. On the other hand, this

[49] The Brexit Steering Group works under the aegis of the Conference of Presidents. Its and purpose is to coordinate and prepare deliberations, considerations and resolutions on behalf of the European Parliament on the subject of the UK's withdrawal from the EU. For reference please see: http://www.europarl.europa.eu/brexit-steering-group/en/home/home.html; European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*. Page 1.

[50] Guy Verhofstadt (Brexit Coordinator and Chair of the Brexit Steering Group in the European Parliament), on behalf of the European Parliament, presenting the 'Motion of Resolution' for a future EU-UK relationship. 7th of March 2018. Available at: https://www.youtube.com/watch?v=kMkCzmt2BH8. Accessed 2018-03-14.

[51] See chapter 3.5.1.

[52] Official Website of the European Parliament, *Brexit: Parliament to set out its vision for future EU-UK relations*, Press Release, 7th of March 2018, http://www.europarl.europa.eu/news/en/press-room/20180307IPR99231/brexit-parliament-to-set-out-its-vision-for-future-eu-uk-relations. Accessed 2018-03-14.

[53] European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*. Pages 1-5.

is only a suggestion from the European Parliament. Furthermore, the European Parliament makes clear that a lot of the framework would exclude some of the rights the UK seems set on having – stating that rights, benefits or market access will never be the same for a third country as it is for a Member State.[54]

3.5 Scenario 4: FTA

In this fourth scenario, the UK would create an Free Trade Agreement (FTA) with the EU.[55] Complete autonomy for the UK would be achieved, granting it the power to set its own regulatory and economic policy.[56] In terms of models for an FTA scenario between the EU and the UK, the EU most inclusive and probable FTAs that the EU has concluded are the agreements with Switzerland and Canada.[57]

3.5.1 Swiss Scenario

The most inclusive FTA model is the EU-Swiss FTA. Switzerland has an intimate relationship with the EU and an integration that is quite astounding considering that it has declined membership in the EEA and the EU.[58] Partly, this close relationship is due to Switzerland being a party to EFTA, but the intimacy has also been furthered through bilateral agreements between the EU and Switzerland. More than 100 sector-based agreements have been made – the largest number of agreements the EU has made with another country.[59] Two sets of bilateral sectoral agreements can be discerned, Bilateral I and

[54] Official Website of the European Parliament, *Brexit: Parliament to set out its vision for future EU-UK relations*, Press Release, 7th of March 2018, http://www.europarl.europa.eu/news/en/press-room/20180307IPR99231/brexit-parliament-to-set-out-its-vision-for-future-eu-uk-relations. Accessed 2018-03-14.
[55] Lehmann & Zetzsche, (2016). Page 3.
[56] Cambridge Econometrics, (2017). Page 19.
[57] Lehmann & Zetzsche, (2016). Page 3.
[58] Vahl, Marius & Grolimund, Nina, (2006), *Integration Without Membership: Switzerland's Bilateral Trade Agreements with the European Union*, [Electronic resource], Centre for European Policy Studies, Brussels, 2006. Pages 5-6.
[59] Official website of the European Commission, *Countries and Regions: Switzerland*, http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/. Accessed 2018-03-07; Vahl & Grolimund, (2006). Pages 5-6.

Bilateral II – concluded between 1994 and 2004.[60] Bilateral I and Bilateral II include areas such as the free movement of persons, public procurement, technical trade barriers, taxation of savings, agriculture, combating fraud, air transport, land transport, participation in the Environmental Agency as well as the EU Media Programme.[61] Switzerland and the EU have also concluded a Cooperation Agreement, specifically on the cooperation on competition issues.[62]

This may seem like an excellent option for the UK, however there are some disadvantages with the EU-Switzerland model. Firstly, sector-based agreements are concluded by negotiations on an issue-to-issue basis, and therefore is a slow process. A slow process that requires a large workforce and a considerable amount of funding. Secondly, the Council has declared that it is unwilling to negotiate further bilateral agreements with Switzerland, as a result of the diverging opinions on the most important challenges in this relationship.[63] From the EU point of view, the issues are related to complications of handling a large number of sectoral agreements and the perception that Switzerland attempts to "cherry-pick" among EU norms and policies. From the Swiss point of view the main concerns are associated with the lack of transparency and absence of information about the implementation of the EU-Swiss bilateral agreements.[64]

[60] Vahl & Grolimund, (2006). Page 1.
[61] Official website of the European Commission, *Countries and Regions: Switzerland*, http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/. Accessed 2018-03-07.
[62] Official Website of the European Commission, *Bilateral Relations on Competition Issues*, http://ec.europa.eu/competition/international/bilateral/. Accessed 2018-03-13.
[63] Lehmann & Zetzsche, (2016). Page 2-3.
[64] Vahl & Grolimund, (2006). Page 2.

3.5.2 Canadian Scenario

Another feasible option is the CETA[65] – an FTA concluded between Canada and the EU which provisionally entered into force on the 21st of September 2017.[66]

CETA is an advanced FTA, thus far it is the most extensive FTA between the EU and a non-EU State. However, it is less broad than a EU membership in the sense that it has less provisions on agriculture, migration and financial services.[67] The CETA goes beyond former EU policy practices in trade, and eliminates 98% of import tariffs and custom duties, as well as abolishes all tariffs between Canada and the EU during a seven year span.[68] Through the removal of technical barriers to trade, CETA will bring free trade of goods and protection of investments.[69] Furthermore, the agreement includes not only a lack of tariffs, but also includes chapters on public procurement, intellectual property rights, direct investment, regulatory cooperation and competition law.[70] In addition to the competition law provisions in the CETA, there is further cooperation between Canada and the EU through a Cooperation Agreement regarding the application of their competition laws. This agreement is older than the CETA, but is still in force and has been connected to the new EU-Canadian relationship through a provision in the CETA.[71]

In some matters the agreement is not as beneficial as might be desirable from a UK point of view – for example: in the light of trade in

[65] CETA, Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, Interinstitutional File: 2016/0206 (NLE), Brussels, 14 September 2016 (OR. en), 10973/16.
[66] Official website of the European Commission, *In Focus: EU – Canada, Comprehensive Economic and Trade Agreement (CETA),* http://ec.europa.eu/trade/policy/in-focus/ceta/. Accessed 2018-03-02.
[67] Neuwahl, Nanette, (2017), CETA as a Potential Model for (Post-Brexit) UK-EU Relations, European Foreign Affairs Review 22, no. 3, Pages 279 – 302, 2017. Page 281.
[68] Hübner, Kurt, Deman, Anne-Sophie & Balik, Tugce, (2017), *EU and Trade Policy-making: the Contentious Case of CETA,* Journal of European Integration, 39:7, Pages 843 – 857, DOI: 10.1080/07036337.2017.1371708. Pages 844-847.
[69] Lehmann & Zetzsche, (2016). Pages 3-4.
[70] Hübner, Deman & Balik, (2017). Page 847.
[71] Wagner-von Papp, Florian, (2017), *Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)*, UCL Faculty of Laws, London UK, 16th of July 2017. Pages 26-30.

services, it does not give the right to the active freedom of services but only to the passive freedom of services. Therefore, one may only purchase a service from the other contracting State but not do business and solicit in the other contracting State.[72]

Thus, in the light of Brexit, the Canada option has its pros and cons. As seen above, it contains a lot of the sections the UK would like in an FTA. However, CETA lacks access to the Internal Market that may be valuable for the UK.[73] What is also noteworthy is that CETA took almost a decade to negotiate. It is not an agreement that the EU and the UK are likely to bring about in less than three years' time (provided there is even a transitional period, otherwise there is only 10 months left)[74] – especially considering the British want to have an even more extensive agreement than CETA.[75]

3.6 Scenario 5: WTO

If the UK and the EU fail to come to an agreement before Brexit or decide to not form an agreement, the WTO scenario would become relevant. This scenario results in the complete absence of affiliation with the EU and as such is not a model for basing an EU-UK relationship on but rather the result of failed negotiations.[76] If the UK would not be a part in neither the EEA, the Customs Union, nor arrive at a FTA, EU-UK trade would automatically be regulated by WTO rules.[77]

In relation to the EU, the UK would have the status as an external country, which would mean a lack in market access for goods or services.[78] Furthermore, the UK would in this situation probably be treated as a Most Favoured Nation (an MFN) by the WTO and would adhere to those

[72] Lehmann & Zetzsche, (2016). Pages 3-4.
[73] Emerson, Michael, (2016). Page 5.
[74] Official website of the European Commission, *News Archive: EU and Canada start negotiations on trade agreement,* Brussels, 1st of November 2009, http://trade.ec.europa.eu/doclib/press/index.cfm?id=487. Accessed 2018-03-02.
[75] Official Website of the BBC, *Brexit: David Davis Wants 'Canada Plus Plus Plus' Trade Deal*, http://www.bbc.com/news/uk-politics-42298971. Accessed 2018-03-13.
[76] Emerson, Michael, (2016). Page 1.
[77] Cambridge Econometrics, (2017). Page 19; Lehmann & Zetzsche, (2016). Page 4.
[78] Emerson, Michael, (2016). Page 2.

principles.[79] As an MFN, UK exports could risk a tariff of 58% on goods that are imported into the EU or countries that the EU have FTAs with, and tariffs for imports into the UK from aforementioned parties could go as high as 65%.[80] Imports and exports would fall under GATT (General Agreement on Tariffs and Trade) and GATS (General Agreement on Trade in Services) respectively. [81] Keeping with the WTO principles, the UK would be free to negotiate its own FTAs with the EU and other WTO members.[82]

However, the membership of the UK in the WTO would have to be renegotiated as the current agreements have been negotiated and signed by the EU. This pertains not only to the WTO membership, but also to the GATS and the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS). Moreover, the General Director of the WTO has expressed that the UK will not simply be allowed to replicate the terms that have been negotiated by the EU and the WTO. Thus demanding a lot more from the UK than just applying for a membership.[83]

Along with adhering to the principles held by the WTO the UK would also be presumed to keep with the principles of other International Organisations such as the International Competition Network (ICN), the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). However, adherence to the principles set up by the ICN and the OECD depends on the fact that the UK will have to reapply to be a member as an independent country after leaving the EU. This is because the EU has an agreement with both these International Organisations, rather than each EU Member State having to conclude their own agreement.[84]

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[79] Lehmann & Zetzsche, (2016). Page 4.
[80] Fabbrini, (2017). Pages 209-212.
[81] Official Website of the WTO, *Principles of the Trading System*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm. Accessed 2018-02-18; Lehmann & Zetzsche, (2016). Page 4.
[82] Emerson, Michael, (2016). Page 2.
[83] Told, Julia, (2017), *(BR)EXIT from the EU: A Legal Perspective*, European Company and Financial Review, ECFR 2017, Pages 490-568. Page 537.
[84] Whish, Richard (2016), *Brexit and EU Competition Policy*, Journal of European Competition Law & Practice, Vol. 7, No. 5, 2016. Page 297.

This option comes with an infinite amount of freedom, something that many who voted for Brexit would agree with. The UK would not have to contend with any particular EU laws, for example EU competition law. However, certain disadvantages for the UK would be imminent. Due to the discrepancy between EU and UK regulations, a lack of FTA or other relationship with the EU would increase the costs of trade for the UK through tariffs and non-tariff barriers.[85] Another disadvantage for the UK would be having to replace a number of EU FTAs that the UK would no longer be party to – as well as of course negotiating agreements with countries with which the EU have no FTAs. This will not only be time-consuming due to the sheer amount of negotiations needed, but many countries have already alluded to that the UK would not be a prioritised country to conclude agreements with.[86]

3.7 Concluding Remarks

No matter if the UK ends up with an EEA agreement or a "Canada plus plus plus"[87] trade deal – except if the UK miraculously opts to stay in the EU – arrangements will have to be made on what laws will continue to apply after Brexit. This could create a lot of uncertainty for UK based companies who may find themselves in the situation where they lose their EU 'passporting rights' which would restrict business to EU Member States, especially if the UK has to operate as a third country and rely either on WTO rules or on any FTA that has been negotiated.[88]

In the context of law, this chapter has shown that if the UK leaves the EU there will be palpable effects on UK legislation. What is noteworthy and intriguing is that, in almost all of the scenarios examined above the UK will

[85] Cambridge Econometrics, (2017). Page 19.
[86] Emerson, Michael, (2016). Page 2.
[87] David Davis, the Brexit Secretary, has in an interview with the BBC stated that what the Conservative party (the party in power) are looking for is a Trade Agreement much like the Canada CETA but rather a "Canada Plus Plus Plus" – describing something much like CETA but with financial services to be included in the tariff-free area.
For the David Davis interview see Official Website of the BBC, *Brexit: David Davis Wants 'Canada Plus Plus Plus' Trade Deal*, http://www.bbc.com/news/uk-politics-42298971. Accessed 2018-03-01.
[88] European Chief Negotiator for the UK Exiting the EU Michael Barnier speaking at the Centre for European Reform in Brussels on the 20th of November 2017. Available at: https://www.pscp.tv/w/1jMJgdMZmRMxL.

in some ways always continue to be bound by EU law. A particularly affected area of law will be competition law, where almost all the scenarios contain various degrees of continued application of EU competition law in the UK. This is due to the international nature of competition law, along with the amount of harmonisation between UK law and EU law on the subject. In the framework of competition law, one of the areas that concerns most scholars is merger control.

4 EU and UK Merger Control

4.1 The Importance of Cooperation in Merger Control

In the light of Brexit and the UK leaving the EU, plenty of legislation will have to be adjusted due to the future lack of EU control and influence in the UK. One of the areas that will be most affected is the area of competition law, as it is a legislative field where the European Commission (henceforth the Commission) is involved on national level – applying both law and policy directly. Furthermore, in the European competition law system, the EU law and the domestic law work in parallel which creates a unique system – a system that the UK has been very involved in developing.[89]

There are a number of fields in competition law that Brexit will inevitably alter, such as competition law enforcement, state aid and competition policy. One of the most important fields of law that will be altered is merger control.[90]

Merger control is an important subject to consider, not only due to the general involvement of the EU on a national level but it is also especially worth considering due to the international elements of merger control.[91] Contemplating the *GE Honeywell Case*[92] – the case regarding two companies based in the US (General Electric and Honeywell) attempting to merge. If granted, the merger would have been the largest industrial merger in history at that time. However, the merger failed as the Commission found that the merger's conglomerate effects caused an impediment to effective competition on the Internal Market.[93] Two companies that were solely based in another

[89] Vickers, John, (2017), *Consequences of Brexit for Competition Law and Policy*, Oxford Review of Economic Policy, Vol. 33, No. S1, Pages S70–S78. Page 70.
[90] Vickers, (2017). Pages 70-72.
[91] Weber Waller, Spencer, (1997), *The Internationalization of Antitrust Enforcement*, Boston University Law Review, Vol.77:343. Pages 344-346.
[92] Judgment of the Court of First Instance of 14 December 2005. General Electric Company v Commission of the European Communities. Case T-210/01. ECLI:EU:T:2005:456.
[93] Grant, Jeremy & Neven, Damien J., *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict,* Graduate Institute of International

part of the world were affected by European merger control – highlighting how extraterritorial the nature of the subject is, and therefore the importance of collaboration. This is not the only occurrence of EU merger control having effects far beyond its geographical borders.[94] Hence it is clear that a purely national system is inadequate in regulating the merger control of companies that will on the one hand inevitably affect other markets than the national one, and on the other hand be regulated by other supranational regulations.[95] To better understand the implications the internationality of merger control will inescapably have on Brexit and UK law, one must first look into the EU merger control and the UK merger control.

4.2 A Brief Summary of EU Merger Control

A concentration of two or more independent undertakings unite to form a new entity – is called a merger or an acquisition (both terms are in this thesis included in the term *merger* unless otherwise specified). Thus, merger control is the review of a merger under the competition laws – which allows competition authorities to regulate the accumulation of market power by large companies. This is because mergers not only create a permanent change on a market, but also affect competition in multiple other ways. In the EU, the purpose of merger control is to regulate mergers between entities to ensure that no significant obstruction to effective competition in the Internal Market or in a substantial part of the Internal Market might occur. The task of competition authorities is thus to ensure that any mergers which have such severe impacts on competition are prohibited.[96] EU merger control consists foremost of the Merger Control Regulation (EUMR).[97] The EUMR entails a

Studies, Geneva, March 2005, Available at: http://ec.europa.eu/dgs/competition/economist/honeywell.pdf. Pages 2-4.

[94] See for reference the Case *Boeing/McDonnell Douglas*: Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.877 - Boeing/McDonnell Douglas). 97/816/EC. OJ L 336, 8.12.1997. Pages 16–47.

[95] Weber Waller, (1997). Pages 344-345.

[96] Jones, Alison & Sufrin, Brenda, (2016), *EU competition law: text, cases, and materials*, 6. ed., Oxford: Oxford University Press. Pages 1084-1085.

[97] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. OJ L 24, 29.1.2004. Also known as the EUMR; Jones & Sufrin, (2016). Pages 1093-1095.

'one-stop-shop' review of mergers in Europe that affect the Internal Market, meaning that the merging parties can obtain a single clearance from the EU rather than having to apply in multiple countries. After Brexit, the Commission will no longer have any competence in regard to UK competition. This could result in complications not only for companies wanting to make merger transactions within the EU, but also for UK policies and the work of the UK Competition and Markets Authority (the CMA).[98]

In addition to the EUMR it is important to recognise the applicability and effect of Article 101 and Article 102 in the Treaty on the Functioning of the European Union (TFEU). EU merger control and the Significant Impediment to Effective Competition (SIEC) test in the EUMR as well as the test under Article 101 for restricting competition are close in application. Thus, looking to the articles, the application of the EUMR on mergers is closely connected to the antitrust regulations. Therefore, the core provisions in Articles 101 and 102 TFEU are still important for the application of EU merger control, in so far as merger control is and always will be a part of competition law.[99]

4.3 A Brief Summary of Merger Control in the UK

To understand the full extent of Brexit's effect on merger control depending on the different scenarios brought up in chapter 3, this section will introduce the current situation in merger control in the UK – to provide context for the following chapters.

The definition of a merger is the same in UK merger control as it is in EU merger control, as mentioned above in section 4.2. Merger control in the UK is comprised to the Enterprise Act from 2002 (henceforth referred to as the EA02), which regulates mergers and markets. The CMA is the central enforcement body for competition law, and appeals to the CMAs decisions

[98] Vickers, (2017). Page 71.
[99] Carles Esteva Mosso, Deputy Director-General for Mergers in the EU, speaking at the GCLC Conference 2016 on the 1st of February, Available at: http://ec.europa.eu/competition/speeches/text/sp2016_03_en.pdf. Pages 1-2.

are made first and foremost to the Competition Appeals Tribunal (the CAT).[100] The EA02, much like the EUMR, ensures remedy, mitigation and prevention of mergers that may limit competition.[101] Unlike the EUMR, the EA02 does not have a mandatory notification process for mergers – however, many mergers are still notified voluntarily.[102]

The one-stop-shop principle is enshrined in Article 21 of the EUMR, and regulates the jurisdiction of a merger examination. If a merger transcends the thresholds set out in the EUMR, it is considered to have a Union Dimension[103] and will fall under the competence of the Commission and not be examined by the national authority.[104] Thus, the rules in EA02 do not generally apply to such mergers, instead the Commission has exclusive jurisdiction.[105]

Along with the EA02, merger control and UK competition law is also influenced by the Competition Act 1998 (henceforth referred to as CA98). The CA98 mirrors the prohibitions in Article 101 and 102 in TFEU, and contains Section 60 which holds the principle on consistency of treatment between EU and UK law. The principle means that when a UK court or the CMA are considering questions relating to the CA98 it needs to take into account the EU Treaties as well as principles and decisions made by the CJEU and the Commission.[106]

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[100] Vickers, (2017). Pages 72-73.
[101] Vickers, (2017). Pages 72-73.
[102] Slaughter & May, (2009), UK Merger Control Under the Enterprise Act 2002, A Paper Prepared by the Law Firm Slaughter and May, 2009, Available at: http://www.slaughterandmay.com/media/64563/uk_merger_control_under_the_enterprise_act_2002_-_nov_2009.pdf. Page 1.
[103] In layman's terms this indicates that if the merger is large enough it will have an effect on the competition in the European Union.
[104] Vickers, (2017). Pages 72-73; For more information on the turnover thresholds, please see: http://ec.europa.eu/competition/mergers/procedures_en.html. Accessed: 2018-04-09.
[105] Article 9 EUMR holds that if the effects to competition are centralised to a certain Member State, the national authority can regain competence over the case. However, despite that cases can be shifted from one authority to another, the basis for interaction between the Commisson and NCAs is still the one-stop-shop principle. For reference see: Slaughter & May, (2009). Page 1; Vickers, (2017). Pages 72-73.
[106] Vickers, (2017). Page 72.

4.4 UK Merger Control After a Hard Brexit

If the UK leaves not only the EU but also the EEA and the Customs Union this will have a great impact on merger control in the UK. In order to understand the scenarios described in the chapters 5 – 9 an understanding of the consequences of an absolute lack of EU influence on UK merger control is needed.

First of all, from the moment the UK leaves the EU, there would of course be a continued applicability of the substantive provisions of UK Competition Law. Both the CA98 and the EA02 are parts of UK legislation and thus not dependent on a membership in the EU.[107] Section 60, CA98, states that there is a responsibility for UK courts and the CMA to ensure that there is no disparity between UK case law and principles compared to EU principles, decisions and statements laid down in the TFEU, by the Commission and by the CJEU.[108] If Section 60 is not repealed before the the UK leaves the EU, it would continue to apply after Brexit, and would either have to be removed "post-mortem" or it would continue to apply and create harmony between the CMA and the EU. Despite the unwillingness by pro-Brexit politicians to maintain CJEU jurisdiction[109], it is possible that Section 60 could continue to be effective. Regardless of the outcome of Brexit it will continue to be important for the UK to take into account the EU precedents and principles, as the UK will continue to be part of Europe. There is, for example, an ongoing debate in Switzerland regarding the extent to which Swiss courts interpret and follow CJEU precedent. Thus, to interpret national laws in conformity with corresponding laws in the EU may be important even if a country and its courts are not a part of the EU.[110]

It is however unlikely that Section 60 would survive Brexit as one of the main reasons the UK is leaving the EU is that citizens are calling for legislative powers to be brought back to the UK and to escape CJEU

[107] Vickers, (2017). Page 73.
[108] Wagner-von Papp, (2017). Pages 36-37.
[109] Whish, (2016). Page 297.
[110] Wagner-von Papp, (2017). Page 36.

jurisdiction.[111] Furthermore, on the subject on competition law enforcement, the UK Government has produced the *European Union (Withdrawal) Bill* (the Bill) which, if it becomes law, will mitigate Section 60 and instead the UK will not be forced but have the option of taking EU principles into account. The Bill will further ensure that Commission Decisions, as well as infringement decisions by foreign National Competition Authorities (NCAs), will no longer be binding on UK courts or the CMA. [112]

Coordination mechanisms that can be found in the EUMR will no longer be binding in the EU-UK relationship. In the EA02, Part 9 acknowledges that the UK has the possibility of sharing information with the Commission. However, there is no complementary legislation for the UK receiving information from the Commission. This Part in UK legislation may be removed or at least altered, and replaced or reinforced with a Cooperation Agreement for example if the EU and the UK relationship is to rely on an FTA.[113]

Secondly, Brexit may not only signify change for merger control through the CA98, but also jurisdictional rules for the CMA. In situations where large corporations plan mergers they expect to have to deal with a number of merger filings. However, the corporations also expect predictability as to which jurisdictions they have to file in. The jurisdictional rules in the UK have guidance tools rather than a simple applicable turnover test or control thresholds, which can make it difficult to foresee if a merger filing is required or not. Without EU legislation, the UK may have to create legislation in order to avoid putting a too heavy burden on corporations. However, such legislation could mean that certain mergers that are in fact harmful to consumers are not caught – such as cases that need to be reviewed under material influence rules or that have a low turnover.[114]

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[111] Whish, (2016). Page 297.
[112] Article 16 in Regulation 1/2003; Article 9 in Damages Directive 2014/104/EU; Wagner-von Papp, (2017). Page 37.
[113] Brexit Competition Law Working Group Issues Paper*,* Key Legal and Policy Questions Within the Competition Sphere that HM Government Will Need to Examine When Considering its Options in Respect of Brexit, October 2016. Page 7.
[114] Berridge, Alison & Lindsay, Alistair, (2017), *Brexit, merger control and potential reforms,* European Competition Law Review, E.C.L.R., 2017, 38(10), Pages 435-436. Page 435.

Thirdly, due to EU merger control not being applicable in the UK, the above mentioned one-stop-shop principle under the EUMR would also no longer apply. This could put the CMA in a new situation, as there would be an inevitable increase in the CMA's workload. Due to the lack of case-reallocation mechanisms, in situations of international mergers, the CMA would no longer be able to rely on the Commission scrutinising mergers on behalf of the EU. Rather, the CMA will after Brexit be responsible for investigations of competition law infringements independently from the Commission, which will mean an extra level of control. This will result in expenses and uncertainty for businesses along with a duplication of work, as both the Commission and the CMA will examine a number of the same mergers. This may of course also result in conflicting decisions or remedies, which would have consequences on legal certainty. Without legal certainty, corporations could have issues knowing which approach to rely on – making the whole matter of mergers a lot more complicated than it is today.[115]

It is also likely that the CMA workload would increase further due to legal uncertainty. The UK holds a voluntary notification system. However, if the CMA later finds a merger to have had a negative effect on competition and the merger has been completed without being notified – that could have detrimental effects on the merger deal. Thus, it will be easier for corporations to just ignore the voluntary element of the UK merger control and file "just in case". The number of filings with the CMA could skyrocket, due to the just in case filings and the lost opportunity of filing only with the Commission. Furthermore, a voluntary system relies on that the NCA has enough competence to be able to recognise mergers that are problematic but have not been notified.[116]

A merger control free from the EU has been deemed desirable by certain scholars, especially the possibility for the UK to alter competition law as they see fit.[117] It seems to be a common misconception, that merger control will be high on the list of changes that the UK can make to its own legislation

[115] Whish, (2016). Page 297.
[116] Berridge & Lindsay, (2016). Page 435.
[117] Vickers, (2017). Page 77.

promptly after Brexit. In reality, however, a long list of national laws will be amended following Brexit and merger control will likely not be the most pressing matter. In combination with the possibility that an agreement with the EU may limit the UKs innovation abilities in the area of competition law, the openness of merger control without the EU has been overstated.[118]

Lastly, Brexit will entail not only the loss of the Commission and the lack of harmonised legislation. A withdrawal from the EU will lead to a removal from the ECN, negate the UK's ability to develop competition law and policy and retire the UK as one of the major contributors to EU merger control. Furthermore, the many merger notifications that today are handled in London on behalf of non-UK parties are unlikely to survive the distance created between London and Brussels.[119]

4.5 Merger Control After Brexit

After looking into chapter 4.4 it is clear that it is highly likely that, even if the UK leaves the EU, the UK will continuously have to deal with EU merger control as well as international merger control in a way that no politician seems to have pinpointed as of yet. Depending on the scenario the direct affiliation with EU merger control will vary greatly. Even though the EUMR will presumably continue to apply to the UK during the transitional period, there will come an effective date when issues will arise depending on which way the UK chooses to leave the EU.[120]

UK merger control post-Brexit is yet unclear. Any adjustments will depend on the scenario that the EU-UK negotiations produce. Therefore, the next chapters analyse the scenarios from chapter 3 but purely from a merger control standpoint.

[118] Berridge & Lindsay, (2016). Page 435.
[119] Whish, (2016). Pages 297-298.
[120] European Competition Lawyers Forum, (2017), *Brexit and Merger Control in the EU: a Proposed Way Forward*, A Paper Prepared by the European Competition Lawyers Forum, European Competition Journal, Vol. 13, Nos. 2-3, Pages 151-171, DOI: 10.1080/17441056.2017.1408248, 20th of November 2017. Page 152.

5 The EEA and Merger Control

5.1 Introductory Notes on the EEA Membership

If the UK would decide to remain in the EEA, this would entail the least intrusive changes to UK merger control. The EEA competition rules correlate with the EU rules, and apply to all the undertakings in the EEA area.[121] Thus, in the light of merger control the UK would not only have to comply with its own competition law but continue to comply with the EU through the EEA Agreement and the guidelines therein.[122] The UK would have to keep part of its competition law harmonised with EU law. Essentially, it would seem that if the UK would reapply as an EFTA member and join the EEA little would change regarding to merger control.

5.2 EEA Merger Control and EU Merger Control

The rules on competition are transposed into the EEA Treaty, and in Article 57 of the EEA Agreement it is made clear that the EUMR applies equally to EEA Member States.[123]

Set out in the EEA Agreement, Article 57(2)(a) provides that the exclusive jurisdiction of the Commission in the EU also covers the three EFTA contracting States. Thus, the Commission has exclusive jurisdiction in the EEA to investigate mergers with a Union Dimension.[124] For the purpose

[121] Official Website of EFTA, *Competition,* http://www.efta.int/eea/policy-areas/goods/competition-aid-procurement-ipr/competition. Accessed 2018-02-28.
[122] Official Website of the Norwegian Competition Authority, *Overview of Competition Legislation in Norway,* http://www.konkurransetilsynet.no/en/legislation/overview/. Accessed 2018-02-28.
[123] Allen & Overy, (2016), Brexit Law – EEA Membership: What Does It Mean?: Implications of EEA Membership Outside the EU – Different Name, Same Game?, A Paper Prepared by the Law Allen & Overy, July 2016, Available at: http://www.allenovery.com/Brexit-Law/Documents/Macro/EU/AO_BrexitLaw_-_EEA_Membership_Jul_2016.PDF. Page 6.
[124] EUMR, Article 1 and Recitals 8-9.

of a Union Dimension, EEA and EFTA Member States are then also included.[125] Thereby, the advantage for corporations to be able to file according to the one-stop-shop principle, momentarily held by the UK through membership in the EU, could be maintained after Brexit through membership in the EEA and EFTA.

The compliance control is not only carried out by the Commission but also by the EFTA Surveillance Authority (the ESA). Article 57(2)(b) provides that ESA holds jurisdiction over any mergers that have an 'EFTA Dimension', but not a Union Dimension. To be encompassed in the EFTA Dimension a merger must meet specific thresholds (which are equivalent to the EU thresholds).[126] When a merger has a Union Dimension in an EEA country the merger must be notified by the Commission. The Commission then investigates the concentration to examine if it is compatible with the EU standards.[127] Like the Commission, the ESA can examine notifications and complaints, undertake investigations and adopt decisions. ESA applies similar rules to those applied by the Commission, and in the event that the Commission implements EEA competition rules it does so on the basis of EU procedural rules. [128]

Article 58 of the EEA agreement states that the Commission and the ESA are obliged to cooperate in general policy issues as well as certain individual cases which fall under the EEA competition rules. Thus, the outcome of the cases are meant to be the same despite which authority handles the issue. There is of course the problem that in the event of an appeal the cases will be handled by the EFTA Court and the CJEU respectively, but a uniformity of applications is ensured by an exchange of information and a system of cooperation between the authorities.[129] In reality, mergers with an EFTA Dimension are so rare that presently the ESA has examined only a minor number of cases.[130]

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[125] Allen & Overy, (2016). Page 6.
[126] Broberg, (2013). Pages 207-208.
[127] EUMR, Article 4.
[128] Broberg, (2013). Pages 207-208.
[129] Broberg, (2013). Pages 208-210
[130] Official Website of the EFTA Surveillance Authority, *Competition Cases Archive*, http://www.eftasurv.int/competition/competition-cases/competition-cases-archive/. Accessed 2018-02-28.

Though the two authorities may seem on equal footing, the Commission holds an hierarchical position over the ESA. For example, it has the power to request investigations by the ESA into the EFTA Community – a power that has not been bestowed upon the ESA.[131]

5.3 EEA Membership and UK Merger Control

In the event of the UK deciding not to reject the Internal Market altogether and instead stay in the EEA – the EU would still be highly involved in the UK merger control. Through the EEA Agreement the EU maintains control of concentrations in Europe, though it might to appear to be less control in the EEA area. In fact, the Commission has not given up any of its competence to the benefit of the ESA. This is visible firstly in that there is no joint jurisdiction between the two parties and, secondly, in that if the Commission has jurisdiction both the ESA and any of the EFTA states NCAs are expected to give up any claim to jurisdiction. For the UK this principle would mean that the UK would continue to leave the central instrument of merger control as well as the establishment of industrial policy to an authority over which it after Brexit will have no means to control or in some ways even influence.[132]

Consequently the UK would continue to benefit from the one-stop-shop principle, something which would greatly benefit the UK through the continued coordination of merger investigations ensuring legal certainty in the EU as well as allowing the UK Government not having to spend more Government funds on the CMA to cope with the influx of merger notifications.[133]

Considering the legislations of the three contracting EFTA states, UK legislation would have no immediate need to amend its legislation on merger control when leaving the EU and re-entering EFTA and the EEA.[134] The principles held in both the EA02 and the Section 60, CA98, would

[131] Broberg, (2013). Pages 207-208.
[132] Broberg, (2013). Pages 209-210.
[133] Muscolo, Gabriella, (2017), *Brexit: Which Brexit?,* Rivista Italiana di Antitrust, Italian Antitrust Review, No. 2, 2017. Page 4.
[134] Slaughter & May, (2009). Page 30.

continuously apply to the UK in almost the same way, with minor amendments to include the ESA and the EFTA Court. [135]

It is noteworthy that some mergers could start falling under the CMA competence through the EEA Agreement. In the EEA Agreement the agricultural sector and fisheries sector are actually excluded from its scope. Hence, it is unclear whether mergers in these sectors would fall under EU law or not, as the products are in fact exempted from the EEA agreement.[136]

The UK could request the status of an 'EEA minus state', with the explicit provision of UK control over its own competition law and merger control.[137] However, it seems unlikely that this is a plausible alternative. Partly because the EU has long promoted its own model on competition law among its business partners, and partly because the UK would with all probability not prioritise merger control over for example immigration if it got the status of a minus state.[138]

In the end, it is doubtful that the UK would want to remain a part in the EEA – considering that the British people voted against many issues that can be linked to a continued membership in the EU Internal Market.[139] Despite the likelihood of such an occurrence, if it were to occur, UK merger control would remain approximately the same.

[135] Lianos, Ioannis, Mantzari, Deni, Wander von Papp, Florian & Thepot, Florence, (2017), *Brexit and Competition Law*, Centre for Law, Economics and Society, Policy Paper Series: 2/2017, UCL Faculty of Laws, September 2017. Page 4.
[136] Official Website of EFTA, *Agriculture, Fisheries and Food Safety*, http://www.efta.int/eea/policy-areas/goods/agriculture-fish-food. Accessed 2018-02-28.
[137] For more information on the 'EEA minus State', see Chapter 3.2.
[138] Lehmann & Zetzsche, (2016). Page 3.
[139] Told, (2017). Page 525.

6 The Customs Union and Merger Control

6.1 Introductory Notes on Customs Unions

In the scenario where the UK decides to go along the same lines as Turkey, the UK would only be a part of the Customs Union – an area which is disclosed from the competition law area. In this situation it would appear that there is no real interaction between the EU merger control and UK merger control.[140] However, by analogy with the Customs Unions agreement between EU and Turkey, this agreement includes a Chapter on the approximation of laws.[141] Even though the Chapter does not oblige Turkey to harmonise its merger control with EU merger control – it may be implied that this is a long-term objective. The situation would be different for the UK, as their laws are already adjusted to EU law, but by analogy with the situation in Turkey and due to the EU's explicit intent one may argue that it is likely, and would be beneficial, for the UK to keep its laws adjusted to the EU laws in a manner that is similar to that of Turkey.[142]

To understand the full extent of how the UK merger control could be impacted by a membership in the Customs Union, this thesis describes the situation in Turkey and try to apply the Turkish management of a Customs Union membership to the UK situation.

It is of course a possibility for the UK to completely disregard how Turkey has handled its Customs Union Agreement and decide not to amend its merger control. The UK could then still maintain a Customs Union Agreement, but without competition law provisions. A comparable view of a situation where the UK is not forced to align any legislation with EU rules is

[140] Official Website of the European Commission, *Bilateral Relations > Turkey,* http://ec.europa.eu/competition/international/bilateral/turkey.html. Accessed 2018-02-28.
[141] Decision No. 1/95, Chapter VI, Section II: Competition (approximation of laws).
[142] Official Website of the European Commission, *Turkey : Customs Unions and Preferential Arrangements*, https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/customs-unions/turkey-customs-unions-preferential-arrangements_en. Accessed 2018-02-28.

found in chapter 4.4, and will thus not be pursued any further in this chapter. Once the UK has left the EU it may be in a situation that is comparable to that of Turkey, the focus will be on how Turkey has in fact amended its merger control to correspond with EU merger control even without having been obliged to do so. This is meant to enlighten the reader of the deep influence of EU merger control from the position of a non-Member State.

6.2 Turkish Merger Control and EU Merger Control

Turkish merger control is regulated in the Turkish Competition Act[143] and the Merger Communiqué[144]. The fundamentals of merger control such as the market shares and concentration levels is very similar to the approach taken by the Commission in the EU Horizontal Merger Guideline.[145] For example, Article 7(2) in the EUMR has been duplicated in Article 3 in the Communiqué.[146]

The Turkish NCA has communicated two guideline documents on the assessment of mergers in Turkey, the first on horizontal mergers and the second on non-horizontal mergers. The guidelines are harmonised with the EUMR, creating a further bond between the two merger control regimes. The guidelines on mergers published by the Turkish NCA take into account a

[143] Turkey Law No. 4054 of December 12, 1994, on Protection of Competition.
[144] Turkey Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. Amended by Communiqué 2017/2.
[145] Official Website of the Global Legal Group: Global Legal Insight, *Merger Control 2017 Turkey*, https://www.globallegalinsights.com/practice-areas/merger-control/global-legal-insights---merger-control-6th-ed./turkey. Accessed 2018-04-12; Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03).
[146] Official Website of the Global Legal Group: Global Legal Insight, *Merger Control 2017 Turkey*, https://www.globallegalinsights.com/practice-areas/merger-control/global-legal-insights---merger-control-6th-ed./turkey. Accessed 2018-04-12.

further harmonisation with the EU.[147] The notification format in Turkey is very similar to the Form CO (the notification form for the Commission).[148]

Article 43 of Decision No. 1/95 of the EC-Turkey Association Council gives authority to the Turkish NCA to notify and request relevant measures from the Commission if a Union merger will adversely affect competition in Turkey. The same authority is also afforded to the Commission, to ensure harmonisation between the two merger control regimes. The Commission is however reluctant to share evidence or arguments with the Turkish NCA, even when formally requested.[149]

The Draft Competition Law in 2013 (though no longer in force) demonstrates how Turkey has continuously assimilated its competition law and merger control to the EU regime.[150] There seems to be an interest from the Turkish side to harmonise its competition law with EU competition law, not only in strictly competition law matters as is provided in the Chapter on approximation of laws but also in the areas of state aid and merger control.[151]

6.3 Customs Union Membership and UK Merger Control

Despite the lack of actual legislation forcing Turkey to amend its merger control and harmonise it with EU law, parts of the Turkey merger control are harmonised. The question is why? For the UK, in case they end up in a

[147] Website of the Global Legal Group: International Comparative Legal Guides, *Merger Control 2018 Turkey*, https://iclg.com/practice-areas/merger-control-laws-and-regulations/turkey. Accessed 2018-04-12.
[148] Website of the Global Legal Group: International Comparative Legal Guides, *Merger Control 2018 Turkey*, https://iclg.com/practice-areas/merger-control-laws-and-regulations/turkey. Accessed 2018-04-12.
[149] Website of Thomson Reuters: UK Practical Law, Merger Control in Turkey: Overview, https://uk.practicallaw.thomsonreuters.com/0-504-6682?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1. Accessed 2018-04-12.
[150] Website of the Global Legal Group: International Comparative Legal Guides, *Merger Control 2018 Turkey*, https://iclg.com/practice-areas/merger-control-laws-and-regulations/turkey. Accessed 2018-04-12.
[151] Güner, Ayşe & Gönenc, Gürkaynak, (2016), *Turkey Merger Control*, The European, Global Competition Review: Middle Eastern and African Antitrust Review, 21st of July 2016. Available at: https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2017/1067867/turkey-merger-control.

situation where a membership in the Customs Union is eligible, the lack of restrictions on merger control would, from the view British public, seem as a positive addition to the Brexit situation. However, the amount of freedom in a membership in the Customs Union is not as clear as it may seem.

It is very likely that the Turkish willingness to harmonise national competition law and merger control with EU law is due to Turkey being a candidate country for EU membership and in the process of transposing EU legislation into national law.[152]

However, in light of the UK companies threatening to leave the UK after the Brexit vote – it is not unrealistic that the UK would feel a need to amend its legislations to ensure that companies feel welcome and safe in the UK.[153] In that case, the way Turkey has assimilated its merger control to the EU merger control is perhaps not such a farfetched option.

Despite this, the lack of regulations which oblige Turkey to harmonise its merger control to be compatible with the EU opens up the possibility for the UK to only adapt its competition law to ensure an approximation of laws to EU law and nothing else.

[152] Official Website of the European Union, *Countries*, https://europa.eu/european-union/about-eu/countries_en. Accessed 2018-04-13.
[153] Curry, Rhiannon, Dakers, Marion & Martin, Ben, (2016), *UK Firms Mull Moves in Wake of Brexit*, The Telegraph, 29th of June 2016, Available at: https://www.telegraph.co.uk/business/2016/06/29/uk-firms-mull-moves-in-wake-of-poll/.

7 The AAs and Merger Control

7.1 Introductory Notes on AAs

The possibility of an AA is the least discussed scenario in the literature so far, and yet it is the scenario that the European Parliament is leaning towards.[154] The relationship would be a more consistent relationship than the one with Switzerland, and would moreover create a flexible framework for the EU and the UK to build a stable relationship.

How, and if, the UK would have to manage its merger control in a new AA relationship with the EU is best examined through the existing AA between the EU and Ukraine[155]. This agreement is a good example as it includes unparalleled access to the Internal Market for a country that is not a Member State. Furthermore, it encompasses areas where the UK have already stated that it wants to cooperate with the EU – such as defence and security.[156]

The AA between Ukraine and EU was concluded in September 2017. It is a comprehensive Treaty on their political and economic relationship, and includes a Deep and Comprehensive Free Trade Area (DCFTA). The AA is said to modernise Ukraine through alignment with EU norms. One of the regimes that Ukraine has to align itself with is competition law, and thereby merger control.[157]

Just like the situation with Turkey, as mentioned above, where it is a possibility for the UK to completely disregard how Ukraine has handled its AA and decide not to keep its merger control harmonised with EU merger control. The effect of UK merger control without any EU alignment has already been discussed in chapter 4.4. Thus this chapter will focus on how

[154] For more information on AAs see chapter 3.3.
[155] The Accession Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. Official Journal L 161/3, 29.5.2014.
[156] Policy Paper, The United Kingdom's Exit From, and New Partnership with the European Union White Paper, Part 11.9, *Cooperating in the Fight Against Crime and Terrorism*.
[157] Emerson, Michael & Movchan, Veronika, (2016), *Deepening EU-Ukrainian Relations: What, Why and How?*, Brussels: Centre for European Policy Studies (CEPS), Kyiv: Institute for Economic Research and Policy Consulting (IER) & London: Rowman & Littlefield International. Pages 1-3 and 112-113.

Ukraine has chosen to amend its legislation to fit EU merger control, and thereby illuminate how the UK may choose to act if it becomes a non-Member State.

7.2 Ukrainian Merger Control and EU Merger Control

In the AA between the Ukraine and the EU, Chapter 10 in Title IV, the subject of competition law and merger control is examined. In the Chapter, anti-competitive practices and transactions are prohibited or sanctioned. It is made clear that 'concentrations between undertakings, which result in monopolisation or substantial restriction of competition in the market in the territory of either Party' are inconsistent with the agreement.[158] The principles are derived from Article101 and Article 102 TFEU, and are only prohibited as far as they affect trade between the EU and Ukraine. However, what may affect trade among EU countries is broadly defined in the EU to include as many concentrations and practices as possible.[159] Through the AA, Ukraine has agreed to approximate its laws and enforcement practices with the EUMR. Within three years time, Articles 1, 5(1), 5(2) and 20 of the EUMR are to be implemented in Ukraine law.[160] The Articles result in Commission control over concentrations with a Union Dimension on the basis of EU thresholds, that EU determines the calculation of turnover and how the Ukrainian NCA has to publish its decisions.[161]

Ukraine is given a wide margin of discretion in how they implement and enforce the section containing merger control, as long as Ukraine ensures that anti-competitive practices are effectively addressed and that there are authorities responsible for the enforcement of competition law. There is no requirement to approximate the whole body of merger control, but only the specific Articles mentioned above.[162]

[158] EU-Ukraine Accession Agreement, Article 254.
[159] Emerson & Movchan, (2016). Pages 112-113.
[160] EU-Ukraine Accession Agreement, Article 256.
[161] EUMR, Articles 1, 5(1), 5(2) and 20.
[162] Emerson & Movchan, (2016). Page 113.

7.3 An AA and UK Merger Control

It has been pointed out by the Brexit Steering Group that an AA is a flexible arrangement for a post-Brexit EU-UK, as the framework would allow for variable modes of cooperation. However, competition law continues to be one of the areas of law that the EU finds of outmost importance for a relationship with a non-Member State.[163] In the Resolution published by the European Parliament on the framework for a future EU-UK relationship, it is declared that in such a future relationship it is expected that the UK continues to comply with international standards as well as EU legislation and policies in competition law. Though the focus of compliance with EU standards mostly regard protection of workers, environment, consumers etc. – the expectation of compliance remains.[164] Delving deeper into the Resolution, the Brexit Steering Group upholds that a membership in the Internal Market as well as the Customs Union would be the most beneficial agreement. Such a relationship would however demand an absolute coherence to the four freedoms as well as the incorporation of EU rules, including the competition law regime.[165]

Thus, even though the AA may seem as the most adaptable scenario, it must be noted that the UK would need to walk the fine line between satisfying the leave-voters and appeasing the EU. In the European Parliament Resolution the EU seems keen on keeping the UK close in both legislative and merger control matters. Therefore, if the UK would want to be part of the EU and the Internal Market in such a way as the Ukraine, EU merger control would be one of the consequences. In such a situation the simplest solution would be to keep EU law incorporated in UK law as it is now. Although that would however include the EU legislation and CJEU control that leave-voters object to.

[163] European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*, Paragraph J.
[164] European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*, Paragraph 4.
[165] European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*, Paragraph 11.

8 FTAs and Merger Control

8.1 Introductory Notes on FTAs

FTAs are focused on market access and barriers to trade. However, though it may not be the first thing that springs to mind, competition law can also be part of an FTA.

The EU is very aware of the importance of coordinating its competition laws with other countries. Regarding merger control, a disadvantage of not coordinating efforts is the lack of exchange of information. If no agreement has been made between two countries, the exchange of information has to rely on informal approaches with no legal basis – a situation which is neither ideal nor ensures legal certainty. Therefore, the Commission is actively establishing cooperation with foreign NCAs and many FTAs thus include provisions on competition law.

This chapter analyses two FTAs to pinpoint how the relationship between a non-EU country and the EU can have an impact on merger control. The two agreements will be brought up in turn, and each section will describe a scenario with specific regard to how the FTA could affect the competition law regime, as well as explaining how they differ and what the scenario would mean for the UK if it choose to negotiate an FTA in the same manner. The last section of the chapter will elaborate on the importance of a Cooperation Agreement as well as FTAs in relation to post-Brexit UK merger control.

8.2 Switzerland

8.2.1 Swiss Merger Control and EU Merger Control

In Switzerland, competition law and more specifically merger control is governed in the Federal Act of Cartels and Other Restraints of Competition. The legislation was adopted in 1995, and has since been amended a number of times. Through each amendment the Federal Act has been brought closer

to EU competition law. [166] Yet, for a long time, none of the numerous agreements made between Switzerland and the EU contained any provisions on competition law.[167]

In 2013, the Competition Law Cooperation Agreement was signed.[168] The agreement was set out to enable the two parties to coordinate their enforcement efforts – especially to exchange protected and confidential information. This bilateral Cooperation Agreement runs along the same lines as the bilateral agreements that the EU has already concluded with for example Canada. However, this Cooperation is a second-generation Cooperation Agreement[169] and thus more penetrating.[170] In the EU-Switzerland Cooperation Agreement, the scope of information exchange is broader, and information can be exchanged without consent of the affected companies. The Cooperation Agreement even ensures that in some cases information can be exchanged without the need of a formal investigation. Furthermore, provided that the competition law enforcement activities may affect important interests of the party, the Swiss NCA and the Commission are required to share information on competition law investigations or proceedings. The Commission may share this information with its Member States' NCAs and the ESA, to satisfy its own obligation of information sharing. Finally, the Cooperation Agreement also includes a provision on conflict avoidance and a provision to enable requests to initiate enforcement activities by the other party.[171]

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[166] Brei, Gerald, Rab, Suzanne & Stempler, Ilyse, (2012), *EU and Swiss Competition Law: Navigating the Boundaries*, Swiss Business Law Journal SZW/RSDA, February 2012. Pages 136-137.
[167] Brei, Rab & Stempler, (2012). Pages 136-137.
[168] EU-Switzerland Cooperation Agreement, Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. Brussels, Official Journal L 347, 3.12.2014, Pages 3-9.
[169] A second-generation Cooperation Agreement, is an EU Cooperation Agreements with another state from after 2010. The second-generation agreements are more inclusive, for example the EU-Switzerland Cooperation Agreement includes the exchange of confidential information.
[170] EU-Switzerland Cooperation Agreement, Paragraph 7 and 8.
[171] Mamane, David, (2012), *Competition Law Cooperation Agreement EU/Switzerland*, Kluwer Competition Law Blog, 31st of July 2012, Available at: http://competitionlawblog.kluwercompetitionlaw.com/2012/07/31/competition-law-cooperation-agreement-euswitzerland/. Page 1.

Before the Cooperation Agreement, EU and Switzerland collaborated in the area of competition law enforcement on an informal basis – a system that did not ensure cooperation to the needed extent. The importance of agreeing to cooperation in consideration of merger control, is the possibility of coordinating enforcement activities.[172] Naturally, large mergers will affect more than one jurisdiction simultaneously. Without coordination, NCAs will face the issue of starting parallel investigations – Switzerland has had to spend excessive funds and large amounts of time, while sometimes not even having access to all the important documents. By signing a Cooperation Agreement, the Swiss NCA and the Commission can for example coordinate dawn raids, and discuss information for the purpose of cooperation and coordination.[173]

8.2.2 The Swiss FTA as a Model for Future UK Merger Control

The Swiss bilateral agreements are sector-specific agreements that cover cooperation in specified areas, and do not cover overarching principles like EU competition policies – with an exception for the Cooperation Agreement.[174]

In the terms of the UK removing itself from the EU competition law regime, the Swiss scenario is a scenario were the UK would no longer have to adhere to any EU principles while at the same time retaining the possibility to exchange information in parallel merger control procedures. The scenario would fulfil both the unwillingness of Brexit voters of being bound by EU rules and CJEU legislation, while at the same time not overly complicating the situation for cross border mergers which involve the UK and the EU. Furthermore, Switzerland's association with international mergers means that the information exchange is highly valued by the Swiss NCA. The same could

[172]Official Website of the Switzerland's European Policy*, Cooperation Between Competition Authorities*, https://www.eda.admin.ch/dea/en/home/bilaterale-bkommen/ueberblick/bilaterale-abkommen-nach-2004/wettbewerb.html. Accessed 2018-04-20.
[173] Mamane, (2012). Page 1.
[174] Vahl & Grolimund, (2006). Page 78.

thus with all likelihood be true for the CMA, considering the UK's association with international mergers.[175]

What makes the Swiss Cooperation Agreement so attractive is that in relation to the first-generation Cooperation Agreements[176] (as discussed in chapters 8.2 and 8.3), the Swiss can exchange protected or confidential information without approval of the company the information concerns.[177] A much needed amendment considering the not entirely uncommon unwillingness of corporations to cooperate.[178]

However, it is important to note that the bilateral agreements between EU and Switzerland not only took a very long time to negotiate, but also are unpopular with the Commission as they are difficult to manage.[179]

8.3 Canada

8.3.1 Canadian Merger Control and EU Merger Control

The CETA cites competition law in Chapters 17, 18 and 19.[180] Through the Chapters EU and Canada agree to prohibit and sanction practices that distort competition and trade, for example anti-competitive mergers.[181] The provisions on competition law in the CETA are broad. Chapter 17 on competition policy ensures that the "parties recognise the importance of free and undistorted competition" and "shall take appropriate measures to proscribe anti-competitive business conduct".[182] The Chapter also includes the principles of transparency and non-discrimination.[183] Chapter 18 refers to

[175] Mamane, (2012). Page 1.
[176] A first-generation Cooperation Agreement, is an EU Cooperation Agreements with another state from before 2010. The first-generation agreements are more simple and rudimentary than the second-generation agreements.
[177] EU-Switzerland Cooperation Agreement, Paragraph 4.
[178] Muscolo, (2017). Page 6
[179] Fabbrini, (2017). Pages 209-211.
[180] CETA, Chapter 17.
[181] Official website of the European Commission, *CETA Chapter by Chapter*, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. Accessed 2018-04-23.
[182] CETA, Chapter 17 Article 2(1) and Article 2(2).
[183] Wagner-von Papp, (2017). Page 26.

state enterprises, monopolies, and enterprises granted special rights or privileges and Chapter 19 refers to government procurement.[184]

In view of mergers, the CETA prohibits mergers with substantial anti-competitive effects. However, the actual impact on merger control is limited due to the legislation's vague nature and lack of established enforcement regime, as the Chapter does not agree on a dispute settlement.[185] However, there is a second element to competition law in the EU-Canada relationship. On the subject of competition law enforcement, the CETA refers to the 1999 Cooperation Agreement between Canada and EU.[186]

The Cooperation Agreement between EU and Canada manages the cooperation of enforcement between the parties on the subject of competition law.[187] The Agreement promotes cooperation and coordination of the application of the competition laws in the two jurisdictions. The Cooperation Agreement includes notification requirements, coordination, negative comity, positive comity, exchange of information and consultations.[188] This can be considered a first-generation Cooperation Agreement, one of the earliest concluded by the EU. The earlier Cooperation Agreements prohibit the exchange of confidential information; information can only be exchanged if the corporation concerned consents to the exchange.[189]

8.3.2 The Canadian FTA as a Model for Future UK Merger Control

The CETA is the most extensive bilateral agreement negotiated between the EU and a non-EU nation to date. The agreement will eliminate custom duties and tariffs between the Canada and EU. It is an especially comprehensive

[184] CETA, Chapter 17-19.
[185] CETA, Chapter 17 Article 4; Official website of the European Commission, *Dispute Settlement*, http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/. Accessed 2018-04-23.
[186] CETA, Chapter 17 Article 3.
[187] Agreement between European Communities and the Government of Canada Regarding the Application of their Competition Laws. Signed on 17 June 1999. OJ L 175, 10.7.1999, Page 49 – (1999/445/EC, ECSC). [EU-Canada Cooperation Agreement].
[188] Muscolo, (2017). Page 6; EU-Canada Cooperation Agreement Chapter 1, Chapter 2, Chapter 3 and Chapter 7.
[189] Muscolo, (2017). Page 6.

Treaty due to the inclusion of public procurement, direct investment and regulatory cooperation.[190] However, the lack of actual enforcement of competition law in the CETA makes Chapter 17 seem more like a symbolic gesture to include competition law in the FTA rather than a deliberate and effective method to do so. Instead, the CETA refers to the first-generation Cooperation Agreement between the two parties which has been upheld since 1999. Legally, the Cooperation Agreement is almost disappointing and most of the duties described therein are more like guidelines that seem to hold a token importance.[191]

With the UK in mind, and from a merger control perspective, the relationship between Canada and EU seems like a viable option. It is a large change from how the UK and the EU have cooperated before, however it is still a better relationship than merely coexisting. In the event of the UK choosing to follow the CETA scenario, it would be recommendable to commit to a Cooperation Agreement to ensure that the UK does not have to rely on informal exchange of information with EU. To no longer be able to share confidential information with, or receive confidential information from, the Commission could be a hard blow to the CMA considering the problems Europe already faces with forum shopping.

Recognising the fact that the Canadian first-generation Cooperation Agreement was concluded in 1999, it may be unlikely that the UK would have to make due with an agreement that lacks confidential information exchange.[192] However, assuming that the UK would follow in the exact footsteps of Canada, the impact on UK merger control and the CMA's function would be heavy despite a Cooperation Agreement.

[190] Hübner, Deman & Balik, (2017). Page 847.
[191] Wagner-von Papp, (2017). Pages 30-31.
[192] For reference see the second-generation agreement as concluded between the EU and Switzerland in chapter 8.4.

8.4 An FTA and UK Merger Control

8.4.1 The Importance of a Cooperation Agreement

The cooperation system in merger control that is currently in place between the Commission and the CMA will not apply in case of a hard Brexit. New mechanisms would be needed to prevent some of the risks of non-cooperation. The CMA has declared that a model like the Canadian Cooperation Agreement would be a reasonable solution for the UK.[193] The House of Lords EU Internal Market Sub-Committee has however shown a preference for an even more comprehensive agreement than the Swiss Cooperation Agreement.[194]

Without Cooperation Agreements the competition authorities would have limited coordination of enforcement activities. This is especially difficult in cases of parallel investigations that have an international element. In such situations, coordination has to rely on leniency policies – or reliance on non-confidential information where no leniency policies exist.[195] Despite this, a Cooperation Agreement, even one that is as inclusive as the EU-Switzerland Cooperation Agreement, will still be a very large adjustment for the UK – especially since the UK has been a major player in the EU institutional framework.[196]

8.4.2 A Brief Analysis on FTAs and UK Merger Control

The economies in Europe are closely linked, meaning that infringements of merger control seldom affect only one country. Therefore, infringements that occur in the UK will affect the EU and vice versa. Due to this there ought to be a mutual will to cooperate. After the UK leaves the EU, the EU will have a limited possibility to conduct investigations and enforce sanctions on UK

[193] Muscolo, (2017). Page 4-5.
[194] Muscolo, (2017). Page 7
[195] This area of cooperation will be further examined in chapter 9. For reference see: Mamane, (2012). Page 1.
[196] Whish, (2016). Pages 297.

companies.[197] To investigate or sanction corporations on UK territory it is in the interest of the EU to cooperate with UK authorities. The UK will be in the same position, for example if it wishes to enforce its merger control against corporations in the EU they may need investigative information from the EU country in question.[198]

As demonstrated above, FTAs are closely linked to Cooperation Agreements. However, it is clear that if there was a will to *only* achieve the level of merger control that is in the interest of both the UK and the EU, an FTA is actually rather unnecessary as the bulk of the cooperation is kept in the Cooperation Agreements.

[197] It can actually be done through the 'single-entity doctrine', for more information on this see the Case *ICI-Dyestuffs*: Judgment of the Court of 14 July 1972. Imperial Chemical Industries Ltd. v Commission of the European Communities. Case 48/69. ECLI:EU:C:1972:70.
[198] Lianos, Mantzari, Wander von Papp & Thepot, (2017). Page 26.

9 The WTO and Merger Control

9.1 Introductory Notes

The WTO scenario is a default option, provided that the EU and the UK cannot come to an agreement. The scenario has elements of a bilateral agreement, but lack an opportunity for the parties to form their own relationship.[199] The scenario brings up not only the WTO but also the ICN, the OECD and UNCTAD, to determine the extent to which the UK will continue to be affected by International Organisations' competition law regimes even if the UK is no longer a member of the EU. Even though the UK would have to reapply to be a member of these International Organisations, they are also noteworthy from a merger control standpoint.

In this scenario, the UK would have no access to the Internal Market but trade based on the legal framework provided by an International Organ. These legal frameworks would provide market access for the UK to the EU market, but not much else.[200]

In this scenario it is clear that all legislation could, and would, alter according to what is described in chapter 4.4.

9.2 The WTO and EU Merger Control

Currently, the WTO contains virtually no binding competition rules, and no rules on merger control. In the past there have been wide discussions on the effects of cross-border mergers and the negative consequences mergers can have on competition. In fact, the ICN, OECD, UNCTAD and WTO have all discussed the possibility of creating an international framework in the field of competition law. These frameworks have mostly focused on the lack of competition law regimes in developing countries, rather than a competition

[199] Lianos, Mantzari, Wander von Papp & Thepot, (2017). Page 6.
[200] Told, (2017). Pages 536-537.

framework that would affect countries with a functioning competition law regime.[201]

As mentioned above, the WTO has no binding rules on competition, despite the continuous discussion of competition concerns since the inception of the organisation. Numerous WTO agreements have implied competition policy concerns and there is a, currently dormant, 'Working Group on the Interaction between Trade and Competition Policy' (the WGTCP).[202] Thus, the actual impact of WTO on competition policy in the world is very small.

There are elements of international cooperation that have actual effects, such as the ICN. The ICN is open to all countries with a national antitrust law, and it directs itself especially to the NCAs. Thus, this is only for the agencies to try to draft principles together rather than for the benefit of national governments – and the CMA is already a member.[203]

There is also the OECD Competition Committee, a group that focuses on competition in regulated sectors as well as the international elements of competition.[204] The OECD has also adopted Recommendations to reflect principles of cooperation in the field of competition, for example the 2014 'OECD Recommendation Concerning International Cooperation on Competition Investigations and Proceedings'.[205] Thus, the OECD oversees and encourages Cooperation Agreements between countries.

There is also the UNCTAD Competition and Consumer Policies Programme, a group that ensures that partner countries get access to open and contestable markets as well as the advantages of raised competition.[206] The UNCTAD has also created a Model Law on Competition which includes a Chapter on mergers and highlights the importance of merger control. Furthermore, the UNCTAD is continuing to be a forum for examining and

[201] Muscolo, (2017). Page 7.
[202] Hufbauer, Gary & Kim, Jisun, (2009), *International competition policy and the WTO*, Federal Legal Publications Inc, The Antitrust Bulletin: Vol. 54, No. 2/Summer 2009. Pages 327-328.
[203] Muscolo, (2017). Page 7.
[204] Muscolo, (2017). Page 7.
[205] Official Website of the OECD, *OECD inventory of international co-operation agreements on competition*, http://www.oecd.org/daf/competition/inventory-competition-agreements.htm. Accessed 2018-04-23.
[206] Muscolo, (2017). Page 7.

discussing issues concerning competition law, for example on the Trade and Development Board. [207]

In contrast to EU merger control, the International Organisations do not provide a direct model or forum for cooperation but rather promote the concept and provide guidance.

9.3 The WTO and UK Merger Control

The membership in various International Organisations is not something that will have any effect on UK merger control after the UK leaves the EU.

No special treatment or actual cooperation with the EU will come through the involvement in an International Organisation. The UK is already a member of all the aforementioned organisations – however some of the memberships are dependent on a membership in the EU. Provided that they regain membership, the UK will continue to be heard in the OECD and the ICN but it will no longer be considered a significant force of the EU institutional framework, which will likely lessen its influence.[208]

The UK would of course be expected to adhere to and maintain the international recommendations and principles, however, the actual enforcement of the policies are toothless considering the lacking ability of most International Organisations to actually discipline countries that do not comply with the said policies.

[207] UNCTAD Model Law on Competition (2010). Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Geneva, 8–12 November 2010. TD/RBP/CONF.7/L.6. Chapter VI.
[208] Whish, (2016). Pages 297.

10 Reflections and Conclusion

10.1 Synopsis

This thesis shows that Brexit is a complicated affair. There are many effects of the UK leaving the EU, one of which is the impact on UK merger control. As merger control is an international field of law, large mergers generally do not confine themselves to one state. If the UK decides to no longer be an EU Member State, UK merger control legislation and cooperation may be altered.

There are several scenarios for how an EU-UK relationship might look after the UK leaves the EU. The scenarios differ depending on how the EU-UK negotiations turn out, and if there will be any kind of relationship between them at all. There are five main scenarios examined in this thesis, which describe the most likely scenarios available to the UK. Firstly, there is the membership in the EEA scenario in which the UK would reapply to the EFTA and the EEA after leaving the UK. The UK would in this scenario continue to be a part of the Internal Market, but not the Customs Union. This scenario is not likely due to that the UK would have to keep the freedom of movement for EU citizens in place, something which the leave-campaign was strictly against. Secondly, there is a membership in the Customs Union scenario which would mean a membership in the Customs Union but not in the Internal Market. The benefits of a Customs Union membership is the continuous free movement of goods but without the free movement of EU citizens. However, at the same time, a Customs Union establishes restraints on a state's trade policy which the UK may not be so fond of. Thirdly, an AA scenario would establish a flexible framework for further bilateral agreements between the EU and the UK which could include various elements of cooperation. Though it would require some negotiating for the agencies, both the EU and the UK could benefit from a stable foundation. Fourthly, an FTA scenario is plausible and would either run along the lines of the Swiss FTA or the CETA. Though FTAs are very flexible, an FTA would take a long time to negotiate - especially considering that the UK wants a more inclusive agreement than the

CETA. Fifthly, the WTO scenario is the default scenario that may occur if the EU and the UK cannot come to an agreement at all. Interestingly, whilst the UK would be presumed to uphold international merger control principles in line with best practice, the UK would not necessarily be bound by those principles. This is because its membership is currently reliant on a continued membership in the EU. Thus, even for these most basic cooperation guidelines the UK may have to go through the process of reapplying to the International Organisations.

Depending on the scenario the EU-UK negotiations arrive at, plenty of UK legislation and cooperation may have to be adjusted if the UK leaves the EU. Merger control is an interesting angle on the possible EU-UK relationship scenarios. Partly due to how international the field of merger control is, and partly due to the importance of collaboration in merger control. If the UK leaves the EU, and if no specific agreement on merger control is made, the UK will be able to detach its merger control from the EU completely. This can be done through changing current legislation so that the UK will not have to contend with CJEU precedents, the one-stop-shop principle will no longer be in place and the UK will no longer be a part of the ECN. However, EU merger control has effects far beyond its borders, see for example the *GE Honeywell Case* where a merger between two US based companies was stopped by the Commission. Looking at the application of EU and UK merger control, and considering the internationality of merger control, it is likely that the UK can never be entirely closed off from the EU. It is thus interesting to see exactly how the scenarios mentioned above will actually impact UK merger control.

The various scenarios that depict what the EU-UK relationship may look like after Brexit all have an impact UK merger control. An EEA scenario will alter UK merger control, but only marginally due to that the one-stop-shop principle is applicable to EEA Member States and that the Commission has a lasting relationship with the ESA. Furthermore, the cooperation between the EU and the EEA Member States is virtually the same as between the EU and EU Member States. This means that the UK would be able to continue cooperating with states much as it is at present and essentially keep its

legislation as it is now. A Customs Union membership would, at a glance, give the UK more power over its own merger control, as it would not oblige the UK to have a merger control that is harmonised with EU merger control at all. However, considering the effect the Customs Union membership has had on Turkish laws, it is clear that a membership in the Customs Union would still imply a continued harmonisation of UK merger control – much like how the UK merger control legislation is harmonised with EU legislation at present. An AA would provide a framework for conducting further bilateral agreements between the UK and the EU. The framework would be very adaptable, and yet the EU-Ukraine AA indicates continued harmonisation of UK merger control in this scenario as well. An FTA, either a EU-Swiss FTA or a CETA, scenario would mean that the UK will have to most likely rely on a Cooperation Agreement for its merger control interactions. Actual UK merger control legislation would no longer need to be harmonised with EU merger control legislation, enabling the UK to amend its legislation freely. A WTO scenario would mean that the UK would have only guidelines for a merger control cooperation with the EU. Furthermore, the UK would have no specific agreement on cooperation and it would not need to keep its legislation harmonised with EU merger control legislation. It is thus clear, that if the UK leaves the EU it will in all likelihood have an impact on UK merger control no matter which scenario becomes applicable.

10.2 The Best Case Scenario

Many different scenarios with many different outcomes and effects for merger control can be envisaged for when the UK leaves the EU. The exact and definite consequences will depend on how the EU-UK negotiations proceed.[209] The scenarios examined in this thesis are the different situations that the negotiations between the UK and the EU can lead to. These range from a membership in the EEA to an absolute lack of agreement between the parties. This brings this thesis to its final question: what would be the best Brexit solution regarding merger control?

[209] Muscolo, (2017). Page 3.

It is clear that merger control is meant to hinder mergers with anti-competitive attributes. Even if Brexit removes the UK from the EU, the foundation of merger control will not change. However, based on the different scenarios, adjustments must be made to merger control. For example, if the UK remains in the EEA, merger control would continue much as it is – but if Brexit fails to be succeeded by an agreement of any kind, the lack of coordination between the EU and the UK could result in much work for the CMA and the UK.

The UK government made its position clear in its Policy Paper; it does not aim to have an agreement with the EU that includes the Internal Market or the Customs Union. Instead, the UK would prefer a tailor-made and extensive FTA.[210] From a merger control legislative perspective, and considering the aim to follow in the footsteps of Canada, the UK is adamant on taking control of its own laws by withdrawing from CJEU jurisdiction and distancing UK competition law from EU competition law.[211] However, the UK is at the same time open towards having a continuous data transfer between the UK and the EU – probably through a Cooperation Agreement considering the aforementioned willingness to have a CETA relationship.[212]

The EU has its own position. The European Parliament has made its view clear in the Resolution and would like an AA between the EU and the UK. In this, they would like a close association between the UK and the EU with a coherent governance of the relationship. This would be a flexible model, but still a close association – closer than the EU's relationship with Canada. However, the EU maintains that a membership in the Internal Market and the Customs Union would be the best solution for the UK – which would include compliance with CJEU jurisprudence.[213] This should however be read

[210] Policy Paper, The United Kingdom's Exit From, and New Partnership with the European Union White Paper, Part 8, *Ensuring Free Trade With European Markets*; Wagner-von Papp, (2017). Page 3.
[211] Policy Paper, The United Kingdom's Exit From, and New Partnership with the European Union White Paper, Part 2, *Taking Control of Our Own Laws*.
[212] Policy Paper, The United Kingdom's Exit From, and New Partnership with the European Union White Paper, Part 8.36-8.41, *Ensuring Free Trade with European Markets: Cross-cutting Regulations*.
[213] European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*. Page 2.

critically, as it is the EU that is effectively stressing what would be optimal for the UK. On the subject of competition law the European Parliament only emphasises the importance of a maintained adherence to international standards as well as Union policies and legislation. Furthermore, the European Parliament notes that if the UK is to have a continued membership in the Internal Market the CJEU jurisprudence will continue to be binding.[214] Concerning merger control, the Resolution states nothing specific and hints at no exchange of data between the countries that would aid in a merger control situation. These statements demonstrate the potential issues of negotiations and coming to an adequate solution as the agencies are seemingly on opposite ends of the spectrum.

To come to an adequate solution is particularly important considering the extraterritoriality of merger control. It could be argued that the application of merger control should not be determined based a company's place of incorporation but rather on the effect on markets that the concentration may have. The actual location should thus be irrelevant. Merger control in the EU is in many ways also based on this premise. The aim of the EU competition law regime is established to shield against protectionism and political Member State intervention, which could disrupt or undermine competition law in the EU. The importance of effective competition in the EU area cannot be understated, not only for the benefit of companies and governments in the area, but also for consumers and employees.[215]

It is also noteworthy that the majority of mergers do not create problems for NCAs nor the Commission, simply due to that most mergers are lawful. However, UK companies are likely to remain affected by the EU no matter the outcome of Brexit, due to the international elements of EU merger control. As long as a merger has a Union Dimension, the EU considers it part

[214] European Parliament Resolution, *Guidelines on the framework of future EU-UK relations*. Paragraph 4 and 11.
[215] Lyons, Bruce, Reader, David & Stephan, Andreas, (2017), *UK Competition Policy Post-Brexit: Taking Back Control While Resisting Siren Calls*, Journal of Antitrust Enforcement, 2017, 5, Pages 347–374 doi: 10.1093/jaenfo/jnx011. Page 356.

of its regime and will take action. This happens regardless of if the companies affected are primarily situated outside the EU.[216]

Based on these premises, and the materials of this thesis, the best scenario for the UK after Brexit from a merger control perspective would be an AA with an added second-generation Cooperation Agreement.

As described above, the impact on UK merger control will be different depending on which scenario the EU-UK negotiations lead to. The UK has shown a preference for an FTA and the EU is favouring an AA. These two scenarios differ in that an AA allows for a closer relationship with the EU, by building a framework that can be used for further negotiations, while an FTA allows for more independency for the UK. The flexibility of an AA framework with the added second-generation Cooperation Agreement that includes an exchange of information would be a good solution for the UK and the EU alike. An AA would allow the agencies to create an extensive agreement before the transitional period is over, which would ensure that when the UK leaves the EU there is a foundation to build the post-Brexit relationship upon. Furthermore, the opportunity for exchanging information is crucial to merger control and the EU is thus unlikely to accept a deal that excludes cooperation between the jurisdictions.

An AA is a flexible kind of agreement, ensuring that the UK could have the possibilities of including certain principles and avoiding others. It is highly adaptable, and according to the head of the Brexit Steering Group such an agreement would not even have to be along the same lines as the Ukraine AA. Rather, it would create a much needed framework for negotiations, to ensure that the UK will not fall into the same overly complicated relationship that Switzerland and the EU have. However, the lack of merger control generally included in an AA is concerning from a corporate, natural person, and government perspective. Thus, a second-generation Cooperation

[216] For elaboration on this see the two-thirds rule in Article 1 EUMR. In the Article it is specified that for a concentration to be not have a Union-dimension, when it surpasses the thresholds, each of the corporations involved in the concentration need to have two-thirds of their Community-wide turnover within one Member State. See also the Case *GE/Honeywell*: Judgment of the Court of First Instance of 14 December 2005. General Electric Company v Commission of the European Communities. See also the Case T-210/01. ECLI:EU:T:2005:456. Judgement of the Court of First Instance of 25th March 1999. Gencor Ltd v Commission of the European Communities. Case T-102/96. ECLI:EU:T:1999:65.

Agreement between the parties would ensure at least some kind of collaboration in the area – protecting the much needed exchange of information between the parties. The EU has actually proclaimed that they would prefer the Antitrust Community to be kept together, not only the uniform set of rules but also as regards enforcement and cooperation matters. The ECN will feel the loss of the CMA, as the UK has been an influential source in the policy making and enforcement of competition law in the EU.[217] As regard Brexit negotiations, the EU is thus unlikely to desire a deal that excludes cooperation between the jurisdictions within merger control. Instead an AA/Cooperation Agreement might satisfy the EU's will to ensure uniform merger control in Europe.

From a merger control perspective, it is evident that a membership in the EEA would be more logical and continue to protect competition law in the EU and the UK. However, one cannot simply disregard the UK's objections to the policies connected to the Internal Market and the membership therein that comes not only with rights the UK wants but also for example the adherence to CJEU and the free movement of persons. An AA/Cooperation Agreement type of relationship will satisfy not only the UK's disinterest in the Internal Market and the Customs Union but also enough of the EU's interest of keeping the UK included.

Brexit as a concept is an interesting trade-off between politics and trade. However, recent years have shown that UK politics are not only based on a will to keep Britain British – but a combination between pride and nostalgia for a lost empire. In some ways, it seems as if the nationalistic views that are spreading in the world have not only sparked Brexit, but are also catching up with merger control. To keep Britain British seeming includes the safekeeping of British companies from being acquired by European companies. The concept of free trade in combination with this new world of nationalism with powers such as the US and the UK strengthening their own borders will be an interesting development. Protectionism and competition law have famously not been very compatible. Thus, the need for cooperation

[217] Muscolo, (2017). Pages 7-8.

in merger control to align timing, remedies and to avoid conflicting decisions will become greater. The international element of merger control will not decrease simply due to the inaptitude of states to handle such concentrations. The handling of such cases will only become increasingly complex. After the UK has left Europe, corporations may decide to relocate to avoid such complications. A quote appeared in the Times on the 21st of May that describes this quite beautifully: "Whatever Brexit brings, we will always have Lisbon".[218]

10.3 Concluding Remarks

In the current Brexit situation it is unclear what an EU-UK relationship may actually look like in the future. The governmental, political and legislative policies have all played a certain part in making Brexit what it is today. No matter the outcome, Europe has been shaken to its core. The effects of Brexit are numerous, the scenarios are varied and the margin of error is larger than anyone would have anticipated. Merger control will continue to be important, even if protectionist views on the world may change what Europe will look like in the future. What is important right now, is that the EU and the UK alike need to find a scenario that is beneficial to both agencies. If not, setbacks could be considerable not only for the UK and its corporations, but also for the EU in the long run. Alas, every cloud has a silver lining. "If you can't be a good example, you'll have to serve as a horrible warning".[219]

[218] Evans, Peter, (2018), *Whatever Brexit brings, we will always have Lisbon,* The Times, London, 21st of May 2018. Available at: https://www.thetimes.co.uk/article/whatever-brexit-brings-well-always-have-lisbon-says-streetbees-boss-0gqg27kk9.
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