Cambridge Yearbook of European Legal Studies, 20 (2018), pp. 233–251
doi:10.1017/cel.2018.4

First published online 11 July 2018

Stumbling Towards the UK's New Administrative Settlement: A Study of Competition Law Enforcement After Brexit

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Abstract
While there has been much talk of the role of parliaments and courts in the Brexit process, far less—indeed very little—has been said about the challenges facing the largest part of the UK government: the administrative branch. Whatever results from the UK's negotiations with the EU, Brexit will likely necessitate wide-ranging and fast-paced administrative reform in the UK. In this article, we use a detailed case study of a particular part of administration—the Competition and Markets Authority ('CMA')—to highlight the nature and extent of the challenges facing administrative agencies. This case study is demonstrative as, while there is an extant UK competition administration structure, competition law and its enforcement are highly Europeanised. We propose that the challenges facing administrative bodies in the UK—including the CMA—can be understood as possessing three key dimensions: internal organisation issues; external coordination issues; and substantive legal issues. We argue that, in many instances, these three dimensions will be in tension which each other. That is to say, the reality of reforming administration post-Brexit will involve trade-offs between questions of internal organisation, external coordination, and substantive law.

Keywords: competition administration, Brexit, state aid, merger control, UK Competition and Markets Authority

I. INTRODUCTION

Since the *Miller* case concerning the triggering of the Article 50 TEU process by which the UK will withdraw from the EU, there has been much talk of the role of domestic courts and parliaments in relation to the Brexit process and beyond.[1] There

* We are grateful to M-J Clifton, Richard Kirkham, and Jack Simson-Caird for comments and discussions on various drafts, as well to Kenneth Armstrong and Okeoghene Odudu for helpful editorial contributions.

[1] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1

has also been extensive discussion around the status and role of devolved institutions, particularly in relation to Scotland.[2] Such discussion is, of course, to be welcomed. By comparison, however, there has been very little discussion of the challenges Brexit presents to the largest part of the UK government: the administrative branch.[3] This article seeks to fill that gap by asking: what are the challenges facing UK administration in the wake of Brexit? This article thus offers a piece of public law futurology. It does this by using aspects of competition law enforcement and administration as a detailed case study. To be clear, we do not seek in this article to offer a comprehensive analysis of competition law and enforcement options: instead, we drill down into particular areas to highlight the nature of the questions that are arising in the wake of Brexit *vis-à-vis* administrative reform. Through this analysis, we propose a general framework for understanding the challenge Brexit poses to administrative bodies in the UK.

This article has three main parts. Part II of the article argues that Brexit—whatever form any final 'agreement' takes —will entail administrative branch reform that is likely to be wide-ranging and fast-paced.[4] Reform is inevitable as not only legal powers but also the administrative organisational structures which make those powers effective will require re-calibration of some kind. Part III suggests that the challenge facing administrative bodies in the UK—including the Competition and Markets Authority ('CMA')—can be understood as possessing three key dimensions: internal organisation issues; external coordination issues; and substantive legal issues. In many instances, these three dimensions will be in tension which each other. The result of this trade off will be an inevitably imperfect new administrative settlement.[5] Part IV of the article offers a case study of the CMA—the UK's principal competition enforcement agency—through the prism of the three-

(F'note continued)
All ER 158 (concerning whether a statute was necessary for the EU to be notified under Article 50, TEU). For discussion of Parliament, see e.g., House of Lords European Union Committee, *Scrutinising Brexit: The Role of Parliament* (2016) HL Paper 33; N Wright and O Patel, *The Constitutional Consequences of Brexit: Whitehall and Westminster* (UCL, 2018) 21 April 2017, UCL Constitution Unit Briefing Paper. Discussion on the courts has related largely to the future role of the CJEU, see e.g., R Hogarth, *Brexit and the European Court of Justice* (Institute for Government, 2017). There has also been wide-ranging discussion of the role of the UK courts. For example, Lord Neuberger—the recently retired President of the UK Supreme Court—has publicly raised this issue, see C Coleman, 'UK Judges Need Clarity After Brexit - Lord Neuberger' (*BBC News*, 8 August 2017) http://www.bbc.co.uk/news/uk-40855526.

[2] For an excellent overview and analysis, see R Rawlings, 'Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations' (2017) *The Constitution Society*.

[3] Our focus here is largely on central government administration. Distinct issues arise regarding, e.g., local government and devolved administration post-Brexit.

[4] This is possible under Article 50 TEU. See further House of Commons Foreign Affairs Select Committee, *Article 50 Negotiations: Implications of 'No Deal'* (7 March 2017) Ninth Report of Session 2016–17.

[5] Of course, all administrative systems are imperfect in some way and the current system of competition administration is itself not perfect.

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

part framework.[6] This case study has been selected as, while there is an extant UK competition administration structure, competition law and its enforcement are highly Europeanised. As a result of Brexit, a variety of important legal and institutional questions arise in this sphere. Two of the major institutional questions facing the CMA—specifically those relating to merger control and state aid—are discussed, as these issues are of immediate importance following Brexit. While we have selected this area of administration for this study, it is important to note that some administrative agencies will be less affected by Brexit than others. It will also be the case that some bodies may be entirely unaffected (at least in some direct way). However, for the purpose of understanding and framing the challenges facing administration due to Brexit, it is helpful to study an organisation like the CMA where the effects of Brexit are more evident immediately.

II. LAW AND ADMINISTRATIVE REFORM IN THE UK AFTER BREXIT

Reform of the UK's system of public law has only been given detailed systematic study in the past few decades.[7] In recent years, there has been a more developed discussion about the process of constitutional change in the UK even if the basic proposition of practice remains unchanged namely that constitutional reform is simply part of the political process.[8] What, generally speaking, remains neglected is systematic study of how administrative systems change.[9] Administrative changes may appear, at least on their face, as more 'technical' in nature rather than explicitly 'political' constitutional reforms, but administrative reforms are hugely significant in terms of how government actually runs day-to-day, and how individuals and undertakings interact with the state. In many ways, it is the 'micro' to constitutional law's 'macro'.[10]

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[6] There are other agencies in the UK with powers to enforce competition law, e.g., the Financial Conduct Authority ('FCA'), the Office of Communications ('OFCOM'), the Office of Water Services ('OFWAT'), and the Office of Gas and Electricity Markets ('OFGEM'). These authorities and their competition powers will not be considered here but they create additional complexity to the post-Brexit landscape considered here.

[7] R Brazier, *Constitutional Reform*, 3rd ed (Oxford University Press, 2008), Chapters 1–2.

[8] There has, however, been discussion of the recognition of fundamental 'constitutional statutes' in recent years, see F Ahmed and A Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461.

[9] Part of this subject was addressed in A Le Sueur, 'Designing Redress: Who Does it, How and Why?' (2012) 20(1) *Asia Pacific Law Review* 17; A Le Sueur and V Bondy, *Designing Redress: A Study About Grievances Against Public Bodies* (2012) Nuffield Foundation Report. There are helpful general 'macro' accounts of administrative change but these rarely dig into the details of the change process, e.g., P Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016).

[10] T Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in S Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010).

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The administrative reform process in the UK is best characterised as a trade-off, determined principally by actors within the executive branch, between quality, on the one hand, and efficiency, on the other hand.[11] This often means, at a less abstract level, that administrative reform is undertaken much like any policymaking exercise, and with practical pressures (delays, case backlogs, cost pressures, etc) being highly relevant considerations in system design. It is within this broad context that much post-Brexit reform of administration will take place. The role for Parliament in relation to this reform process is, as is normally the case with administration in the UK, ultimately likely to be marginal in practice.

To be clear, the post-Brexit reformation of administration and administrative law is inevitable.[12] The relationship between EU administration and member state administrations is one where the EU 'tends to serve as a kind of intermediary between different national administrations'.[13] This has been conceptualised as the EU being a 'second order administration'[14] to member state administrations, or EU administration being 'an administration composed of other administrations and interacting with them in a series of ways'.[15] This 'composite administration' emerges directly from 'the very nature of supranational governance allied with the networked character of relations between various regional, national and supranational levels of administration in the EU'.[16] EU administration, mixed as it is with member state administrations, has also become more and more intertwined to international levels of governance.[17] The task for UK administration after Brexit is then, as one former Director General of the World Trade Organization ('WTO') put it, equivalent to 'removing egg from an omelette'.[18]

Of course, much of the detail of the extent of the change required is dependent on what is agreed between the UK and the EU, both during and beyond the Article 50 process. Whatever the eventual position is, it is clear that, barring some wholly unexpected political turnaround, full UK membership of the EU is off the negotiating

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[11] Le Sueur and Bondy see note 9 above, pp 22–32 (considering the various actors responsible for designing redress concerning administration in the UK).

[12] Our definition of administrative law is broad, to include all aspects of the relationship between law and administration, and not simply the principles of judicial review.

[13] D Curtin, 'Executive Power' in D Patterson and A Södersten (eds), *A Companion to European Law and International Law* (Oxford: Blackwell, 2016); B Bastos, *Beyond Executive Federalism: The Judicial Crafting of the Law of Composite Administrative Decision-Making* (2018) unpublished Ph.D. thesis, European University Institute.

[14] Bastos, see note 13 above.

[15] D Curtin, 'Second Order Secrecy and Europe's Legality Mosaics' (2018) *West European Politics* (online pre-publication) 4.

[16] Ibid, p 4.

[17] A von Bogdandy and P Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9(11) *German Law Journal* 2013.

[18] B Chu, 'Brexit Will Be Like "Removing Egg from an Omelette", Warns Former World Trade Organisation Chief' (*The Independent*, 27 February 2018).

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

table[19]—if 'Brexit' is to mean anything at all, at the very least it has to mean this.[20] But the UK's position seems to be, at least at present, to try to seek more regulatory freedom from the EU via an extensive free trade agreement rather than an association agreement.[21] Such a move would have the consequence of UK administration taking significant responsibility back from the EU. Whatever the details are, Brexit makes administrative reform effectively inevitable irrespective of the outcome of the negotiating process. The major reason for this is that there are many powers and functions, presently held and carried out by EU agencies, which the UK will likely have to assume responsibility for at the national level. The UK could, for instance, assume exclusive power in those areas it has shared competence with the EU, such as social policy, environmental policy, consumer protection, chemicals regulation, medicine evaluation, and energy.[22] Our study of competition administration effectively highlights the much wider challenges of 'removing egg from an omelette' across all areas of administration.

The assumption of additional administrative responsibilities on the national level will involve a complex and extensive re-organisation of legal powers (itself presenting a significant problem of constitutional law in relation to the appropriate use of delegated powers to create secondary legislation, which is widely expected to be how this transition will be facilitated).[23] But beyond the technicalities of rearranging various powers, there will have to be some—potentially very large—changes in an organisational sense. When viewed from this perspective, Brexit has never presented merely a matter of shifting around the legal powers granted to various administrative agencies. Instead, it will involve the creation of new teams within administrative agencies (as well as, perhaps, new agencies), the re-distribution of budgets, and many other significant functional changes.

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[19] HM Government, *The United Kingdom's Exit from and New Partnership with the European Union* (2017) Cm 9417.

[20] The new post-referendum Prime Minister (Theresa May MP), then campaigning for the post of Conservative Party leader, famously remarked that 'Brexit means Brexit', see: A Cowburn, 'Theresa May Says "Brexit Means Brexit" and There Will Be No Attempt to Remain Inside EU' (*The Independent*, 11 July 2016).

[21] Theresa May, Florence Speech, 22 September 2017, https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu.

[22] See Article 4 of the TFEU. Article 4(1) states that the EU shares competence with the Member States, where the Treaties confer on it a competence which does not fall within the category of exclusive competence (Article 3 TFEU) or the category of competence 'to carry out actions to support, coordinate or supplement the actions of the Member States'. Furthermore, Article 4(2) TFEU provides a list of 'principal' categories of shared actions. Therefore, the list should not be considered exhaustive, as the category of shared competence is a 'general residual category', see P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed (Oxford University Press, 2015), p 83.

[23] In its February 2017 White Paper (see note 19 above, p 10), the Government stated one of the proposed Great Repeal Act's 'three primary elements' will be to 'enable changes to be made by secondary legislation to the laws that would otherwise not function sensibly once we have left the EU, so that our legal system continues to function correctly outside the EU'. See further J Simson Caird, *House of Commons Library Briefing Note: Legislating for Brexit: The Great Repeal Bill* (23 February 2017) Number 7793, section 5; House of Lords Constitution Committee, *The 'Great Repeal Bill' and Delegated Powers* (7 March 2017) HL Paper 123.

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Post-Brexit administrative reform, as well as being inevitable, is likely to be fast-paced and wide-ranging. It is likely to be wide-ranging as there will be *many* legal and functional gaps to plug within administration. Reform is likely to be fast-paced due, principally, to how Article 50 works. As is now well-known, after 'notification' there is a two-year window within which the exiting Member State and the EU are able to make an agreement.[24] Given the extent of what has to be negotiated, this is a very short amount of time. A transitional framework may ease the pressure here.[25] Nonetheless, such restrictive timeframes—especially when seen in the light of the government's pledge to give 'Parliament the opportunity to debate and scrutinise the changes' promises high-tempo administrative reform.[26] In the absence of quick changes, so-called 'Brexit day'—whenever it arrives—presents not just an international trade 'cliff-edge' but also a domestic administrative one.

III. FRAMING THE CHALLENGE FOR ADMINISTRATIVE BODIES AFTER BREXIT

It is helpful to devise a general framework for understanding the challenges facing administrative bodies in the UK after Brexit. We suggest there are three key dimensions to that challenge. The first type of challenge facing administrative bodies after Brexit relates to internal organisation. By this it is meant questions of how administrative bodies structure their own procedures, resources, staff, etc.[27] The second type of challenge for administrative agencies relates to external coordination. External coordination challenges are those concerning how the administrative body works with other bodies, both at the EU and UK levels. The third type of challenge relates to substantive legal issues. Much of administrative reform takes place under the rubric of 'operational change'. That is to say, it does not involve reforming legislation or other laws but, instead, amending how something is done in practice. Occasionally, however, 'hard' legal norms do structure responses to administrative reform. One response is to work around the legal norm. Another is to seek to change it (for example, by pressing for legislative reform).

Among the three categories outlined above, there will be tensions. The tensions exist at two levels: *within* the categories and *between* the categories. In respect of the

[24] Article 50, in part, provides '[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'.

[25] K Armstrong, J Bell, P Daly, and M Elliott, *Implementing Transition: How Would it Work?* (2017) University of Cambridge Faculty of Law Research Paper No. 57/2017, available at https://ssrn.com/abstract=3052328 or http://dx.doi.org/10.2139/ssrn.3052328.

[26] HM Government, see note 19 above, para 1.8.

[27] B Forbes and M Hughes, 'Brexit and Implications for UK Merger Control: Implications for the CMA's Workload and What Not to Do' (10 February 2017) *Competition Bulletin*; J Vickers, 'Consequences of Brexit for Competition Law and Policy' (2017) 33 (supp. 1) *Oxford Review of Economic Policy* 70.

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former, the idea that designing (or reforming) administrative bodies is a task riddled with unresolvable tensions was observed by Teubner.[28] He argued that almost all legal and political institutions are placed under the competing demands of efficacy, responsiveness, and coherence. That is to say, citizens and others demand administrative bodies to be successful in managing their role, to be responsive to the public will, and to be aligned with the foundational normative commitments of society. Teubner contended that any design or re-design of an administrative institution that sought to improve its performance in one of these three respects would almost certainly have negative effects on at least one of the other two. As Mashaw put it, this can be read as painting a picture of the task of 'structuring and controlling administrative institutions' as a 'perpetually unsatisfactory project of institutional design', which even has 'a certain fatalistic hue'.[29] In other words, 'from one or another perspective, every institution will fail, or be seen as partially failing'.[30] This nature of administrative institutions, of course, transcends issues created by Brexit. Administration existed in these conditions before Brexit. At the same time, the scale and speed of the administrative reforms that Brexit will likely prompt is an exceptional instance where many of these tensions that already exist within administrative bodies will be thrust forward and debated. Similarly, there are regularly tensions about external co-ordination and substantive law in administrative bodies. These two issues will likely often be dragged into focus by Brexit. Furthermore, we will also see tensions not just *within* issues of internal organisation, co-ordination, and substantive law, Brexit will also raise tensions *between* these areas. For instance, the preferred internal organisation of an administrative body may be compromised by the preferred external coordination strategy, such as maintaining a close working relationship with EU administration. Again, these types of tension are not new, but Brexit highlights and unsettles them. Ultimately, these tensions—both within and between each of the categories outlined—will get resolved at some point, even if only by the absence of action. They may be determined by administrative bodies themselves, of by external forces beyond their individual control. The result, in the many different instances where such tensions will arise, will be the creation of the UK's new post-Brexit administrative settlement. This tripartite framework can serve as an analytical tool to highlight both the nature of those tensions and assist in mapping them out.

IV. A CASE STUDY OF THE COMPETITION AND MARKETS AUTHORITY

A powerful example of the inevitability of administrative reform post-Brexit can be seen in the context of competition law enforcement. In this part of the article, we use

[28] G Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (Walter de Gruyter, 1987).

[29] JL Mashaw, 'Structuring a Dense Complexity: Accountability and the Project of Administrative Law' (2005) 5(1) *Issues in Legal Scholarship* 1, p 14.

[30] Ibid.

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

the CMA as a case study by which to examine in detail the difficulties facing the UK administration following Brexit in terms of internal organisation, external coordination, and substantial law as described above. We do not seek to explore the entirety of the challenges facing administrative reform in competition law enforcement, instead we look closely at two particular areas: merger controls and state aid. These areas are of particular interest post-Brexit as the CMA will gain competence in those areas—competence which currently belongs to the European Commission ('Commission')—and it will significantly increase the workload for the CMA.[31] Currently, the Commission has exclusive competence to (1) clear mergers with a Union dimension based on the thresholds set out in the European Merger Regulation ('EUMR'); and (2) decide whether state aid by a Member State is deemed compatible with Article 107 TFEU. While there is an extant UK competition administration structure, competition law and its enforcement are highly Europeanised and, as a result of Brexit, a variety of important legal and institutional questions are now in play. Furthermore, competition law—though it is often far from the headlines and from mainstream consciousness—is an important tool for ensuring consumer welfare and a significant driver in the UK economy. The CMA estimated that it produced an annual average of direct consumer benefits of £745 million between 2012–2013 and 2014–2015.[32] The pending UK departure from the EU raises the concern that any weakening of the competition law regime would ultimately have a negative impact on consumers and the wider economy. Even if substantive laws are kept for the most part, administration will remain a key issue as the success of competition rules is contingent upon effective enforcement.[33] This was recognised recently through the passing of the Consumer Rights Act 2015 and the UK's implementation of the Damages Directive on 9 March 2017, which make it easier to bring private enforcement actions in the domestic courts.[34] Through looking at some of the challenges facing the CMA in the context of mergers and state aid, we highlight how the reality of reforming administration post-Brexit will involve trade-offs within and between questions of internal organisation, external coordination, and substantive law.

Before looking in detail at mergers and state aid, it is important to explain the wider institutional framework of competition law enforcement in the UK and the questions

[31] In its written evidence (CMP0002) to House of Lords European Union Committee, *Brexit: Competition and State Aid* (2018) HL 67, the CMA has estimated that Brexit could result in an additional caseload of 30 to 50 phase 1 mergers and half a dozen phase 2 cases each year.

[32] National Audit Office, *Report by the Comptroller and Auditor General: The UK Competition Regime* (2016), p 4.

[33] P Lowe, M Marquis, and G Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart, 2016).

[34] The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (implementing Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringements of the competition law provisions of the Member States and of the European Union). On the benefits, see Department for Business, Innovation & Skills (now BEIS), *UK Implementation of the EU Damages Directive (2014/104/EU): Impact Assessment* (2015).

that Brexit is posing of it. In terms of substantive law, the two main components of UK competition law are the Competition Act 1998 ('CA98'), on antitrust, and the Enterprise Act 2002 ('EA02'), on mergers and markets. The central enforcement body is the CMA, but there are a range of other authorities with competition powers.[35] Because the main components of UK competition law are UK statutes, they will remain *in situ* after Brexit. It is worth noting that the anticompetitive conducts covered by Articles 101 and 102 of the TFEU, will still be deemed illegal under UK law, as Chapter I and Chapter II of the CA98 replicate in almost identical terms.[36] Thus it may not be necessary to implement wide-ranging substantive changes to competition law rules currently in force in the UK. There are, however, some exceptions. For example, there may need to be a clarification in regard to the territorial scope of Chapter I.[37] Moreover, the UK has no state aid legal framework and will need to enact rules on state aid. The UK has not enforced state aid since it gained accession to the EU in 1973. The Department for Business, Energy and Industrial Strategy ('BEIS') has merely been able to help public authorities understand state aid issues and advise on how to reduce and manage risk of providing state aid, but not enforce against illegal state aid against a national legal framework.

In relation to the role of the EU courts, it may be necessary to amend or repeal Section 60 CA98, as they will no longer have jurisdiction over the UK.[38] Section 60 of the CA98 requires UK courts, tribunals, and competition authorities to ensure consistency with EU law and, in particular, any principles applied and decision research by EU courts. The consistency principle in section 60 CA98 will not remain a requirement post-Brexit. However, some argue it would be a good idea for UK courts and regulatory bodies to 'have regard to' relevant EU court judgments and EC decisions[39] in order to provide legal certainty to UK business. This approach posits several issues related to how the expression 'have regard to' should be interpreted.[40] According to Coleman, 'have regard to' would entail taking into account the EU cases and in order to depart from them, it would be necessary to provide clear reason for doing so. Thus, such proposed amendment would still 'appear to give considerable weight to EU law in the decision-making practices of the CMA and the UK courts'.[41] The amendment or repeal of section 60 CA98 raises the policy question on how much influence do we still want to confer

[35] This body was created on 1 April 2014 by the Enterprise and Regulatory Reform Act 2013 and took over the competition functions of the Office of Fair Trading and Competition Commission.

[36] A working group—the *Brexit Competition Law Working Group*—chaired by Sir John Vickers has been established to consider these issues, see: Brexit Competition Law Working Group, *Conclusion and Recommendations* (2017), para 1.7.

[37] Ibid, para 2.3.

[38] M Coleman, 'The Future of Section 60 CA98 Post-Brexit: Observation on the Provisional Conclusions of the Brexit Competition Law Working Group' (2017) *Brexit Competition Law Working Group*, available at https://www.bclwg.org/wp-content/uploads/2017/05/Martin-Coleman-Section-60-Note.pdf.

[39] Brexit Competition Law Working Group, see note 36 above, para 2.8.

[40] Coleman, see note 38 above.

[41] Ibid.

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

to EU law over competition law in the UK and it may be an opportunity for the UK not to have regard to it. The single market imperative underpinning the entire ethos of the EU made it necessary to implement the consistency principle in section 60 CA98, but leaving the EU and the single market (if this is the end result of the Brexit negotiations) will arguably make this principle redundant for the UK. Nevertheless, this view collides with the one of the BCLWG, which believes it could threat legal certainty.[42] Arguably, this fear is short-lived given that EU law is so embedded in UK case law so even if we disregard EU jurisprudence, the UK competition law system will retain the desired legal certainty. In a recent report by the House of Lords on 'Brexit: Competition and State Aid', it was highlighted that the UK may wish, over time, to depart from EU competition case law, particularly as the Single Market imperative underpinning it may no longer be relevant to the UK. With the repatriation of responsibility in this area, the UK will be free to take a more innovative and responsive approach to tackling global competition enforcement challenges.[43]

Beyond substantive legal issues, without administrative reform there could be serious holes in the enforcement of competition rules in the UK sphere.[44] For example, Sir Philip Lowe, a former Director General of Competition, has predicted that a significant number of mergers, cartels, and cases linked to abuse of market power by large firms—previously dealt with by the Commission due to their international aspects—will be added to the CMA's workload.[45] The inevitable result of this, Lowe has claimed, will have a substantial impact on the internal organisation:

> The substantially increased responsibilities of the CMA and related UK institutions post-Brexit, will require a correspondingly substantial increase in its staff resources. It is unrealistic to imagine that the increased workload can be dealt with significantly by a change in the CMA's enforcement priorities. With unchanged staff numbers, its future involvement in international mergers, cartels and antitrust cases could well eliminate any possibility for it to engage in market enquiries and consumer protection work.[46]

To put this in more general terms: the main administrative organ charged with the task of competition enforcement in the UK will be compelled to revisit their powers and how they, in organizational terms, manage to carry out their functions. The issues presented by Brexit to competition law and its enforcement are manifold and complex. For the sake of the present case study we will drill down into two of the major challenges facing competition administration in the UK post-Brexit in terms of internal organisation and external coordination: merger control and state aid.

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[42] Brexit Competition Law Working Group, see note 36 above, para 2.8.

[43] House of Lords European Union Committee, see note 31 above.

[44] Ibid, para 1.5.

[45] P Lowe, *The Implications of Brexit for UK and EU Competition Policy and Law Enforcement* (2016) Response to Brexit Competition Law Working Group Issues Paper, p 11.

[46] Ibid, p 12.

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

A. Merger Control

At present, UK mergers that meet certain turnover thresholds fall exclusively under the jurisdiction of the EUMR.[47] However, Brexit is likely to end this 'one-stop' merger control regime for UK companies, leading to more mergers being reviewed by the CMA under the Enterprise Act 2002, creating internal organisational pressures. In certain cases, this will result in parallel investigations between the CMA and the Commission—creating a clear issue of external coordination. A transaction that qualifies under the EUMR may also be subject to UK merger control. Mergers, whether of UK or foreign businesses that meet both UK and EU thresholds will likely face scrutiny under both systems. Furthermore, the CMA will not be able to seek a reference on the back of a UK national dimension of an EU merger. In some cases, a Member State may request a transaction, which would otherwise be reviewed by the Commission, to be considered at the Member State level. For these cases the EUMR provides for a referral mechanism for the Member State.[48] Giving Member State authorities and merging parties the ability to reallocate jurisdiction helps to ensure that merger transactions are reviewed by the best placed authority in the EU to conduct the review. The referral mechanisms will continue to apply in the run-up to Brexit. For mergers that have been notified to the Commission by the time of Brexit, the CMA should make fullest use possible of its ability to request full or partial reference back to the UK of any notified merger that is likely to have a significant nexus to or impact on the UK. For mergers that have been notified to the Commission for which the geographic market(s) is EEA-wide or global, and/or the relevant assets that might be subject to a remedy are outside the UK, the referral requirements may not allow the Commission to refer the transaction back to the UK for review. For mergers that have not yet been notified at the point of Brexit, it would be sensible for the parties to mergers with a significant UK component to engage in pre-notification contacts with both the Commission and the CMA. While the CMA could apply its own merger control rules in such a case, it will do so in parallel with the Commission, rather than in its stead. Such parallel review raises the possibility of one authority permitting a merger and the other blocking one, or of diverging remedies between the UK and EU regimes.[49] All mergers requiring multi-jurisdictional consent face the challenges of coordination and conflicting outcomes, but Brexit will generate additional transaction risks if the merger requires clearance in both the UK and the EU. It has been suggested in the House of Lords'

[47] Council Regulation (EC) 139/2004 [2008] OJ L24/1, 29.1.2004. See further N Parr, R Finbow, and M Hughes (eds), *UK Merger Control: Law and Practice*, 3rd ed (Sweet & Maxwell, 2016).

[48] The European Merger Regulation 139/2004 Article 9(2) provides that a member state may request referral on its own initiative or upon the invitation of the Commission.

[49] Conflicting outcomes between the UK and other European competition authorities have recently occurred in relation to Akzo's proposed acquisition of Metlac (which was cleared in several jurisdictions around the world but blocked in the UK) and Eurotunnel's attempt to purchase the former SeaFrance business (which was cleared in France but blocked in the UK). Another, older example of conflicting outcomes occurred in relation to GE's bid for Honeywell (which was cleared in the USA but blocked in the EU).

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report on 'Brexit: Competition and State Aid' that it would be helpful for the CMA to issue guidance on this referral mechanism as the Brexit process develops. This would allow merging parties to understand the external coordination between the CMA and the Commission. This is to provide greater certainty to businesses as to the considerations that the CMA may take into account and the type/extent of engagement that it may have with parties in order to make the necessary determinations. Moreover, the risk of double jeopardy for firms operating in both the UK and the EU is strong reason for the CMA to consider some form of coordination relationship with EU enforcement. Here, we may see issues of external coordination have to take priority over internal organisation preferences.

To put these changes in the context of impact they may have on the CMA's internal organisation, the CMA published 60 decisions concerning qualifying mergers in 2015/16 and 56 such decisions in 2016/17.[50] In 2015, 2016, and 2017 respectively, the EU Commission was notified of 337, 362, and 380 mergers it ought to consider.[51] Even 20 or 30 more merger decisions dealt with at the UK-level would represent a very substantial increase in the CMA's workload.[52] To manage its workload, the CMA has discretion not to refer a merger case if the market concerned is of insufficient importance to merit a 'Phase II' investigation, also known as the *de minimis* exception.[53] This applies where: (1) the annual value in the UK of the market or markets concerned is, in aggregate, less than £3 million, provided there is no clear cut undertaking instead of a Phase II reference available; (2) the annual value in the UK in aggregate is between £3 million and £10 million and the expected consumer harm resulting from the merger is not materially greater than the average public cost of a Phase II investigation (which is around £400,000) having regard to the size of the market concerned, the likelihood of a substantial lessening of competition ('SLC'), the magnitude of any competition that would be lost, and the duration of any SLC; or (3) any relevant consumer benefits outweigh the SLC and its adverse effects.[54] According to the 2010 Guidance on such exceptions, where the annual value of the market concerned is in aggregate more than £10 million, the CMA will generally consider the case to be of sufficient importance to justify a reference.[55] Where the annual value of the market concerned is in aggregate less than £3 million, the CMA will generally consider that a reference is not justified. Where

[50] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697957/Merger-inquiry-outcomes-March-2018.pdf.

[51] European Commission, *Merger Statistics* (2017), available at http://ec.europa.eu/competition/mergers/statistics.pdf.

[52] Forbes and Hughes, see note 27 above; Vickers, see note 27 above.

[53] Section 22(2)(a) and Section 33(2)(a), Enterprise Act 2002.

[54] Office of Fair Trading, *Mergers: Exceptions to the Duty to Refer and Undertakings in Lieu of Reference* Guidance (2010) OFT1122.

[55] Ibid.

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the annual value of the market is between £3 million and £10 million, the CMA will have regard to the factors mentioned in (2) above.

The CMA has recently changed the upper bound threshold over which the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference from £10 million to £15 million.[56] Furthermore, the CMA has altered the lower bound threshold (the threshold that the CMA will generally not consider a reference justified) from £3 million to £5 million.[57] The decision of whether a case falls within the *de minimis* exception is not linked to the parties' cost of the proceedings but cost to the public purse. Thus, a case may be referred even if a referral negates the anticipated synergies of the case. From 2007 to January 2017, in 21% of Phase II cases, the parties chose to abandon the deal rather than proceed with the Phase II referral.[58] It has been recognised that the fact that the CMA can review mergers due to concerns in markets that are entirely insignificant is a common source of frustration for merging parties. Any opportunity to extend the scope of the *de minimis* exception may thus be welcome.

A potential revenue-raising exercise for the CMA in light of the increased workload due to Brexit involves merger filing fees. Such a fee is expected not to be very welcome, especially for smaller mergers. As it stands, the UK utilises a voluntary filing system, meaning that businesses are not required to notify their mergers to the CMA. This means that even if a merger triggers either the turnover threshold or the share of supply threshold,[59] the merging parties can choose not to notify the merger to the CMA but rather to go ahead and complete the transaction. With Brexit comes the question of whether the CMA should implement a mandatory merger notification system. However, this does need to be balanced against the concerns of businesses. The flexibility of the voluntary system with a clawback right (meaning that the CMA can still intervene in those mergers which may already be underway but were not notified to the CMA) means that there is still protection against anticompetitive activity, but without the burden on businesses by forcing them to notify. However, the downside to the voluntary regime is that it may cause costs and damage to businesses when it intervenes post-merger.

It may be worth considering alternatives to increasing the *de minimis* thresholds and merger filing fees as a means of generating funds for the CMA. One of the other options would be increasing notification thresholds in order to reduce

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[56] Competition and Markets Authority, *Mergers: Exception to the Duty to Refer in Markets of Insufficient Importance* (June 2017) CMA64.

[57] Ibid.

[58] J Schmidt, 'Big Enough to Matter or Too Small to Care? Small Mergers and Competition Authorities' (2017) *Shepherd and Wedderburn*, available at https://shepwedd.com/sites/default/files/Big_enough%20_to_matter_or_too_small_to_care.pdf.

[59] Transactions are caught by the UK merger control rules (under the Enterprise Act 2002) and may be investigated by the CMA if there is a 'relevant merger situation'. A merger situation will qualify for review if it meets either of the two alternative jurisdictional tests: (1) If the enterprise to be acquired exceeds £70 million turnover (the turnover test); or (2) as a result of the merger, 25% share of supply of goods or services of any description is created or enhanced in the UK as a whole or in some 'substantial part' of the UK (share of supply test).

the number of smaller mergers that are notifiable to the CMA. The CMA could also take a prioritisation decision that it will investigate fewer smaller or simpler mergers.[60] Alternatively, the CMA could simply not conduct investigations with the intensity that it currently does.[61] The review process could be altered for simpler cases, for example by changing the 'duty to refer' to a 'discretion to refer' mergers to Phase II. Even where competition is significantly lessened, the CMA ought to be able to decide whether or not to clear the merger in Phase I if the parties to the transaction agree on an appropriate remedy; reduce the time available at Phase I and Phase II investigations (including placing limits on pre-notification discussions); and revisit the powers and duties of the Panel at Phase II so that they focus solely on remedies or on issues that remain in dispute at the end of Phase I. Beyond this, the CMA could look at its internal resourcing, such as reallocating staff from other areas (such as market investigations or antitrust) to merger cases.

In the longer term, if resourcing is a pressing issue, Parliament could legislate to raise the jurisdictional thresholds and/or give the CMA more flexibility to accept remedies in Phase I, especially considering that the Commission is strikingly more flexible in accepting remedies at this stage. One final potential remedy for a CMA lacking in resources could be, where the CMA considers cases that are also reviewed by the Commission—in particular where the UK issues are not materially different from those raised in the Member States—for the CMA to clear cases on the basis of UK versions of the remedies agreed by the Commission in Phase I or Phase II. With these types of cases, the CMA could focus its analysis and its resources on whether the UK raises any materially different issues from those arising in the EU Member States and whether there are any plain flaws in the Commission's market analysis or the remedies package. Ultimately, by utilising more efficient and prudential methods in analysing merger cases, the CMA may conserve funds without the need for recourse to altering the *de minimis* thresholds or increase the merger filing fees.

Another significant legal impact of Brexit in the context of merger control will be the extension of the reach of public interest provisions. Currently the government can only override competition concerns with public interest issues such as national security,[62] media plurality and the stability of the financial system in relation to mergers being reviewed under UK merger control law. After Brexit, the UK might be able to permit a merger considered to be in the public interest to proceed in the UK notwithstanding that it had been prohibited at EU level, provided that the prohibited EU aspects of the transaction could be carved out of the wider transaction. This

[60] Brexit Competition Law Working Group, *Brexit Competition Law Working Group: Second Roundtable* (2016), pp 2–3.

[61] A Lindsay, *Brexit Competition Law Working Group Issues Paper Response* (2016), p 2.

[62] In October 2017, the UK government, through the Department for Business, Energy and Industrial Strategy, launched the National Security and Infrastructure Investment Review, where it is proposed to allow the government to intervene in the merger of small businesses when there are national security concerns, see: Department for Business, Energy & Industrial Strategy, 'Government Updates Mergers Regime to Protect National Security' (17 October 2017), available at https://www.gov.uk/government/news/government-updates-mergers-regime-to-protect-national-security.

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possibility is part of the broader question of the extent to which non-competition considerations should apply in UK merger policy. Vickers claims, however, that the lure of the 'public interest' should be resisted when it comes to competition policy.[63] The Brexit Competition Law Working Group is of the same view: even if Brexit would allow the government to introduce other non-competition grounds to the merger control system, such approach should not be taken.[64] The inclusion of other non-competition criteria might entail 'distorting merger policy away from its prime focus on competition'.[65] Even if public interest is present in many jurisdictions, it is narrowly interpreted[66] and 'has become increasingly marginalised'.[67] Public interest can be incorporated in the domestic legislation in several ways, and the one usually preferred is as an exception to the substantive test.[68] The latter test being reasonable belief, on the basis of the evidence available, that the proposed acquisition may operate or be expected to operate against the public interest, i.e. whether on the balance of probabilities it will do so.[69] Investment in the UK could be at risk due to the unpredictability that such non-competition criteria might create.[70] Additionally, there is a global plea for convergence in merger regulations arising out from the International Competition Network, the Organisation for Co-operation and Development and the UN Conference on Trade and Development.[71] A further expansion of public interest, due to the consideration of socio-economic factors, would undermine the benefits that convergence bring to the merger review system.[72] However, if the contrary is decided, and new non-competition grounds are introduced, it has been argued that they should have a narrow scope and be 'applied in a disciplined, transparent and objective manner'.[73]

Overall, visible in the mergers context post-Brexit is a complex set of tensions, particularly between questions of how the CMA internally organises itself, due to the lack of endless resources at a time where the CMA is gaining competence to review mergers that may otherwise had been looked at by the Commission, to what extent it will need to externally coordinate with the Commission in terms of case allocation and divergence in the transitional period and beyond.

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63 Vickers, see note 27 above.

64 Brexit Competition Law Working Group, see note 36 above, para 3.9

65 Ibid, para 3.12.

66 D Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) *UEA Law School Centre for Competition Policy*, p 58.

67 Ibid, p 1.

68 Reader, see note 66 above.

69 *Office of Fair Trading & Ors v IBA Health Ltd* [2004] EWCA Civ 142 (19 February 2004).

70 Reader, see note 66 above.

71 Ibid, p 25

72 Ibid.

73 Brexit Competition Law Working Group, see note 36 above, para 3.14.

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B. State Aid

State aid is likely to raise the most urgent problem following Brexit for several reasons. Firstly, the EU is likely to insist on state aid control as a condition for any comprehensive trading agreement, as confirmed in the European Council guidelines for Brexit negotiations.[74] According to these guidelines, a trading agreement 'must ensure a level playing field in terms of competition and state aid'[75] as well as 'appropriate enforcement and dispute settlement mechanisms'.[76] Thus, according to the guidelines, it is not enough to merely include state aid as a principle, there must be appropriate enforcement of state aid in the UK. Secondly, there are no state aid statutes in the UK which mirror Article 107 TFEU, presenting a clear and unavoidable issue of substantive law. This means that the UK will have to consider the scope of any state aid provision. It may decide to either copy the EU state aid provisions, leaving out the cross-border element, or create a new state aid model tailored to the UK. The latter would be complicated compared to copying the current EU model.

Unless a state aid framework is created within the UK at the time of exit, there will be a range of pressing internal organisational issues and external coordination issues. It will create enormous legal uncertainty for existing state aid recipients as well as for businesses/sectors being involved in ongoing state aid cases. In case a trade agreement is not subscribed, the relationship between the UK and the EU would be subject to the WTO regulations and the corresponding state aid rules, which are more limited.[77] Therefore, whatever route Brexit takes, it will be necessary to have a state aid framework. Other areas may be subject to WTO rules, such as public procurement. The UK participates in the Agreement on Government Procurement (WTO framework) as an EU Member State and its direct membership would also be at stake with Brexit. Many potential solutions have been proposed,[78] but this topic will not be further explored in this article, as we will focus on state aid.

Currently, the CMA does not deal with state aid or have any powers to enforce state aid. BEIS is responsible for state aid across the whole of government, including local and regional government and the devolved administrations in the UK. At the EU level, the Commission is the authority enforcing the EU state aid rules set out in the Treaty.[79] Following Brexit, it has been decided that the CMA will be the

[74] *European Council (Art. 50) Guidelines Following the United Kingdom's Notification Under Article 50 TEU* (29 March 2017), available at http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines.

[75] Ibid, para 20.

[76] Ibid, para 23.

[77] N Crafts, 'Brexit and State Aid' (2017) 33 (supp. 1) *Oxford Review of Economic Policy* 105.

[78] Directorate-General for Internal Policies, *Consequences of Brexit in the Area of Public Procurement* (April 2017) IP/A/IMCO/2016-23, p 27.

[79] Article 107 TFEU, which provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

competent public authority to enforce state aid rules in the UK as opposed to the courts. While there are a number of issues in carrying over the state aid rules to UK law in terms of substantive law and procedure, the internal organisational issues this present are likely to be very significant.[80] The particular challenge is in the form of the CMA having, most likely, to enforce an area of competition law–state aid–which is new to the agency. For this, the CMA would need to establish a new state aid unit within the CMA. The likely reasons why the CMA will be the best placed authority to deal with state aid are multiple. First, the CMA currently has wide jurisdiction across the UK in relation to (amongst other things) competition law enforcement. Second, it has the necessary combination of legal, economic, and policy expertise. Third, it has the experience of analysing the effect of competition law on government policies and of conducting complex investigations involving detailed factual inquiry and economic assessments. Fourth, it already has experience of giving advice to public bodies on the competition implications of their policies or on proposals for legislation. Finally, its independence is widely recognised.[81]

Although the CMA is independent of the Government, state aid will be a politically difficult area to enforce due to the potential tensions between Government and the CMA. The CMA would be required take action against the very Government funding its operation. One of the core elements of any state aid provision is that the aid is granted to a company or an industry through state resources. Thus, the perpetrator will always be the State and any action will almost always be against the State. Action can also be taken against a company, as seen in the recent taxation cases,[82] but it will be the State's responsibility to recover any illegally provided aid.[83] The European enforcer of state aid, the Commission, does not face the same political conundrum as the CMA, as it is enforcing the state aid rules against a large number of Member States. The political sensitivities surrounding state aid is unique to this area of law and is rarely presented in merger and antitrust cases. For the CMA, this presents a challenge of how it coordinates its own role *vis-à-vis* state aid within the wider UK government.

(F'note continued)
undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

[80] For a discussion on the substantive law, see G Peretz, K Bacon, and I Taylor, 'Bringing State Aid Home: Could an Effective State Aid Regime Be Devised for the UK?' (2017) *UK State Aid Law Association*, paras 12–20, 25, available at http://uksala.org/bringing-state-aid-home-could-an-effective-domestic-state-aid-regime-be-devised-for-the-uk.

[81] Ibid, para 25.

[82] For example, European Commission Decision of 30 August 2016 State Aid SA.38373 – (Apple); European Commission Decision of 21 October 2015 on State Aid SA.38374 – (Starbucks); European Commission Decision of 21 October 2015 on State Aid SA. 38375 – (Fiat); State Aid SA.38944 – (Amazon); State Aid SA. 38945 – (McDonald's); and SA.44888 – (GDF Suez).

[83] L Lovdahl Gormsen 'Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax' (2017) 8(7) *Journal of European Competition Law and Practice* 423.

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Creating a new state aid unit within the CMA will carry resource implications and it is unimaginable that it could be funded on the current budget, adding to the internal organisation challenges imposed on the CMA. There would be an unavoidable need to recruit and train specialists in the area of state aid. Unlike the merger regime, discussed above, there is no way to make state aid cost neutral. As mentioned above, in the area of mergers, the CMA could, although likely an unpopular move, increase the merger filing fee. In the area of anticompetitive behaviour, the CMA could impose fines. This is not an option in the context of state aid. At best, the CMA can decide to have a recovery mechanism, which attempts to restore the situation before the granting of aid, which is different to imposing a fine for anticompetitive behaviour.[84] It is unknown how many state aid cases this unit would deal with on an annual basis, but it would naturally be more than now, where there is no state aid enforcement in the UK.

Overall, the issue of state aid presents the CMA with a multi-headed reform challenge that can be understood in terms of the analytical framework we set out. It presents a major issue of substantive law, as there is no extant state aid law in the UK and legal provisions would need to be accommodated in some form. There are questions of external coordination, both in terms of the CMA's ongoing relationship with the EU and its relationship with other parts of the UK government. Perhaps the most significant tension, though, is how the CMA will internally organise itself. The CMA has, at present, no state aid responsibilities as those lie with BEIS and the assumption of such a role would have wide-ranging implications. Once again, it is clear that each of these areas exert pressures on others.

V. CONCLUSION

Brexit will be a far-reaching catalyst for social, political, and economic change in the UK. At the time of writing this article, much of the detail of what Brexit will involve remains unknown. Within that fluid context, this article has, through a case study of two major aspects of competition administration, offered a piece of futurology in relation to the reformation of the administrative branch post-Brexit. In doing so, it has sought to shed light on a neglected part of the debate around the challenges facing the UK state both during and after the Brexit process. It has been shown that, whatever results from the UK's negotiations with the EU, Brexit will necessitate administrative reform, which is likely to be wide-ranging and fast-paced. We suggested that the challenge facing administrative bodies in the UK—including the CMA—can be understood as possessing three key dimensions: internal organisation issues; external coordination issues; and substantive legal issues. In many places, these three dimensions will be in tension which each other. That is to say, the reality of redesigning administration post-Brexit will often involve a trade-off between

[84] *Belgium v Commission* Case C-142/87, EU:C:1990:125, para 66; *Spain v Commission* Joined Cases C-278/92, C-279/92, and C-280/92, EU:C:1994:325, para 75; *Commission v Italy* Case C-350/93, EU:C:1995:96, para 21; *Italy v Commission* Case C-310/99, EU:C:2002:143, para 98.

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press

questions of internal organisation, external coordination, and substantive law. The result of this trade-off will be an inevitably imperfect new administrative settlement for the UK. From the perspective of administration across the EU, the analysis this article has offered—and grappling with the implications of Brexit more generally—reflects the view that there has been the evolution of a 'composite administration' within the EU. The integrated nature of EU administration is the primary source of the administrative challenge facing the UK. Of course, composite administration will remain in place for the remaining EU Member States but, with Brexit, its nature is more likely to be revealed in a way it has not previously been seen. What the implications of withdrawing from it look like will also become much clearer.

https://doi.org/10.1017/cel.2018.4 Published online by Cambridge University Press