

# UK exit from the EU

Guidance on the functions of the CMA under  
the Withdrawal Agreement

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# 1. Preface

- 1.1 The United Kingdom's exit from the European Union (EU Exit) is effective in the UK from 11 p.m. on 31 January 2020 (Exit Day).<sup>1</sup> Pursuant to Article 126 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement),<sup>2</sup> a transition period runs from Exit Day until 11 p.m. on the 31 December 2020 (the Transition Period).<sup>3</sup> During the Transition Period, existing arrangements for the discharge of the functions of the Competition and Markets Authority (CMA) will be largely unaffected.
- 1.2 This guidance is designed to explain how EU Exit affects the CMA's powers and processes for competition law enforcement ('antitrust', including cartels), merger control and consumer protection law enforcement during the Transition Period, towards the end of that period, and after it ends.<sup>4</sup> The guidance also explains the treatment of 'live' cases, which are those cases that are being reviewed by the European Commission or the CMA during and at the end of the Transition Period.
- 1.3 This guidance applies to the CMA's ongoing and future:
- merger cases under the Enterprise Act 2002 (EA02);
  - antitrust cases, including cartels, under the Competition Act 1998 (CA98) – i.e. relating to the competition law prohibitions on anti-competitive agreements, and on abuse of a dominant position; and
  - enforcement of consumer protection legislation, in particular under Part 8 of the EA02.

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<sup>1</sup> Article 185, Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community; and section 20(1), European Union (Withdrawal) Act 2018.

<sup>2</sup> [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 13 December 2019.](#)

<sup>3</sup> Article 132 of the Withdrawal Agreement provides for the possibility to extend the Transition Period by up to one or two years if such an extension is agreed by the 'Joint Committee' before 1 July 2020. However, under UK law, section 15A of the European Union (Withdrawal Act) 2018 (as introduced by section 33 of the European Union (Withdrawal Agreement) Act 2020) prohibits UK ministers from agreeing an extension. Any reference to the Transition Period in this document includes any extension.

<sup>4</sup> So far as they relate to competition law under the Competition Act 1998 and Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013, and the CMA's enforcement powers under consumer protection legislation, in particular Part 8 of the Enterprise Act 2002.

- 1.4 This guidance cross-refers to, and should be read alongside, the CMA’s existing guidance, which continues to apply. In case of conflict between this guidance and any other CMA guidance document, the most recent guidance should prevail.<sup>5</sup>

### ***What is not specifically covered by this guidance?***

#### *The UK’s future relationship with the EU*

- 1.5 At the time of publishing this guidance, the UK’s relationship with the EU after the end of the Transition Period (referred to as the Future Relationship)<sup>6</sup> remains subject to negotiation with the EU.
- 1.6 The CMA may issue further guidance in due course to clarify or amend elements of this guidance and explain any differences to the UK regime which will take effect at the end of the Transition Period.

#### *‘No deal’ Statutory Instruments and guidance*

- 1.7 On 22 January 2019, the Government made the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#).<sup>7</sup> These were designed to apply from Exit Day and give effect to EU Exit in the event of ‘no deal’ – i.e. in the absence of a ratified Withdrawal Agreement (and therefore no Transition Period).<sup>8</sup> A number of ‘no deal’ statutory instruments in the field of consumer protection were also made, in particular the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) relating to enforcement of consumer legislation.<sup>9</sup> Since there is now a ratified Withdrawal Agreement

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<sup>5</sup> All CMA guidance documents are available at: [www.gov.uk/cma](http://www.gov.uk/cma)

<sup>6</sup> See the ‘Political [declaration](#) setting out the framework for the future relationship between the European Union and the United Kingdom’.

<sup>7</sup> As amended by section 22, The International Accounting Standards and European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2019.

<sup>8</sup> As explained in paragraph 2.20, the European Union (Withdrawal Agreement) Act 2020 delays the effect of the Withdrawal Act SIs (the ‘no deal’ statutory instruments) until the end of the Transition Period and grants powers to make statutory instruments where provisions of the Withdrawal Agreement need further implementation. The Withdrawal Act SIs will be amended using these powers, where appropriate, to give effect to the Withdrawal Agreement.

<sup>9</sup> Other ‘no deal’ statutory instruments in the field of consumer protection are Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 and Timeshare, Holiday Products, Resale and Exchange Contracts (Amendment etc.) (EU Exit) Regulations 2018.

and a Transition Period, the present guidance does not cover those ‘no deal’ Statutory Instruments in detail.<sup>10</sup>

### *CMA’s functions*

- 1.8 Some of the CMA’s functions which are less materially affected by EU Exit are not specifically covered by this guidance, including regulatory appeals, market studies, market investigations and the criminal cartel offence. The CMA guidance on these functions may, however, refer to concepts under EU law.<sup>11</sup> These references will continue to have effect in the UK for as long as, and in so far as, EU law has legal effect in the UK.<sup>12</sup> For example, the cartel offence regime is governed exclusively by UK domestic law and will therefore not be directly affected by EU Exit, but the [Cartel Offence Prosecution Guidance \(CMA9\)](#) refers to exclusions from the cartel offence, which are based on EU law.<sup>13</sup> During the Transition Period, those exclusions will continue to apply.
- 1.9 The CMA’s prioritisation principles<sup>14</sup> are also not materially affected by this guidance. More generally, unless otherwise stated in this guidance, the CMA’s existing guidance will continue to apply to the exercise of each of its functions.
- 1.10 This guidance offers an explanation of the legal changes expected to result from EU Exit but it is not a definitive statement of, or a substitute for, the law itself. The legal tests which the CMA applies in carrying out its functions are not addressed in this guidance. A range of publications on how the CMA carries out this substantive assessment is available at [www.gov.uk/cma](http://www.gov.uk/cma). Any person who considers that they or their business may be affected by an

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<sup>10</sup> The CMA has published guidance which describes the effects of EU Exit on the CMA’s functions in a ‘no deal’ scenario (the No Deal Guidance). For the avoidance of doubt, the No Deal Guidance will not apply during the Transition Period. [Guidance on the functions of the CMA after a ‘no deal’ exit from the EU, 18 March 2019](#).

<sup>11</sup> See the following existing guidance in respect of these areas: [Regulatory appeals and references, Market studies and investigations: CMA3](#); [Guidelines for market investigations: CC3 \(revised\)](#); and [Cartel offence prosecution: CMA9](#).

<sup>12</sup> The CMA will conduct market studies and market investigation, as it currently does, under domestic legislation. When relevant, the CMA will take into consideration the relationship between domestic legislation and Articles 101 and 102 Treaty on the Functioning of the European Union, in compliance with Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (Regulation 1/2003).

<sup>13</sup> The exclusions to the offence are also contained in the EA02, as amended by Enterprise and Regulatory Reform Act 2013 (Section 188A). Under paragraph 4.17 of Cartel Offence Prosecution Guidance (CMA9), an individual will not commit an offence if the agreement is made in order to comply with a legal requirement, and a legal requirement includes a requirement: “[...] (b) imposed by or under TFEU or the European Economic Area Agreement and having legal effect in the United Kingdom without further enactment, or (c) imposed by or under the law in force in another European Union Member State and having legal effect in the United Kingdom.”

<sup>14</sup> [Prioritisation principles for the CMA: CMA16](#).

investigation into suspected anti-competitive practices or a breach of consumer protection law or may have an interest in it,<sup>15</sup> or that they or their business may be involved in a transaction which may trigger the UK merger control thresholds in the EA02, should consider seeking independent legal advice.

## **Guidance structure**

1.11 The remainder of this guidance is split into four sections:

- **Section 2: Legal framework** – this section presents and explains the impact of the Withdrawal Agreement and consequential domestic legislation on the UK legal framework in relation to merger control, competition and consumer protection;
- **Section 3: Merger control** – this section explains the rules and procedures that will apply to merger control during the Transition Period and how it is envisaged that mergers with an EU element will be treated at the end of the Transition Period;
- **Section 4: Competition law enforcement (antitrust, including cartels)** – this section focuses on the rules and procedures that will apply to cases under the competition law prohibitions during the Transition Period and on how it is envisaged that competition cases with an EU cross-border element will be treated at the end of the Transition Period;
- **Section 5: Consumer protection law enforcement** – this section focuses on the rules and procedures that will apply to consumer cases during the Transition Period and on how it is envisaged that consumer cases with an EU element will be treated at the end of the Transition Period;
- **Annex:** this annex provides a table listing the EU block exemptions in force under EU law.

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<sup>15</sup> For example, complainants or customers.

## 2. The legal framework

### ***Part 1: The Withdrawal Agreement***

#### *Key provisions of the Withdrawal Agreement*

- 2.1 During the Transition Period, EU law (with the exception of certain specified provisions) applies in the UK.<sup>16</sup> EU law must also be interpreted and applied in the UK in accordance with the same methods and general principles as those applicable within the EU.<sup>17</sup>
- 2.2 Provisions of the Treaty on the Functioning of the European Union (TFEU), the Treaty on European Union, EU regulations and other legislation which deal with European competition and consumer law therefore continue to apply in and to the UK during the Transition Period.<sup>18</sup>
- 2.3 The European Commission and the Court of Justice of the European Union (CJEU) shall also continue to have the powers conferred upon them by EU law in relation to the UK and natural and legal persons residing or established in the UK during the Transition Period.<sup>19</sup>
- 2.4 The jurisdiction of the European Commission and the CJEU in the UK during the Transition Period, and for certain types of cases after the end of the Transition Period, accordingly remains the same as it did before EU Exit.<sup>20</sup>

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<sup>16</sup> Articles 127(1) and (3), Withdrawal Agreement.

<sup>17</sup> Article 127(3), Withdrawal Agreement.

<sup>18</sup> Including, but not limited to, Articles 101, 102 and 106 of the TFEU, the EU Merger Regulation, Council Regulation (EC) No 1/2003, Regulation (EC) No 2006/2004 on Consumer Protection Cooperation Regulation and Council Directive 93/13/EEC on unfair terms in consumer contracts.

<sup>19</sup> Article 131, Withdrawal Agreement.

<sup>20</sup> Article 95(1), Withdrawal Agreement provides that decisions adopted by EU institutions before the end of the Transition Period which are addressed to the UK, or to its natural and legal persons, will be fully binding on and in the UK. Article 86(1), Withdrawal Agreement provides that the CJEU will have exclusive jurisdiction to hear issues relating to the legality of such decisions and the compliance of the UK with such decisions. Article 86(2), Withdrawal Agreement provides that the CJEU shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the UK made before the end of the Transition Period.

Articles 95(1), 92 and 93, Withdrawal Agreement provide that decisions made by EU institutions after the end of the Transition Period which are addressed to the UK, or to its natural and legal persons will be fully binding on and in the UK if the procedures that led to the adoption of these decisions were initiated before the end of the Transition Period and concern compliance with EU law of the United Kingdom or compliance with EU competition law in the United Kingdom. Article 95(3), Withdrawal Agreement provides that the CJEU shall have exclusive jurisdiction to review the legality of these decisions.



2.5 Further detail on what this means in practice for merger control, competition and consumer law enforcement in the UK during the Transition Period is set out in this guidance.

## ***Part 2: The UK domestic legislation giving effect to EU Exit and the Transition Period***

2.6 The UK Parliament has passed two key pieces of primary legislation which give legal effect in UK law to EU Exit and to the Withdrawal Agreement:

- the European Union (Withdrawal) Act 2018 (referred to in this guidance as the ‘Withdrawal Act’) which essentially repeals the European Communities Act 1972 with effect from Exit Day and brings across certain EU legislation to form part of the UK’s domestic law (see below from paragraph 2.7 onwards); and
- the European Union (Withdrawal Agreement) Act 2020 (referred to in this guidance as the ‘Withdrawal Agreement Act’) which postpones the effects of the Withdrawal Act from Exit Day until the end of the Transition Period, gives effect to the Withdrawal Agreement and amends the Withdrawal Act (see below, paragraph 2.15 onwards).

### ***Key provisions of the Withdrawal Act***

2.7 Set out below are the key provisions of the Withdrawal Act. However, the effect of these provisions is altered by the Withdrawal Agreement Act, and therefore should be read in conjunction with paragraph 2.15 onwards.

2.8 On 26 June 2018, the Withdrawal Act received Royal Assent. The Withdrawal Act repeals the European Communities Act 1972 on Exit Day.<sup>21</sup> The European Communities Act 1972 was the principal piece of legislation passed by the UK Parliament that gave effect to EU law in the UK.<sup>22</sup>

2.9 Pursuant to section 3 of the Withdrawal Act (although subject to the exceptions contained in section 5 of the Withdrawal Act), directly effective EU legislation, including EU regulations, decisions and EU treaty articles,<sup>23</sup> so far as operative immediately before EU Exit, are brought across and form part of the UK’s domestic law on and after EU Exit.

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<sup>21</sup> Section 1, Withdrawal Act.

<sup>22</sup> See further paragraph 2.16.

<sup>23</sup> Including articles of the Treaty on European Union and articles of the TFEU.

- 2.10 Furthermore, under section 2 of the Withdrawal Act, UK domestic legislation which is EU-derived – including that enacted under section 2(2) of the European Communities Act in order to implement an EU directive – also continues to have effect in UK domestic law on and after Exit Day.
- 2.11 Following EU Exit, anything which continues to be, or forms part of, UK domestic legislation by virtue of sections 2 or 3 of the Withdrawal Act (see the two preceding paragraphs of this guidance) constitutes ‘**retained EU law**’. For further information on the concept of ‘retained EU law’ under the Withdrawal Act, please refer to the following public papers:
- House of Commons Library – [The European Union \(Withdrawal\) Bill: Retained EU law](#); and
  - House of Commons Library – [The status of ‘retained EU Law’](#).
- 2.12 Under section 8 of the Withdrawal Act, UK Ministers have the power to make statutory instruments to amend retained EU law with a view to preventing, remedying or mitigating (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law.<sup>24</sup> The Government used this power when it made the Competition (Amendment etc.) (EU Exit) Regulations 2019 on 22 January 2019 and the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 on 6 February 2019 (together, the Withdrawal Act SIs),<sup>25</sup> which were designed to apply from Exit Day in the event a withdrawal agreement was not concluded. As noted below (paragraphs 2.20 and 2.21), the Withdrawal Agreement Act provides for additional powers for Ministers to make statutory instruments.
- 2.13 Under the Withdrawal Act, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law or general principles of the CJEU laid down up until Exit Day.<sup>26</sup>

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<sup>24</sup> Section 8(1), Withdrawal Act.

<sup>25</sup> Mentioned also in paragraph 1.7 above. A number of other consumer protection statutory instruments were also made.

<sup>26</sup> Pursuant to section 6 of the Withdrawal Act, this applies so far as retained EU law remains “unmodified”. Where retained EU law has been modified on or after Exit Day it can be interpreted in accordance with CJEU case law and the general principles of EU law where that accords with the intention of the amendments (s.6(6) Withdrawal Act). Retained EU law can be modified only in a way prescribed under section 7, Withdrawal Act, as amended by Schedule 5(40), Withdrawal Agreement Act.

2.14 As a final point, it is important to note that under the Withdrawal Act, the UK Supreme Court and Scotland's High Court of Justiciary<sup>27</sup> are not bound by any retained EU case law.<sup>28</sup> As a result, after Exit Day, CJEU case law relating to unmodified retained EU law will have the same status in domestic courts and tribunals as existing decisions of the UK Supreme Court or High Court of Justiciary. However, the Withdrawal Agreement Act has amended section 6 of the Withdrawal Act in order to enable the Government to alter, and set out in regulations (after consultation), the circumstances in which specified UK courts and tribunals would not be bound by retained EU case law.<sup>29</sup> The status of CJEU case law after Exit Day could, therefore, be subject to change and it is possible that it might not, in certain circumstances, bind courts lower than the UK Supreme Court and Scotland's High Court of Justiciary.

### *Key provisions of the Withdrawal Agreement Act*

2.15 The Withdrawal Agreement Act gives effect to the Withdrawal Agreement<sup>30</sup> and amends the Withdrawal Act in a number of ways, including those set out further below.

2.16 As mentioned above (paragraph 2.6 (ii)), despite the fact that the Withdrawal Act repeals the European Communities Act 1972, the Withdrawal Agreement Act modifies the Withdrawal Act to include a saving provision that preserves the effect of the repealed European Communities Act 1972 until the end of the Transition Period.<sup>31</sup> The Withdrawal Agreement Act also modifies certain parts of the European Communities Act 1972 to reflect the fact that the UK has left the EU, and that the UK's relationship with EU law during the Transition Period is determined by the UK's commitments in the Withdrawal Agreement, rather than as a Member State.<sup>32</sup>

2.17 This means that directly applicable EU law, including the main treaty articles relevant for competition purposes (Articles 101 and 102 TFEU) and the main relevant EU regulations (such as Regulation 1/2003,<sup>33</sup> EU block exemption

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<sup>27</sup> The highest criminal court in Scotland.

<sup>28</sup> Section 6(4), Withdrawal Act and Withdrawal Act, Explanatory Notes, Section 6: Interpretation of retained EU law.

<sup>29</sup> Sections 5A, 5B, 5C and 5D, Withdrawal Act (as introduced by section 26, Withdrawal Agreement Act).

<sup>30</sup> See in particular Parts 1, 2 and 3 of the Withdrawal Agreement Act.

<sup>31</sup> Section 1A, Withdrawal Act (as introduced by section 1, Withdrawal Agreement Act).

<sup>32</sup> Sections 1A and 1B, Withdrawal Act (as introduced by sections 1 and 2, Withdrawal Agreement Act).

<sup>33</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003, p. 1–25.

Regulations<sup>34</sup> and the EU Merger Regulation)<sup>35</sup> will continue to apply in the UK during the Transition Period, through the saved effect of section 2(1) of the European Communities Act 1972.<sup>36</sup>

- 2.18 In addition, the Withdrawal Agreement Act ensures that domestic legislation implementing or referring to EU law still has effect in the UK in accordance with the Withdrawal Agreement.<sup>37</sup> For example, where there are references to the obligations on ‘Member States’ in CA98 and EA02, as a result of a provision in the Withdrawal Agreement Act, these references are to be read as though the UK were still a Member State during the Transition Period.
- 2.19 The Withdrawal Agreement Act also amends the Withdrawal Act so that the directly effective EU legislation brought across to form part of UK’s domestic law as retained EU law,<sup>38</sup> is that which is operative immediately before the end of the Transition Period rather than immediately before Exit Day.
- 2.20 The Withdrawal Agreement Act delays the effect of the Withdrawal Act SIs until the end of the Transition Period. The Withdrawal Agreement Act also amends the powers granted to Ministers under section 8 of the Withdrawal Act (to make statutory instruments to amend retained EU law) to allow for the correction of any deficiencies arising as a result of or in connection with the end of the Transition Period or any other effect of the Withdrawal Agreement.<sup>39</sup>
- 2.21 Moreover, the Withdrawal Agreement Act gives domestic legal effect to the provisions of the Withdrawal Agreement relating to matters other than the Transition Period. Where provisions of the Withdrawal Agreement need further implementation, it grants powers which can be used to make statutory instruments for this purpose. This will allow, for example, for specific provision to be made in relation to competition cases ongoing at the end of the Transition Period.<sup>40</sup> The Withdrawal Act SIs will be amended using these powers, where appropriate, to give effect to the Withdrawal Agreement.

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<sup>34</sup> See Annex.

<sup>35</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1-22.

<sup>36</sup> Note that UK consumer protection legislation enacted under section 2(2) of the European Communities Act 1972, which implements EU consumer law directives, remains in force notwithstanding the repeal of the European Communities Act 1972.

<sup>37</sup> Section 1B, Withdrawal Act (as introduced by section 2, Withdrawal Agreement Act).

<sup>38</sup> See paragraph 2.8.

<sup>39</sup> Section 8, Withdrawal Act (as amended by section 27, Withdrawal Agreement Act).

<sup>40</sup> Section 7A, Withdrawal Act (as introduced by section 5, Withdrawal Agreement Act) and section 8B, Withdrawal Act (as introduced by section 18, Withdrawal Agreement Act).

## 3. Merger control

### ***Part 1: During the Transition Period***

#### *'One-stop-shop'*

- 3.1 During the Transition Period, pursuant to the Withdrawal Agreement<sup>41</sup> and the Withdrawal Agreement Act, the UK will broadly continue to be treated as if it were a Member State under the EU Merger Regulation (EUMR),<sup>42</sup> such that the 'one-stop shop' principle under the EUMR continues to apply.<sup>43</sup> The division of jurisdiction between the European Commission and the CMA over mergers which are notifiable under the EUMR or the EA02 will therefore remain the same during the Transition Period.
- 3.2 Accordingly, the UK turnover generated by merging parties<sup>44</sup> will still need to be taken into account when establishing whether a merger<sup>45</sup> satisfies the EUMR jurisdictional thresholds.<sup>46</sup> Relevant UK turnover of merging parties will be included within the 'Union-wide' turnover and the UK will be regarded as a Member State for the purposes of the alternative turnover thresholds under Article 1(3) EUMR.
- 3.3 Where a merger satisfies the EUMR jurisdictional thresholds, the European Commission will continue to retain exclusive competence for the investigation of that merger, including with respect to any effects on any UK market (or market that includes all or a part of the UK).<sup>47</sup> In such a situation, the CMA will not open an investigation, unless jurisdiction is transferred under the referral mechanisms set out in the EUMR (described further in paragraph 3.4). The CMA will continue to work with the European Commission in relation to any issues raised by such mergers that are relevant to the UK, including through

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<sup>41</sup> Article 127(6), Withdrawal Agreement.

<sup>42</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR).

<sup>43</sup> Chapter 18 of [Mergers: Guidance on the CMA's jurisdiction and procedure, January 2014 \(CMA2\)](#) which should be read in light of this guidance and the changes mentioned in paragraphs 3.27 to 3.31.

<sup>44</sup> The 'merging parties' are referred to as 'the undertakings concerned' under the EUMR. This concept is defined in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

<sup>45</sup> The EUMR only applies to 'concentrations' as defined in Article 3 EUMR. Where this guidance refers to mergers in the context of the EUMR, it is to be understood to mean a transaction which would meet the definition of a concentration under the EUMR and the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

<sup>46</sup> Article 1(2) and (3), EUMR.

<sup>47</sup> Article 21(3), EUMR.

attendance at Advisory Committee meetings (subject to the rules governing the UK's invitation to meetings of EU bodies during the Transition Period, set out in the Withdrawal Agreement).<sup>48</sup>

### *Case referrals*

3.4 During the Transition Period, the UK will continue to be treated as if it were a Member State for the purposes of referrals of merger control cases from the European Commission to the national competition authorities of the Member States (NCAs) and *vice versa* under the following provisions:

- Article 4(4), EUMR – a request by the merging parties that a merger be reviewed by an NCA even though it satisfies the EUMR jurisdictional thresholds;<sup>49</sup>
- Article 4(5), EUMR – a request by the merging parties for a merger to be reviewed by the European Commission, even though it does not have a Community dimension, if it is capable of being reviewed under the national merger control laws of at least three Member States;<sup>50</sup>
- Article 9, EUMR – a request by an NCA for the European Commission to refer a merger to an NCA where the conditions of Article 9 are met;<sup>51</sup>
- Article 22, EUMR – a request by one or more NCAs that a merger be examined by the European Commission rather than the NCA(s), even if that merger does not satisfy the EUMR jurisdictional thresholds.<sup>52</sup>

3.5 Where a request for a referral to the CMA (under Article 9 or Article 4(4), EUMR) is accepted by the European Commission prior to the end of the Transition Period, the CMA will retain jurisdiction to review the merger after EU Exit.<sup>53</sup>

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<sup>48</sup> Article 128(5), Withdrawal Agreement.

<sup>49</sup> See paragraphs 18.16 to 18.25 and 18.32 to 18.35 of CMA2 for further information on these types of referrals.

<sup>50</sup> See paragraphs 18.41 to 18.47 of CMA2 for further information on these types of referrals.

<sup>51</sup> See paragraphs 18.26 to 18.35 of CMA2 for further information on the CMA's procedure in relation to Article 9 referral requests.

<sup>52</sup> See paragraphs 18.48 to 18.58 of CMA2 for further information on this procedure.

<sup>53</sup> The CMA has, under section 34A of the Enterprise Act 2002, a maximum of 45 working days beginning on the working day after receipt of the European Commission's referral decision to inform the merger parties of the result of its preliminary competition assessment. Subject to any changes in future legislation, the CMA expects that this timetable will remain unchanged for mergers referred to the CMA where the 45 working day deadline expires after the end of the Transition Period. If a request for a referral to the CMA is not accepted by the European Commission, then the European Commission will retain jurisdiction to review the case.

### *Public interest interventions*

- 3.6 The Secretary of State will continue to be able to intervene on certain limited public interest grounds in mergers being reviewed by the European Commission under Article 21(4), EUMR.<sup>54</sup>

### *Review of decisions by the European Commission*

- 3.7 The CJEU retains full jurisdiction to review decisions of the European Commission under the EUMR that were either adopted before the end of the Transition Period or for mergers in which the administrative procedure has been initiated before the end of the Transition Period (as described below in paragraph 3.9).<sup>55</sup> The jurisdiction of the CJEU covers the effects of these mergers within any UK market.
- 3.8 The UK courts and the Competition Appeal Tribunal do not have jurisdiction to review decisions of the European Commission (or the UK-related aspects of these decisions) and this is not affected by EU Exit.

## ***Part 2: Towards the end of the Transition Period***

### *Cases where the European Commission retains jurisdiction*

- 3.9 At the end of the Transition Period there will be some merger cases which are under review by the European Commission where a final decision has not yet been taken (which are referred to as ‘live’ cases for the purposes of this guidance). The Withdrawal Agreement makes provision for how live cases are to be dealt with in terms of jurisdiction between the UK and the EU.<sup>56</sup> It sets out three scenarios where the European Commission will retain exclusive jurisdiction to review a merger (including in relation to any effects on any UK market) and the CMA will therefore not have jurisdiction over the case.<sup>57</sup> These are:

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<sup>54</sup> See paragraphs 16.16 to 16.22 of CMA2 for further information.

<sup>55</sup> Article 21(2), EUMR. Article 95 and Article 131, Withdrawal Agreement.

<sup>56</sup> Article 92, Withdrawal Agreement.

<sup>57</sup> Except where the case has been referred to the CMA pursuant to a request under Article 9 EUMR or in a situation where the CMA may ultimately take responsibility for monitoring and enforcing any commitments on behalf of the European Commission subject to agreement between the European Commission and the CMA (see paragraph 3.11).

- Where a merger has been formally notified to the European Commission before the end of the Transition Period. This requires that the “*date of notification*”<sup>58</sup> falls before the end of the Transition Period.
- Where the European Commission has, before the end of the Transition Period, accepted (or is deemed to have accepted<sup>59</sup>) an Article 22 EUMR referral request in which the CMA participated.
- Where the European Commission has, before the end of the Transition Period, accepted an Article 4(5) referral request (or the deadline for Member States to disagree to the request has expired).<sup>60</sup>

3.10 The European Commission will retain jurisdiction over these cases until it reaches a final decision, whether at Phase 1 (after an initial phase) or Phase 2 (after an in-depth investigation). For these cases, the CMA will continue sharing and receiving case-related information until the European Commission reaches a final decision. The CMA expects to be included in Advisory Committee meetings for these cases, on the basis that the criteria for invitation set out in the Withdrawal Agreement will be met, although it will no longer have the formal right to vote at such meetings.<sup>61</sup>

3.11 For mergers where the European Commission has accepted commitments from the merging parties, the European Commission will continue to be responsible for monitoring and enforcing all aspects of these commitments, including any UK elements, after the end of the Transition Period. This will also be the case when the commitments have not been agreed before the end of the Transition Period, but the European Commission has exclusive jurisdiction to review the merger (i.e. in the circumstances set out in

<sup>58</sup> Articles 1, 3, 4 and 10 EUMR.

<sup>59</sup> Under Article 22(3) EUMR, if the European Commission does not take a decision within 25 working days from the date on which all Member States have been informed by the European Commission of the initial referral request, then it shall be deemed to have adopted a decision to review the merger in accordance with the request.

<sup>60</sup> If the European Commission has not expressly accepted the request, then the time limit of 15 working days referred to in Article 4(5) EUMR has expired without any of the Member States competent to examine the concentration under their national competition laws having expressed any disagreement as regards the request to refer the case to the European Commission.

<sup>61</sup> Under Article 128(5), Withdrawal Agreement, UK representatives may be invited to meetings of the institutions of the EU during the Transition Period when:

- the discussion concerns individual acts to be addressed during the Transition Period to the UK or to natural or legal persons residing or established in the UK; or
- the presence of the UK is necessary and in the interest of the EU, in particular for the effective implementation of EU law during the Transition Period.

The Withdrawal Agreement adds that the UK representative shall have no voting rights during such meetings. Pursuant to Article 94(4) of the Withdrawal Agreement, Article 128(5) shall apply to the extent necessary for any procedures where the European Commission retains jurisdiction after the end of the Transition Period.



paragraph 3.9 above).<sup>62</sup> The Withdrawal Agreement provides that the European Commission and the CMA may agree to transfer responsibility for monitoring and enforcing the UK elements of such commitments from the European Commission to the CMA.<sup>63</sup> As set out in Section 2 above, secondary legislation will be necessary to make corresponding amendments to domestic legislation.

### *Cases where the European Commission does not retain jurisdiction at the end of the Transition Period*

- 3.12 The CMA may have jurisdiction to review a merger that has not been formally notified or subject to referral to the European Commission before the end of the Transition Period.<sup>64</sup>
- 3.13 If there is a material likelihood that the merger will not have been formally notified or referred to the European Commission before the end of the Transition Period, merging parties may wish to consider the possibility that the CMA will ultimately have jurisdiction to review the merger (and consider engaging with the CMA significantly in advance of the end of the Transition Period).

### *Engagement with the CMA and pre-notification discussions*

- 3.14 Merging parties are encouraged to approach the CMA to discuss whether it might be useful to begin pre-notification discussions in particular where:
- the merger might not be formally notified to the European Commission before the end of the Transition Period; and
  - the merger is likely to meet the conditions set out in the EA02 such that the CMA would have jurisdiction and may raise the possibility of competition concerns.<sup>65</sup>
- 3.15 The CMA considers that early and constructive engagement on mergers that may fall under the jurisdiction of the CMA at the end of the Transition Period is likely to help with the expedient investigation of the case. Where merging

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<sup>62</sup> Article 92(2), Withdrawal Agreement.

<sup>63</sup> Article 95(2), Withdrawal Agreement.

<sup>64</sup> If merging parties are in pre-notification discussions with the European Commission prior to the end of the Transition Period, or considering a merger which meets the EUMR jurisdictional thresholds, it will be necessary to carefully consider whether the merger is likely to be formally notified or referred to the European Commission prior to 31 December 2020. See Commission Decision of 28 January 2019 on public holidays for 2020 for the institutions of the European Union (2019/C 38/05).

<sup>65</sup> Section 23, EA02.

parties choose not to engage with the CMA until after the end of the Transition Period (and therefore substantive pre-notification discussions can only begin at this point), this is, in practice, likely to result in the final outcome of any investigation being reached later than would otherwise be the case.

- 3.16 In considering how to approach the CMA to commence pre-notification discussions, merging parties should follow the guidance set out in Chapter 6 of CMA2.
- 3.17 Where there is some uncertainty about whether the CMA will obtain jurisdiction over a case before the end of the Transition Period, merging parties may wish, in the interests of clarity and certainty, to consider requesting an earlier referral of a case to the CMA under Article 4(4) EUMR.<sup>66</sup> The CMA may also consider whether to request that a case should be referred to the CMA under Article 9 EUMR.

#### *The CMA's mergers monitoring during the Transition Period*

- 3.18 The UK merger control regime is voluntary and therefore there is no obligation to notify a merger. The CMA will only open an investigation on its own initiative where there is a reasonable chance that the transactions may give rise to a relevant merger situation and to a realistic prospect of a substantial lessening of competition.<sup>67</sup>
- 3.19 As noted above, merging parties are encouraged to engage with the CMA at an early stage, particularly where a merger may raise potential competition concerns in the UK.<sup>68</sup> Not notifying a qualifying merger to the CMA raises certain risks for parties (described in more detail in paragraphs 6.20 and 6.21 of Mergers: Guidance on the CMA's jurisdiction and procedure: CMA2). The risks apply equally in cases that fall under CMA jurisdiction because they have not been formally notified or referred to the European Commission by the end of the Transition Period.

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<sup>66</sup> Such a referral is available if the merger may significantly affect competition in a market in the UK which presents all the characteristics of a distinct market. Such effects on competition need not be adverse for the purpose of Article 4(4). Paragraph 18.18 of CMA2 lists additional factors in support of a referral to the UK which would also be relevant in this situation.

<sup>67</sup> CMA2, paragraph 4.38.

<sup>68</sup> The CMA case team will be able to advise, among other matters, on steps that could potentially be taken to expedite the preparation of a draft Merger Notice in anticipation of the CMA gaining jurisdiction after the end of the Transition Period. This may include discussion and review of the Form CO or other submissions made to the European Commission, for which purpose the parties may wish to share such information with the CMA and consent to its use by the CMA in the event of the CMA opening an investigation.

- 3.20 The CMA retains the ability to refer a merger for a Phase 2 investigation for a period of four months after completion.<sup>69</sup> Following the end of the Transition Period, this statutory four-month period will apply for completed mergers from the latest of: (i) the end of the Transition Period;<sup>70</sup> (ii) the date of completion; or (iii) the point at which the CMA is considered to have been provided with notice of material facts about the merger.<sup>71</sup>
- 3.21 Prior to the end of the Transition Period, the CMA will monitor cases which may be the subject of pre-notification discussions with the European Commission but may fall under UK jurisdiction at the end of the Transition Period.
- 3.22 Although the CMA would not start a formal investigation until after the end of the Transition Period,<sup>72</sup> the CMA may take certain preparatory steps during the Transition Period to assess whether a formal investigation is likely to be necessary. In particular, the CMA may approach parties (or third parties) to request information about a merger which is in pre-notification with the European Commission. The CMA may also decide to issue an invitation to comment before the end of the Transition Period to invite third party comments about a merger. The CMA may conduct its own preliminary analysis, or contact other competition authorities, to advance its understanding of the competition issues that might be raised by a merger in preparation for a formal investigation.
- 3.23 In practice, merging parties providing the CMA with information that they have already shared with the European Commission and which is relevant to the UK aspects of the case is likely to facilitate the CMA's initial assessment of whether a formal investigation is likely to be necessary (and, if so, to enable the CMA to progress the case expediently).

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<sup>69</sup> As currently set out in section 24 of the Enterprise Act 2002. This section might be amended according to any guidance on the functions of the CMA after a 'deal' exit from the EU.

<sup>70</sup> The CMA will only obtain jurisdiction over mergers that would otherwise fall under the jurisdiction of the European Commission at the end of the Transition Period. For mergers meeting the EUMR thresholds where EU proceedings have not been initiated but the transaction has completed before the end of the Transition Period (which are likely to be rare in practice), the statutory four-month clock will not commence before the end of the Transition Period.

<sup>71</sup> CMA2, paragraph 4.44.

<sup>72</sup> As mentioned above, until the end of the Transition Period, the UK and the CMA remain subject to the EUMR which provides that national merger control rules cannot be applied to a merger with a "Community dimension" (Article 21(3), EUMR).

### *Cases being reviewed by the CMA prior to the end of the Transition Period*

3.24 The CMA's powers to review a merger under Part 3 of the EA02 are independent of those of the European Commission under the EUMR. Therefore the CMA does not envisage that there will be any change to the procedure followed for cases where the CMA has started its review prior to the end of the Transition Period. In particular, if a merger was referred to the CMA by the European Commission under the EUMR before the end of the Transition Period, the CMA anticipates that it will progress according to a 45 EU working day timetable.<sup>73</sup>

### *'Public interest' cases*

3.25 As explained in paragraphs 16.16 to 16.22 of CMA2, the Secretary of State may also intervene on certain 'legitimate interest' grounds in cases falling under the EUMR through Article 21(4) EUMR. If the Secretary of State has issued or issues a European Intervention Notice in relation to a case which has already been formally notified or referred to the European Commission before the end of the Transition Period, the review will proceed as set out in existing guidance. The European Commission will review the competition aspects of the case and the CMA will review the 'legitimate interest' aspects as defined in Article 21(4) of the EUMR.

3.26 In relation to mergers which may raise public interest concerns, but which have not been formally notified or referred to the European Commission before the end of the Transition Period, the standard procedure for public interest mergers set out in paragraphs 16.7 to 16.15 of CMA2 will apply.

### ***Part 3: After the end of the Transition Period***

3.27 After the end of the Transition Period, mergers will no longer be subject to the EU one-stop shop principle in relation to the UK.

3.28 Pursuant to the Withdrawal Agreement, the turnover of parties in the UK will no longer be relevant for determining whether a merger satisfies the EUMR jurisdictional thresholds. The CMA will also cease to be a competent authority

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<sup>73</sup> The CMA has, under section 34A of the Enterprise Act 2002, a maximum of 45 working days beginning on the working day after receipt of the European Commission's referral decision to inform the merger parties of the result of its preliminary competition assessment. Subject to any changes in future legislation, the CMA expects that this timetable will remain unchanged for mergers referred to the CMA where the 45 working day deadline expires after the end of the Interim Period.

of a Member State for the purposes of the EUMR and may therefore investigate mergers which satisfy the EUMR jurisdictional thresholds.

- 3.29 With the exception of mergers over which the European Commission retains jurisdiction, as described above in paragraph 3.9, the European Commission will no longer have jurisdiction to investigate the effects within the UK of any mergers, with the CMA instead having jurisdiction (to the extent that a merger triggers the thresholds under the EA02).
- 3.30 Where a merger satisfies the jurisdictional thresholds of the EUMR and the EA02, the CMA and the European Commission may conduct parallel assessments of the same merger in their respective jurisdictions.
- 3.31 It will remain important for the CMA to be informed about whether mergers being reviewed in the UK are also subject to investigation in other jurisdictions (as explained in paragraph 19.1 of CMA2). Where possible and appropriate, the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission (and other competition authorities). Merging parties (and third parties) are encouraged to facilitate cooperation with the European Commission and other competition authorities wherever possible.

## 4. Enforcement of the competition law prohibitions ('antitrust', including cartels)

### *Part 1: During the Transition Period*

4.1 As explained in paragraph 2.17 of this guidance, Article 101 (the EU law prohibition on anti-competitive agreements) and Article 102 (the EU law prohibition on abuse of a dominant position) TFEU will have full force and effect in the UK during the Transition Period. This is in addition to the equivalent UK domestic law prohibitions in CA98. Regulation 1/2003 and the EU block exemption Regulations and EU Guidance will also continue to apply.<sup>74</sup>

### *European Commission's enforcement of Article 101 and Article 102 TFEU in relation to the UK*

- 4.2 The European Commission will continue to have the power to enforce Article 101 and Article 102 TFEU in relation to the UK and natural and legal persons residing or established in the UK in the same way as it did before Exit Day. The European Commission may investigate suspected infringements of Article 101 or Article 102 TFEU in the UK or which have effects on a UK market, in the same way as if the UK continued to be a Member State.<sup>75</sup> Appeals related to a decision of the European Commission addressed to natural or legal persons residing or established in the UK will continue to be heard exclusively by the CJEU.<sup>76</sup>
- 4.3 During the Transition Period, the UK and the CMA continue to be subject to the provisions of Regulation 1/2003 which governs the coordination of enforcement of the competition law prohibitions across the EU. Accordingly, where the European Commission has initiated an investigation into a suspected breach of either Article 101 or Article 102, the CMA and the UK

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<sup>74</sup> See also CMA guidance based on EU law, including [Guidance on Modernisation: OFT 442](#), and other guidance such as [Guidance on Agreements and concerted practices: Understanding competition law: OFT 401](#) and [Vertical agreements: Understanding competition law: OFT 419](#).

<sup>75</sup> Further to Article 94(1) of the Withdrawal Agreement, EU law will continue to apply to such investigations. This means for example that in carrying out its investigations with respect to agreements or conduct in the UK, or affecting the UK, the European Commission may use its powers as set out under Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003).

<sup>76</sup> Article 95(3), Withdrawal Agreement.

concurrent regulators<sup>77</sup> will be relieved of their competence to launch or continue their own parallel investigation into the same UK conduct.<sup>78</sup>

### *Commitments and remedies accepted by the European Commission*

4.4 For those cases where the European Commission has, before or during the Transition Period, accepted commitments or remedies from parties in order to address concerns, the European Commission will continue to have responsibility for the monitoring and enforcement of any UK elements of these during the Transition Period (see paragraph 4.23 below for the treatment of commitments and remedies which are due to expire after the end of the Transition Period).

### *CMA's enforcement of the EU competition law prohibitions - Article 101 and Article 102 TFEU*

4.5 Regulation 1/2003 will also continue to apply to the CMA and the UK concurrent regulators during the Transition Period. This means that, as well as having the power to apply the domestic UK competition law prohibition – the Chapter I prohibition (anti-competitive agreements) and the Chapter II prohibition (abuse of dominance) in CA98, the CMA and the UK concurrent regulators also have the power,<sup>79</sup> and are obliged,<sup>80</sup> to apply Article 101 and Article 102 TFEU, to the extent that those provisions are also engaged by the subject matter of the investigation.

4.6 During the Transition Period the CMA will also continue to be able to assist the European Commission and national competition authorities of the Member

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<sup>77</sup> The term 'concurrent regulators' refers to the sector regulators in the UK which have been conferred with legal powers to apply competition law in their sectors concurrently with the CMA. The concurrent regulators are the Civil Aviation Authority (air traffic control and airport operations), the Financial Conduct Authority (provision of financial services), NHS Improvement (health care England), Ofcom (telecoms, broadcasting, post and spectrum), Office of Rail and Road (rail), Ofgem (gas and electricity), Ofwat (water and sewerage), Payment Systems Regulator (participation in payment systems) and NIAUR (gas, electricity, water in Northern Ireland). However, NHS Improvement is not a designated competition authority for the purposes of Regulation 1/2003. For further information, please refer to [Regulated Industries: Guidance on concurrent application of competition law to regulated industries: CMA10](#).

<sup>78</sup> Article 11(6), Council Regulation (EC) No 1/2003. The power of the CMA to investigate is restored once the proceeding initiated by the European Commission has concluded. The Withdrawal Agreement does not change the existing EU rules relating to the competence of national competition authorities following a commitments decision by the European Commission.

<sup>79</sup> Article 5, Council Regulation (EC) No 1/2003.

<sup>80</sup> Article 3(1), Council Regulation (EC) No 1/2003.

States with their investigations<sup>81</sup>, and in turn will expect the CMA and concurrent regulators to receive equivalent assistance.

- 4.7 In addition, pursuant to Regulation 1/2003, the CMA and the UK concurrent regulators may exchange relevant information (including confidential information) with the European Commission or a national competition authority of a Member State during the Transition Period. The CMA and the UK concurrent regulators will also continue to have access to information shared amongst the European Competition Network as if the UK were still a Member State.<sup>82</sup> However, pursuant to the Withdrawal Agreement, the participation and attendance of the CMA or UK concurrent regulators in European Competition Network meetings, oral hearings and Advisory Committee meetings during the Transition Period will be by invitation only and in circumstances where cases involving the UK are under discussion or the presence of the UK is necessary and in the interest of the European Union.<sup>83</sup>
- 4.8 During the Transition Period, section 60 of CA98 will continue to apply. Section 60 CA98 incorporates into UK law a governing principle that UK competition law relating to the Chapter I prohibition and the Chapter II prohibition in CA98 should not diverge in its substantive application from equivalent EU law. In particular, it imposes an obligation on the CMA, the UK concurrent regulators and national courts to ensure the consistent interpretation of the CA98 with the TFEU and established and future EU case law; and a general duty to have regard to any “*relevant decision or statement*” of the European Commission when determining any matter. This means that the CMA, the UK concurrent regulators, and the UK courts must continue to ensure that, so far as is possible, questions arising under the Chapter I prohibition and the Chapter II prohibition in CA98 are dealt with in a way that is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.

#### *Application of EU block exemption Regulations*

- 4.9 All existing EU block exemption Regulations will continue to apply in the UK during the Transition Period, as they did before Exit Day. The EU block exemption Regulations currently in force (and their corresponding expiry

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<sup>81</sup> The UK concurrent regulators are not designated as national competition authorities for Article 20 and Article 22 of Regulation 1/2003. The CMA’s powers in UK law to carry out inspections in the UK on behalf of the European Commission and Member State national competition authorities are set out in Part II and Part IIA of the CA98. Guidance on the CMA’s investigation procedures in CA98 cases 18 January 2019: [CMA8](#).

<sup>82</sup> [Competition law modernisation: OFT442](#), paragraph 8.2, referring to the European Commission’s *Notice on Cooperation within the Network of Competition Authority*.

<sup>83</sup> Article 128(5), Withdrawal Agreement.



dates) are listed in the Annex. In addition, existing agreements between companies that benefit from a 'parallel exemption' under s10 CA98 will continue to have that benefit during the Transition Period (see paragraph 4.22 onwards below for the situation post-Transition Period).

#### *Application of the CMA guidance relevant to antitrust (including cartel) cases*

- 4.10 As stated in paragraph 1.4, the CMA's existing guidance will continue to apply and in case of conflict between existing guidance and this document, the most recent guidance should prevail.
- 4.11 In addition, the UK regime for competition law redress (i.e. private action for breaches of competition law) remains the same during the Transition Period. Parties therefore will be able to bring private UK court action on the basis of suspected infringements of EU and UK competition law or follow-on damages claims on the basis of EU and UK competition law infringement decisions of the CMA, the UK concurrent regulators, the European Commission or Member State national competition law authorities.<sup>84</sup>

#### *Guidance on Competition Disqualification Orders (CMA102)*

- 4.12 The disqualification of directors for infringements of competition law is set out under domestic legislation, and for the most part will not be affected by the UK exiting the EU. However, under the current legislation, infringements of EU competition law are relevant to disqualification and the guidance on [Competition Disqualification Orders \(CMA102\)](#) contains references to EU law, which will continue to apply during the Transition Period.<sup>85</sup>

#### *CMA leniency regime in cartel cases*

- 4.13 The leniency regime applicable in the UK remains the same during the Transition Period, subject to any future amendment unrelated to EU Exit.
- 4.14 The leniency regimes of the European Commission, the CMA and the national competition authorities of the Member States will remain separate and each jurisdiction should be considered individually. The fact that a party has made a leniency application to the European Commission whether before or after

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<sup>84</sup> [Competition law redress: CMA55](#). As mentioned in CMA55, a final infringement decision of any national competition authority or review court of any EU Member State is treated as 'at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties'. Decisions of the CMA, UK concurrent regulators and the European Commission are binding on the Courts.

<sup>85</sup> [Guidance on Competition Disqualification Orders: CMA102](#).

the end of the Transition Period will not provide it with any protection from fines with respect to any UK investigation under the CA98. Nor will such an application provide its employees or directors with any protection from prosecution for the criminal cartel offence in relation to that cartel activity in the UK or from director disqualification proceedings.

- 4.15 As was the case before EU Exit, when considering whether to make a leniency application to the European Commission, parties are encouraged to consider whether it would also be appropriate to make such an application to the CMA<sup>86</sup> and *vice versa*.

## ***Part 2: Towards the end of the Transition Period***

### *European Commission's enforcement of Article 101 and Article 102 TFEU in relation to the UK*

- 4.16 Where the European Commission has formally initiated an investigation under Article 101 or Article 102 TFEU but is yet to reach a decision in respect of that prior to the end of the Transition Period (a 'live' case), the Withdrawal Agreement makes provisions for how the UK elements of these cases are to be dealt with in terms of jurisdiction between the UK and the EU.<sup>87</sup>

#### *(i) Cases where the European Commission retains jurisdiction*

- 4.17 Where the European Commission has formally initiated proceedings before the end of the Transition Period,<sup>88</sup> the European Commission will continue to be competent for the proceedings after the end of the Transition Period. During the Transition Period, Regulation 1/2003 and Regulation (EC) 773/2004 continue to apply to the CMA and the UK concurrent regulators.

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<sup>86</sup> The CMA receives leniency applications, including in relation to regulated sectors. See [Information Note – Arrangements for the handling of leniency applications in the regulated sectors](#).

<sup>87</sup> Article 92, Withdrawal Agreement.

<sup>88</sup> Article 92(3)(b), Withdrawal Agreement. The European Commission can initiate proceedings at any point in time, but not later than the date:

- it issues a preliminary assessment (a Statement of Objections), or a request for parties to express their interest in engaging in settlement discussions, or
- on which the European Commission publishes the summary of the case and main content of the commitments or the notice of inapplicability of Article 101 or 102, but cases can be formally initiated early in the European Commission's investigatory process.

Formal initiation of proceedings is pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004. Pursuant to Article 2(2) of Regulation (EC) 773/2004, the European Commission may make public the initiation of proceedings, but shall inform the parties concerned before doing so.

4.18 For these cases, the CMA and the UK concurrent regulators will continue to have access to relevant information shared amongst the European Competition Network and to be included in the corresponding Advisory Committee meetings (subject to the rules governing the UK's invitation to meetings of EU bodies set out in the Withdrawal Agreement, see paragraph 4.7 above).<sup>89</sup>

*(ii) Cases where the CMA and the UK concurrent regulators may obtain jurisdiction*

4.19 After the Transition Period ends, the CMA and UK concurrent regulators may obtain jurisdiction over elements of proceedings which have already been formally initiated by the European Commission. For example, if the agreements or conduct under investigation may affect trade within the UK and are ongoing as at the end of the Transition Period, the CMA or concurrent regulators may investigate facts postdating the Transition Period. The precise scope of the jurisdiction of the CMA and UK concurrent regulators with respect to such future cases may be the subject of future legislation. The CMA will consider issuing further guidance in due course.

4.20 Where the CMA and the UK concurrent regulators consider that they may have jurisdiction to review the UK elements of a 'live' European Commission case after the end of the Transition Period, the CMA and the UK concurrent regulators may approach the parties to begin gathering information before the end of the Transition Period. Any such first approach does not necessarily imply that the CMA will take enforcement action. The CMA will follow existing principles and procedures, in particular as set out in its guidance on prioritisation principles (CMA16), taking into account the circumstances of EU Exit.

*'Live' CMA antitrust investigations, including cartel investigations*

4.21 When the CMA and the UK concurrent regulators are investigating conduct that may affect trade between EU Member States and have not issued a decision before the end of the Transition Period and the case proceeds, they will no longer apply the EU prohibitions after the end of the Transition Period. The CMA expects that all actions taken by the CMA and the UK concurrent regulators in relation to an investigation prior to the end of the Transition Period will remain valid for the purposes of the continuing domestic

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<sup>89</sup> Pursuant to Article 94(4) of the Withdrawal Agreement, Article 128(5) shall apply to the extent necessary for any procedures referred to in Articles 92 and 93 after the end of the transition period. For the criteria of the UK's invitation to meetings of EU bodies under Article 128(5) see footnote 61 of this guidance.

investigation (in particular with respect to information gathered through notices, interviews or inspections).

### ***Part 3: After the end of the Transition Period***

4.22 After the end of the Transition Period, the CMA and the UK concurrent regulators will only investigate suspected infringements of UK domestic competition law (i.e. the Chapter I and Chapter II prohibitions in CA98) and **not** Articles 101 and 102 TFEU.<sup>90</sup>

#### *Commitments accepted and remedies imposed by the European Commission before the end of the Transition Period*

4.23 The Withdrawal Agreement provides that, after the end of the Transition Period, the European Commission will continue to have responsibility for the monitoring and enforcement of any UK elements of commitments given or remedies imposed in connection with any European Commission proceedings for the application of Article 101 or 102 TFEU. However, the Withdrawal Agreement provides an option to transfer responsibility for enforcing the UK elements of the commitments or remedies to the CMA and the concurrent regulators by mutual agreement between the Commission and the CMA.<sup>91</sup> As noted in paragraph 4.4 above, the CMA will consider whether to issue further guidance in due course on the procedure that would be followed in such cases.

#### *Leniency regime*

4.24 After the end of the Transition Period, the separate leniency regime applicable in the UK will remain, subject to any future amendment.

#### *Company director disqualification orders (CDOs) in competition cases*

4.25 It is expected that the Competition (Amendment etc.) (EU Exit) Regulations 2019 will be amended so that the CMA and UK concurrent regulators will be able to rely on conduct found to have infringed Article 101 or 102 TFEU (in addition to the Chapter I and Chapter II prohibitions in CA98) during the Transition Period for the purposes of making an application for a director

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<sup>90</sup> Leaving aside proceedings formally initiated by the European Commission before the end of the Transition Period (which are discussed at paragraph 4.17 above), this may mean that after the Transition Period there will be parallel UK and EU investigations into the same both pre and post Transition Period conduct.

<sup>91</sup> Article 95(2) of the Withdrawal Agreement. Domestic legislation will need to provide for the CMA being able to monitor and enforce these commitments and remedies.

disqualification order under s.9A of the Company Directors Disqualification Act 1986 (CDDA).

### *EU block exemption Regulations*

- 4.26 The Withdrawal Act and the Competition (Amendment etc.) (EU Exit) Regulations 2019 made under the Withdrawal Act preserve the EU block exemption Regulations in the UK as 'retained exemptions'.<sup>92</sup>
- 4.27 This means that, after the Transition Period, the retained exemptions will operate as exemptions from domestic prohibitions (as covered by s.10 CA98). Beneficiaries of the EU block exemption Regulations and the 'parallel exemption' pre-Exit will continue to benefit from the EU block exemption Regulations as incorporated into domestic law after the end of the Transition Period (and so long as they continue to comply with the retained exemptions). The power to vary (including to extend) or revoke the application of the retained exemptions to the domestic prohibitions will lie with the Secretary of State, acting in consultation with the CMA.
- 4.28 In addition, going forward, companies entering into new agreements after the end of the Transition Period will also be able to benefit from the retained exemptions provided they meet the relevant criteria.

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<sup>92</sup> The EU block exemption Regulation applicable to consortium agreements between liner shipping companies will expire on 25 April 2020. At the time of writing, the European Commission is recommending extending the duration of the existing block exemption for another four years. If, in line with the recommendation, the EU block exemption Regulation applicable to consortium agreements between liner shipping companies is extended, this new block exemption will become the retained exemption applicable in the UK for its duration, unless it is varied or revoked before that by the Secretary of State.

## 5. Consumer protection law enforcement

### *Part 1: During the Transition Period*

5.1 As explained in section 2, under the Withdrawal Agreement EU law will continue to apply to, and in, the UK during the Transition Period. The practical implications in the area of consumer protection are that, in general, immediately after Exit Day UK businesses will be subject to the same requirements as applied beforehand. Similarly, UK consumers will benefit from the same rights, and the CMA will have the same consumer enforcement powers and obligations.

#### *Consumer protection law*

5.2 Consumer protection law is, to a great extent, harmonised within the EU. It therefore follows that much of the UK's existing consumer protection law reflects EU consumer protection law.

5.3 During the Transition Period, businesses based in the UK or elsewhere that trade with UK consumers must continue to comply with UK, including EU-derived, consumer protection laws.<sup>93</sup>

5.4 In addition, new EU consumer protection laws which come into effect during the Transition Period will apply to, and in, the UK.<sup>94</sup>

5.5 Both during and after the Transition Period, UK traders directing their business activities to consumers in the EU must continue to comply with those consumers' local national consumer law which will largely reflect EU law.

#### *Consumer protection law enforcement in EU cross-border cases*

5.6 Currently, Part 8 of the EA02 (Part 8) sets out the principal UK regime for the civil enforcement of a wide range of consumer protection law by the CMA<sup>95</sup>

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<sup>93</sup> This includes both consumer protection laws that implement EU directives and any EU consumer laws that are embodied in EU regulations, which are directly applicable to EU-based traders, (e.g. Council Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights).

<sup>94</sup> For example, the new Consumer Cooperation Regulation (Reg (EU) 2017/2394) which will apply from January 2020.

<sup>95</sup> The CMA has additional enforcement powers under some specific consumer protection legislation, in particular the power to bring criminal enforcement proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (Trading Standards Services and the Department of Enterprise, Trade and Investment in Northern Ireland (DETINI) have the primary duty to enforce these Regulations).

and by other UK enforcers.<sup>96</sup> As well as covering purely domestic cases, it also allows EU enforcers to bring proceedings against UK businesses in the UK courts to protect consumers in their jurisdiction,<sup>97</sup> and also allows the CMA and other UK enforcers to bring proceedings in the UK against EU businesses that are harming UK consumers.<sup>98</sup>

- 5.7 Alternatively, UK businesses directing trade activities to EU consumers and breaching EU or local national consumer law could be subject to enforcement action by national enforcers in the courts of that Member State.<sup>99</sup>
- 5.8 During the Transition Period, the Injunctions Directive and Brussels Ia Regulation<sup>100</sup> will continue to apply to the UK and the Part 8 regime will remain unchanged. If UK consumers are affected by breaches of UK consumer law by EU firms targeting their business activities at UK consumers, the CMA and other UK enforcers will continue to have the power to take action in the firms' local courts and in the UK courts. Similarly, EU enforcers will continue to have the same powers to take action against UK businesses harming EU consumers.
- 5.9 Where a case is commenced during the Transition Period, the same rules on jurisdiction and applicable law will continue to apply to it until the final conclusion of the court case.

#### *Consumer protection law enforcement cooperation with EU enforcers*

- 5.10 The 2006 Consumer Protection Cooperation (CPC) Regulation<sup>101</sup> established a regime for EU cross-border consumer enforcement cooperation and assistance, by prescribing reciprocal powers and duties for Member States' competent authorities to respectively request and provide assistance. As of 17 January 2020, this regulation has been repealed and replaced by the 2017

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<sup>96</sup> Other UK enforcers include Trading Standards Services and DETINI, the Advertising Standards Authority and sectoral regulators such as the Financial Conduct Authority and the Civil Aviation Authority.

<sup>97</sup> Section 215(4) of the EA02 giving effect to Directive (98/27/EC) on injunctions for the protection of consumers' interests (Injunctions Directive).

<sup>98</sup> By virtue of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) the UK courts may have jurisdiction to hear enforcement proceedings for infringements affecting UK consumers and emanating from traders established elsewhere in the EU.

<sup>99</sup> By virtue of the Brussels Ia Regulation.

<sup>100</sup> Article 67(1), Withdrawal Agreement.

<sup>101</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws.

CPC Regulation.<sup>102</sup> The 2017 CPC Regulation preserves the main features of the 2006 CPC Regulation, but strengthens the cooperation mechanisms and provides for a wider range of investigation and enforcement powers for national authorities to better equip them to meet the challenges of the European digital economy.<sup>103</sup> Collectively we refer to the scheme created by these Regulations as the CPC system.

- 5.11 Under the CPC system, competent authorities can ask a cross-border authority for information on a business based in the requested authority's jurisdiction and can require it to take enforcement action against that local business to stop it committing infringements which are harming consumers in the other member state.
- 5.12 The CMA is a UK competent authority under the CPC system and the UK's Single Liaison Office responsible for co-ordinating requests coming to, and from, the UK. The CMA sends requests for assistance to other EU enforcers, including ones referred through it from other UK competent authorities. It also receives requests for assistance from other Member States and refers them to the most appropriate UK competent authority (including itself) or other designated body, such as a Local Authority Trading Standards Service.
- 5.13 In addition, the CPC system provides for Member States' competent authorities, or the European Commission, to co-ordinate common consumer protection law enforcement activities to tackle businesses or infringements that span multiple Member States. The CMA has been involved in a number of these common activities.<sup>104</sup>
- 5.14 Throughout the Transition Period, the legal rights and obligations created under the CPC system, which apply to UK competent authorities, and the CMA's role as the Single Liaison Office, will remain.<sup>105</sup> Therefore, during that period, the CMA will liaise and co-ordinate with the European Commission and other EU competent authorities in the same way as it did before Exit Day.

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<sup>102</sup> Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

<sup>103</sup> For example, these include new powers to order website take-downs and the power to impose penalties.

<sup>104</sup> For example, common activities on children's online games, social media and car hire.

<sup>105</sup> Article 127, Withdrawal Agreement.



## *CMA consumer protection law enforcement guidance*

- 5.15 Information on the CMA's consumer enforcement powers and approach is set out in CMA58 which covers cases involving businesses or consumers in other Member States.<sup>106</sup> The information in CMA58 will continue to apply during the Transition Period.<sup>107</sup>
- 5.16 During the Transition Period, for cases involving businesses or consumers in Member States, the CMA will continue to exercise its consumer enforcement powers in the way indicated in the guidance.

### ***Part 2: Towards the end of the Transition Period***

- 5.17 In the event that consumer enforcement proceedings being brought by the CMA in the UK courts result in a reference to the CJEU for a preliminary ruling on a point of interpretation of European consumer law, it is possible that any such reference may not be determined by the end of the Transition Period. If so, and as explained above in paragraphs 2.3 and 2.4, the CJEU would continue to have jurisdiction to give preliminary rulings on requests from UK courts referred to it before the end of the Transition Period.<sup>108</sup>

### *Cross-border enforcement cases*

- 5.18 The Withdrawal Agreement provides no specific rules on how ongoing cases or requests for assistance which have been referred by, or to, the UK through the CPC regime should be dealt with after the end of the Transition Period. In the case of referrals which have been made to the UK for enforcement action for which the CMA is responsible, the CMA will determine whether and how to take the case forward in accordance with its published prioritisation principles.

### ***Part 3: After the end of the Transition Period***

- 5.19 After the end of the Transition Period, businesses based in the UK or elsewhere that trade with UK consumers must comply with UK consumer protection laws.
- 5.20 The CMA has taken an active role in co-ordinated enforcement projects and knowhow-sharing within the CPC network, and a leading role in the

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<sup>106</sup> [Consumer protection: Enforcement Guidance: CMA58, paragraph 2.7 and Annex C.](#)

<sup>107</sup> Note that after Exit Day, paragraph 2.7, the last entry in the table under Annex A (Consumer legislation under which the CMA has enforcement powers) and Annex C (Wider international working) of CMA58 should be read as referring to the UK's participation in EU consumer cooperation arrangements on the basis that it is no longer a Member State of the EU.

<sup>108</sup> Article 86(2), Withdrawal Agreement.

development of wider partnership working in international fora. The CMA will continue to develop relationships and work with all our international counterparts, including, for example, through the International Consumer Protection and Enforcement Network (ICPEN).

- 5.21 The exact nature of consumer protection law enforcement cooperation to be agreed with the EU as part of the Future Relationship is not known at the time of publishing this document.

## Annex A: EU block exemptions in force under EU law

Regulation	Expiry date	Guidance <sup>109</sup>	Date
Commission Regulation 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements.	30/04/2026	<a href="#">Guidelines on the application of Article 101 of the TFEU to technology transfer agreements</a> 2014/C 89/03	28/03/2014
Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices	31/05/2022	<a href="#">Guidelines on Vertical Restraints</a> 2010/C 130/01  See also <a href="#">CMA Antitrust Vertical agreements: Understanding competition law (OFT419) (Dec 2004)</a>	19/05/2010
Commission Regulation 461/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector	31/05/2023	<a href="#">Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles</a> 2010/C 138/05	28/05/2010
Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to categories of research and development agreements	31/12/2022	<a href="#">Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements</a> Text 2011/C 11/01	14/01/2011
Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to categories of specialisation agreements	31/12/2022	NOTE: <a href="#">Corrigendum to Communication from the Commission, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements</a> 2011/C 33/08 (2/2/2011)	

<sup>109</sup> These guidance documents remain relevant in interpreting the relevant EU block exemption Regulations.

Regulation	Expiry date	Guidance <sup>109</sup>	Date
<p>Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the TFEU to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).<sup>110</sup></p> <p>At the time of writing this guidance, the European Commission has recommended extending the duration of the liner shipping block exemption for another four years.</p> <p>This has been extended until 25 April 2020 by Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application.</p>	25/04/2020	N/A	
<p>Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway (Codified version).</p> <p>There are no Commission Regulations granting block exemption under Regulation 169/2009.</p>	N/A	N/A	
<p>Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.<sup>111</sup></p> <p>There are no Commission regulations currently in force under Regulation 487/2009.</p>	N/A	N/A	

<sup>110</sup> At the time of writing, the European Commission is recommending extending the duration of the existing block exemption for another four years.

<sup>111</sup> Subject to the Future Relationship and subsequent legislation, paragraph 1 of Schedule 3 of the Competition (Amendments etc.) (EU Exit) Regulations 2019 made under the Withdrawal Act revoke this Regulation and thus would not preserve it as a Retained BER after the Transition Period.