

# Foreign Direct Investments

Draft guidance on the CMA's powers  
and procedures

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# 1. Preface

- 1.1 [Regulation \(EU\) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union](#) (the FDI Regulation) becomes applicable on 11 October 2020 and will be in force in the UK until the end of the Transition Period.<sup>1</sup> The FDI Regulation creates a cooperation mechanism within the European Union for the exchange of information and raising concerns in relation to foreign direct investment (FDI) that might affect the security or public order of EU Member States (Member States).
- 1.2 To ensure that the FDI Regulation can operate effectively in the UK, [the Enterprise Act 2002 \(EU Foreign Direct Investments\) \(Modifications\) Regulations \(2020\) Statutory Instrument](#) (the FDI SI) comes into force simultaneously with the application of the FDI Regulation, on 11 October 2020. The FDI SI enables the CMA to use its powers in the Enterprise Act 2002 (the Act) to gather information from businesses in response to a request made under the FDI Regulation and share certain information with Member States and the European Commission (the Commission).
- 1.3 This guidance sets out how the Competition and Markets Authority (CMA) will apply its new powers granted by the FDI SI, as well as how it will approach sharing information with the Commission and Member States for the purposes of the UK complying with the FDI Regulation during the Transition Period. This guidance is aimed at businesses and their advisers and focuses on those legal and procedural points in relation to the FDI SI and the FDI Regulation that are likely to be of immediate concern to them.
- 1.4 This guidance cross-refers to, and should be read alongside, the CMA's existing guidance,<sup>2</sup> which continues to apply. If there is a conflict with provisions in existing guidance, this document clarifies the CMA's approach in the context of the FDI SI and FDI Regulation only.

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<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, as endorsed by leaders at a special meeting of the European Council on 13 December 2019 (the Withdrawal Agreement), the Transition Period runs from 11 p.m. on 31 January 2020 until 11 p.m. on the 31 December 2020. For further explanation of the legal changes expected to result from the United Kingdom's exit from the European Union and how this 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 and after it ends see the CMA's publication: [UKexit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement \(CMA113\)](#).

<sup>2</sup> See for example, [Administrative penalties: Statement of Policy on the CMA's approach](#) (CMA4) and [Transparency and disclosure: Statement of the CMA's policy and Approach](#) (CMA6).

1.5 This document sets out the CMA's intended practice as from 11 October 2020 when the FDI SI comes into force until it is revoked, which is intended to be at the end of the Transition Period, save that section 4 of this guidance will continue to apply in relation to any failure to comply with a CMA information request made prior to the end of the Transition Period under powers granted by the FDI SI.

### ***Guidance structure***

1.6 The remainder of this document contains the following sections:

- Section 2: Legal Framework – this section provides an overview of the FDI SI and the FDI Regulation.
- Section 3: CMA's Extended Information Gathering Powers – this section explains the CMA's information gathering powers and how they will be applied if a request under the FDI Regulation is received from Member States and/or the Commission.
- Section 4: Penalties – this section explains the CMA's powers and procedures that will apply to imposing penalties for failure to comply with an information request issued by the CMA under its powers granted by the FDI SI.
- Section 5: Information Sharing – this section touches upon information sharing by the CMA in the context of the FDI Regulation.

## 2. Legal Framework

- 2.1 The FDI Regulation creates a cooperation mechanism within the European Union for the exchange of information in relation to FDIs that are likely to affect security or public order of the Member States. It also enables coordination of screening of such FDIs.
- 2.2 The FDI Regulation will apply as of 11 October 2020 and the UK is required to implement it in line with obligations in the Withdrawal Agreement.<sup>3</sup> To ensure that the FDI Regulation can operate effectively in the UK, the FDI SI comes into force simultaneously with the application of the FDI Regulation, on 11 October 2020.
- 2.3 The FDI SI, by making two non-textual amendments to the Act, will enable the CMA to use its powers under the Act for the purpose of complying with the FDI Regulation. In particular, the CMA will be able to:
- gather information from businesses in response to a request made by Member States and/or the Commission under the FDI Regulation; and
  - share certain information with the Member States and the Commission (see paragraph 5.5 below).
- 2.4 The FDI SI is intended to be in force until the end of the Transition Period. At the end of the Transition Period, the retained version of the FDI Regulation and the FDI SI will be revoked.

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<sup>3</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 (the Withdrawal Agreement).

### 3. CMA's Extended Information Gathering Powers

- 3.1 Under the FDI Regulation, Member States and the Commission can request information from the Member State where a FDI is planned or has been completed and where the FDI concerned is not undergoing screening (i.e. the CMA is not undertaking a merger investigation in relation to which a public interest notice on grounds of national security has been issued) (an FDI Request).<sup>4</sup>
- 3.2 The FDI SI grants the CMA powers to request information in relation to the FDI Request irrespective of whether a transaction involving foreign investment is subject to a CMA merger control investigation.<sup>5</sup> Any FDI Request and its response will go through the Department for Business, Energy and Industrial Strategy which is the UK contact point for the purposes of the FDI Regulation.
- 3.3 This section explains what type of information the CMA may request for the purpose of the FDI Regulation. This section also explains how the CMA will exercise its information gathering powers for obtaining information sought under an FDI Request.

#### Information to be provided

- 3.4 The information which may be requested by the CMA for the purposes of responding to an FDI Request includes the following:<sup>6</sup>
- the ownership structure of the foreign investor and the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;
  - the approximate value of the FDI;
  - the products, services and business operations of the foreign investor and of the undertaking in which the FDI is planned or has been completed;
  - the Member States in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct relevant business operations;

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<sup>4</sup> Article 7(5) of the FDI Regulation.

<sup>5</sup> Regulation 2 of the FDI SI; paragraph 7.2 of the [Explanatory Memorandum to the Enterprise Act 2002 \(EU Foreign Direct Investment\) \(Modifications\) Regulations 2020](#) (the Explanatory Memorandum).

<sup>6</sup> Article 9(2) of the FDI Regulation.

- the funding of the investment and its source;
- the date when the FDI is planned to be completed or was completed.

## The form of the request

- 3.5 To the extent that the CMA requires information to respond to an FDI Request, the CMA will generally issue a section 109 notice mandating parties to provide the information for the purpose of responding to the FDI Request. The CMA will have the power to issue a section 109 request in this context under the FDI SI which adds providing information to a Member State or the Commission in response to a request made under Article 7(5) of the FDI Regulation as a “permitted purpose” under section 109 of the Act.<sup>7</sup>
- 3.6 Where a section 109 notice is issued to respond to an FDI Request, and not in connection with a review of the transaction by the CMA, it will state that the information is requested for the purposes of responding to an FDI Request and will set out the possible consequence of a failure to comply with the notice. It is important that parties respond to information requests fully and accurately. Intentional or reckless provision of false or misleading information is a criminal offence, regardless of whether that information has been required by a section 109 notice or has been provided to the CMA voluntarily. Intentional alteration, suppression or destruction of any documents the merging party is required to produce by notice under section 109 of the Act is also a criminal offence (see Section 4 below).
- 3.7 The CMA may request information in relation to transactions which have been completed prior to 11 October 2020 but no earlier than 10 April 2019.<sup>8</sup> The CMA will not issue information requests pursuant to the FDI Regulation and will not share information for the purpose of the FDI Regulation once the FDI SI is revoked at the end of the Transition Period.
- 3.8 The fact that the CMA has issued an information request for the purposes of the FDI Request in a merger in which it does not have an open investigation, does not preclude the CMA from opening such an investigation in future nor should it be seen as an indication that the CMA will or will not do so. Whether or not the CMA investigates a merger will be determined by the jurisdictional thresholds and the CMA’s belief that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met.<sup>9</sup> The

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<sup>7</sup> Regulation 2(1) of the FDI SI.

<sup>8</sup> Article 7(10) of the FDI Regulation.

<sup>9</sup> See Paragraph 2 in the CMA publication [Guidance on the CMA’s mergers intelligence function \(CMA56\)](#).

CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Act.

## 4. Penalties

- 4.1 As explained in Section 3 above, the FDI SI grants the CMA information gathering powers under section 109 of the Act for the purpose of Article 7(5) of the FDI Regulation. The CMA has the same administrative and criminal penalties powers under the Act as in relation to any section 109 notice in order to ensure compliance with the CMA’s information-gathering powers in the context of the FDI Regulation.<sup>10</sup>
- 4.2 When imposing penalties for failure to comply with its information requests for the purpose of the FDI Regulation, the CMA will follow the CMA’s statement of policy and procedure as set out in *Administrative penalties: Statement of Policy on the CMA’s approach* (CMA4), subject to the following:
- (a) The text of CMA4 should be read as if the definition of ‘EA02 Requirements’ in paragraph 1.1 of CMA4 also encompasses the CMA’s information gathering powers under the FDI SI (i.e. “This document sets out the CMA’s statement of policy regarding its powers under the enterprise Act 2002 (EA02) ....to impose administrative penalties on a person who fails to comply with: notices requiring the attendance of witnesses, production of documents or supply of estimates, forecasts, returns or other information in Phase 1 and Phase 2 mergers, market investigations [*and in connection with the CMA’s information gathering powers for the purpose of the FDI Regulation*] (EA02 Requirements)”).
  - (b) The CMA will not extend the statutory deadline in merger investigations as a result of one of the parties’ failure to comply with an information request under a section 109 notice issued for the sole purpose of the FDI Regulation. In such circumstances, the ability to extend a timetable deadline for non-compliance will not be a relevant fact to which the CMA will have regard (see paragraph 4.8 of CMA4).
  - (c) The factors listed at paragraph 4.2 of CMA4 also include the following factor: “the failure to comply is likely to have an adverse effect on the UK’s ability to comply with the FDI Regulation”.
  - (d) Decisions made in relation to the imposition of penalties will be made by the person who makes substantive decisions – either a Senior Director or

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<sup>10</sup> Paragraph 7.4 of the Explanatory Memorandum.

senior member of CMA staff responsible for preparing a response to the relevant FDI Request.

- (e) The statutory time limits as to the imposition of a penalty in sections 110A and 110B of the Act do not apply to the enforcement of the CMA's information-gathering powers under the FDI SI.<sup>11</sup>
- (f) Annex B to CMA4 should be read as also containing the '*Summary table of CMA powers under the FDI SI and penalties for failure to comply*' as provided in the Appendix to this guidance.

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<sup>11</sup> Regulation 2(2) of the FDI SI.

## 5. Information Sharing

- 5.1 As mentioned in the preface to this document, the FDI Regulation establishes a framework for the screening of FDI into the European Union and sets up a formal channel for information exchange to facilitate cooperation between the Member States and the Commission in relation to FDIs which may affect security or public order.
- 5.2 This section explains how the CMA's responsibilities under the FDI Regulation have been reconciled with the general restriction on disclosure of 'specified information' as defined under the Act. This section also touches upon practical issues in relation to disclosure under the FDI SI, such as putting the parties on notice that the information will be shared with the overseas authorities.

### Applicable 'information gateways'

- 5.3 Section 237 of the Act imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of any of its functions (referred to as 'specified information') to other persons. The disclosure of specified information is permitted only in certain circumstances, so-called 'information gateways' which are set out in Part 9 of the Act.
- 5.4 Under the existing information gateways, the CMA is allowed to disclose specified information if the disclosure is required for the purpose of a European obligation (section 240 gateway). In addition to information received in response to an information request sent for the purposes of responding to an FDI Request only, the CMA may disclose certain information it receives in the context of a merger investigation for the purposes of complying with a UK obligation under the FDI Regulation.
- 5.5 In addition, the FDI SI provides that the CMA may disclose information for the purpose of providing comments on FDIs taking place in the territory of Member States.<sup>12</sup>
- 5.6 Even when an information gateway applies, the CMA is required to have regard to certain considerations before making a disclosure. In particular, the CMA must have regard to the three considerations set out in section 244 of the Act, namely:

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<sup>12</sup> Articles 6(2), 7(1) and 8(2) of the FDI Regulation. Section 240A of the Act, as inserted by the FDI SI, enables the CMA to make such a disclosure.

- the need to exclude from disclosure (so far as it is practicable to do so) any information whose disclosure the CMA considers to be contrary to the public interest
- the need to exclude from disclosure (so far as practicable) — commercial information the CMA considers might significantly harm the legitimate business interests of the undertakings or — information relating to the private affairs of an individual which the authority thinks might significantly harm that individual's interests,
- the extent to which the disclosure of information relating to the private affairs of an individual or commercial information is necessary for the purpose for which the authority is permitted to make the disclosure.

5.7 These three considerations are applied by the CMA on a case-by-case basis when the CMA is considering disclosure of specified information.

## **Notice to parties**

5.8 When making disclosure under any of the above-mentioned information gateways, the CMA is not obliged to obtain the consent of the party to whom the information relates.<sup>13</sup>

5.9 If the transaction concerned is undergoing a Phase 1 or Phase 2 merger investigation at the time when the FDI Request is received, the CMA will generally notify the Parties that the request is received and will indicate that the information will be shared with the Department for Business, Energy and Industrial Strategy, the Commission and the Member States for the purposes of the FDI Regulation.

5.10 When the FDI Request is received in relation to a transaction which the CMA is not investigating under the merger control regime, the CMA will make clear in its section 109 notice to the parties that the requested information is collected for the purposes of the FDI Regulation and will be shared with the Department for Business, Energy and Industrial Strategy and the overseas authorities.

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<sup>13</sup> Paragraph 4.26 of the CMA document *Transparency and disclosure: Statement of the CMA's policy and Approach* (CMA6).

## Appendix: Summary table of CMA powers under the FDI SI and penalties for failure to comply

CMA power	Penalty for failure to comply	Further information
<p>Section 109 EA02 – powers to require evidence, documents and/or attendance at interviews/meetings</p>	<p>Fixed penalty of up to £30,000 and/or daily penalty of up to £15,000</p>	<p>Penalties may be imposed where there is no reasonable excuse for the failure to comply. These powers can be exercised irrespective of whether or not the CMA conducts or intends to conduct a merger review process in any given case.</p>
	<p>Fixed penalty of up to £30,000 (but not a daily penalty) may be imposed on those who obstruct or delay copying of documents (section 110(3) of the EA02)).</p>	<p>Obstruction or delay must be intentional. These powers can be exercised irrespective of whether or not the CMA conducts or intends to conduct a merger review process in any given case.</p>
	<p>Criminal offence to intentionally alter, suppress or destroy any document requested under section 109 EA02 (section 110(5) of the EA02). It is also a criminal offence knowingly or recklessly to provide false or misleading information to the CMA or the Secretary of State in connection with any of their functions under Part 3 of the EA02 as amended by the Enterprise Act 2002 (EU Foreign Direct Investments) (Modifications) Regulations 2020 (section 117 of the EA02).</p> <p>For both offences, a person is liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.</p>	<p>For information gathering and enforcement powers under sections 109 and 110 EA02, where an act constitutes both:</p> <ul style="list-style-type: none"> <li>(a) a failure warranting administrative penalty; and</li> <li>(b) a criminal offence</li> </ul> <p>the CMA cannot impose an administrative penalty if a person has been found guilty of the criminal offence. Equally, a criminal offence is not committed where the CMA has imposed an administrative penalty in relation to the same act.</p>