

Draft guidance on the effects of the UK's 'no deal' exit from the European Union on the functions of the CMA

Consultation document

28 January 2019

CMA102

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This publication is also available at www.gov.uk/cma.

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1. About the consultation

Introduction

- 1.1. At the time of publication of this consultation document, the United Kingdom's exit from the European Union (EU Exit) is effective in the UK from 11 p.m. on 29 March 2019 (Exit Day). The Competition and Markets Authority (CMA) has published a draft guidance document to explain how EU Exit will affect its powers and processes for antitrust and cartel enforcement, merger control and consumer law enforcement after Exit Day. The guidance also explains the treatment of 'live' cases in a no deal scenario, which are those cases that are being reviewed by the European Commission or the CMA on Exit day.
- 1.2. The draft guidance is intended for businesses and their legal advisers but may also be of interest to other enforcers. For more general information on the antitrust and cartel enforcement, merger control and consumer law enforcement regime, see:
 - Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8)¹
 - Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)²
 - Consumer protection enforcement guidance (CMA58)³
- 1.3. The 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.
- 1.4. Some of the CMA's functions which are less materially affected by EU Exit are not specifically covered by the guidance under consultation, 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 and such references must now be read with the

¹ [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#)

² [Mergers: Guidance on the CMA's jurisdiction and procedure: CMA2](#)

³ [Consumer protection enforcement guidance: CMA58](#)

relevant changes in UK law resulting from EU Exit in mind.⁴ It is further noted that the guidance does not cover the exercise of the CMA's State aid powers.

- 1.5. The draft 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 guidance cross-refers to, and should be read alongside, existing CMA guidance and in case of conflict between an existing guidance document and the draft guidance under consultation, the most recent guidance should prevail.⁵ The CMA may issue further guidance in due course to clarify or amend elements of this guidance and explain any future cooperation agreed with the European Commission after EU Exit. The CMA expects to re-issue guidance to remove references to EU legislation and processes over time.
- 1.6. The draft guidance takes into account the European Union (Withdrawal) Act 2018 (the Withdrawal Act) and the secondary legislation introduced by the Government, including the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) and a number of statutory instruments in the field of consumer protection, in particular the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) relating to enforcement of consumer legislation.

Scope of this consultation

- 1.7. This consultation seeks the respondents' views on the content of the draft guidance and, in particular, the questions raised in Section 3 of this document. We want to ensure that the guidance is clear, comprehensive and useful for its intended readers.
- 1.8. We are seeking the views of interested parties, including but not limited to parties to ongoing procedures before the European Commission, their legal or other advisers who have been involved in antitrust, cartels, merger notification processes, and businesses, legal or other advisers who may be affected by the exercise of the CMA's functions, including in relation to the CMA's consumer enforcement powers.
- 1.9. We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. In particular, we want to ensure that it provides clarity for businesses and their advisers and

⁴ See the following existing guidance in respect of these areas: [Regulatory appeals and references](#), [Market studies and investigations: CMA3](#); and [Guidelines for market investigations: CC3](#).

⁵ All CMA guidance documents are available at: www.gov.uk/cma.

contains sufficient information on how the CMA's powers and processes will be affected by EU Exit.

2. Consultation process

How to respond

- 2.1 We encourage you to respond to the consultation in writing (by email or by letter) using the contact details provided in paragraph 2.5 below.
- 2.2 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 2.3 In the event of a no deal scenario and in pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

Duration

- 2.4 The consultation will run for four weeks, from 28 January 2019 to 25 February 2019.

Contact Details

- 2.5 Responses should be submitted by post or email by no later than midnight on 25 February and should be sent to:

EU Exit No Deal Guidance team
Policy and International
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD
Email: EUExitGuidanceNoDeal@cma.gov.uk

Compliance with government consultation principles

- 2.6 In preparing this consultation, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 2.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 2.8 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the guidance on the effects of the UK's 'no deal' exit from the European Union on the functions of the CMA, before it is finalised and issued.
- 2.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 2.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 2.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 2.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

- 2.13 In the event of a no deal scenario, after the consultation, we will publish a final version of the guidance and a summary of the responses received that fall within the scope of the consultation. As noted above, we propose to publish non-confidential versions of the responses received. These documents will be available on our webpages at www.gov.uk/cma and respondents will be notified when they are available.

3. Questions for consideration

- 3.1 Is the content, format and presentation of the draft guidance sufficiently clear? If there are specific parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- 3.2 We are particularly interested in your views on the following areas:
- (a) Does the draft guidance generally provide sufficient information and clarity in relation to the jurisdiction of merger cases which are being reviewed on Exit day (i.e. 'live' cases)? Does the draft guidance generally provide sufficient information and clarity in relation to the treatment of merger cases opened after Exit day? If not, please indicate if there are any aspects of the merger control rules and procedures on which further information would be useful.
 - (b) Does the draft guidance generally provide sufficient information and clarity in relation to the legal framework that will govern antitrust and cartel cases opened prior to Exit Day (i.e. 'live' investigations)? Is there enough clarity provided in relation to the treatment of antitrust and cartel investigations after Exit Day? If not, please indicate if there are any aspects of the antitrust and cartel enforcement procedures on which further information would be useful.
 - (c) Does the draft guidance generally provide sufficient information and clarity in relation to the CMA's understanding of the legal framework that will govern the consumer protection regime after Exit Day and its approach to the exercise of its functions?
- 3.3 The CMA would also welcome the views of stakeholders on any other aspects of the draft guidance.