

RESPONSE TO CMA CONSULTATION

GUIDANCE ON THE FUNCTIONS OF THE CMA AFTER THE END OF THE TRANSITION PERIOD

Baker McKenzie welcomes the opportunity to comment on the CMA's consultation on the functions of the CMA after the end of the transition period. Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and EU competition law. We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

1. Introduction

- 1.1 We agree with the CMA's stated aim to ensure that its guidance is clear, comprehensive and useful. This is particularly important for businesses that will continue to carry out business activities in the EU and the UK, and will going forwards have to manage the challenges and opportunities of having two separate legal and enforcement frameworks. Given the current climate, the focus has to be on ensuring legal certainty and transparency to promote business continuity.
- 1.2 We have a number of comments on some of the CMA's proposals, as set out below.

2. Enforcement of UK competition law

Consideration of EU law principles

- 2.1 The Guidance notes that section 60A allows the CMA, concurrent regulators and the UK courts to depart from the principles of the TFEU and CJEU case law pre-dating the end of the Transition period, where they consider this appropriate (and a number of factors are listed in the Guidance in this respect).
- 2.2 This divergence has the potential to create significant uncertainty which may have a chilling effect on commercial activities in the UK which are otherwise pro-competitive, and have until now been compliant with EU competition law. We encourage the CMA to provide guidance (at least in the short term) to businesses in advance of any antitrust enforcement action that is divergent to EU law antitrust enforcement and may lead to significant penalties on companies or their employees or directors. This could be done by way of open letters, warning or no-action letters which the CMA has frequently used in the past.

Retained EU law

- 2.3 The CMA notes that geographic scope is relevant to the concept of the restriction of "passive sales". As an example, the Guidance refers to exclusive distribution networks, noting that passive sales bans affecting sales to the UK market or UK customers are capable of falling within the scope of the Chapter I prohibition, and may be treated as hardcore restrictions of competition. This example creates uncertainty for businesses where they seek to manage their distribution network "*with EU Exit and the amendments made by the Competition SI in mind*".
- 2.4 For instance, we consider that the Guidance provides insufficient information with respect to the following:

- (a) The circumstances in which a ban on passive selling may (or may not) fall within the scope of the Chapter I prohibition. Would the position differ if the distributor is based outside of the EU and UK, and if so why?
 - (b) The extent to which a restriction on active and passive cross-supplies between two authorised distributors, both members of a selective distribution system, one based in the UK and the other based in the EU, would fall outside the scope of the Chapter I prohibition.
- 2.5 More broadly, we note that a number of the EU Block Exemption Regulations are due to expire in the near future and the European Commission has already been undertaking large consultation processes with a view to updating those regulations to reflect market developments and to improve rules that are not sufficiently clear or do not refer to recent case law. We would welcome further guidance from the CMA as to how and when it plans to update the Retained Block Exemption Regulations, and to what extent it will have regard to similar developments in the EU.
- 2.6 In addition, to increase transparency and facilitate compliance, we encourage the CMA to consolidate all relevant UK competition law provisions, guidance and retained EU competition law, including Retained Block Exemption Regulations, and make them accessible on a single dedicated webpage of the CMA.

Immunity/leniency applications

- 2.7 The CMA has not provided any guidance as to the status of summary applications made to the CMA before 31 December 2020, and in particular whether immunity or leniency applicants in such cases are expected to provide to the CMA a full immunity or leniency application. This is particularly relevant in cases where both the European Commission and the CMA are still in their investigatory phase, and proceedings under Article 2(1) of Commission Regulation (EC) No 773/2004 have not commenced before the end of the Transition Period.

3. Future cooperation between the CMA and the European Commission

- 3.1 The Guidance provides little information as to the cooperation between the European Commission and the CMA, particularly in respect of future merger and enforcement cases. For instance, we look forward to receiving further guidance as to the steps the CMA will take to coordinate such processes with the European Commission whilst preserving confidentiality and the parties' rights of defence.

4. Divergence between EU and UK consumer protection law

- 4.1 The Guidance notes that "*differences between EU Member States' domestic consumer protection laws and the UK's consumer protection laws will open up from the end of the Transition Period and may increase over time*", and that UK traders that sell to consumers in the EU will need to comply with two different frameworks.
- 4.2 This has the potential to create significant challenges for business that sell to consumers in both the UK and the EU, which could have a detrimental impact on consumers in either territory. To ensure that those businesses can effectively address any divergent requirements, we encourage the CMA to publish timely guidance in advance of any changes to the UK consumer protection framework and any changes in the CMA's approach to enforcement of that framework (including, and not limited to, enhanced enforcement and fining powers of the type originally considered in the 2018 Green Paper 'Modernising Consumer Markets' or that are the subject of the EU Omnibus Directive).

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