

# Guidance on the functions of the CMA after the end of the Transition Period

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# 1. Preface

- 1.1 The United Kingdom's exit from the European Union (**EU Exit**) took place at 11pm UK time on 31 January 2020 (**Exit Day**).<sup>1</sup> 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> provides for a 'transition period' which will end at 11pm UK time on 31 December 2020 (the **Transition Period**).<sup>3</sup>
- 1.2 As explained in the CMA's [Guidance on the functions of the CMA under the terms of the Withdrawal Agreement](#), during the Transition Period, existing arrangements for the discharge of the functions of the Competition and Markets Authority (**CMA**) have been – and continue until the end of the Transition Period to be – largely unaffected. This guidance explains how EU Exit will affect the powers and processes of the CMA for antitrust and cartel enforcement, merger control and consumer protection law enforcement after the end of the Transition Period.<sup>4</sup> The guidance also explains how the CMA will approach the 'transitional provisions' contained in the Withdrawal Agreement, insofar as they relate to the UK competition regime.
- 1.3 This guidance will come into effect at 11pm UK time on 31 December 2020 when the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (the **Competition SI**); the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2020](#) (the **Implementation SI**); the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (the **Consumer Protection SI**); and the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020](#) (together with the Consumer Protection SI, the **Consumer**

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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](#). It is important to note that the Northern Ireland Protocol, included in the Withdrawal Agreement, does not include provisions affecting the CMA's antitrust, merger control or consumer functions, and its application is therefore beyond the scope of this guidance.

<sup>3</sup> In the remainder of this document, we refer to the end of the Transition Period and 31 December 2020 interchangeably. References to 31 December 2020 should be taken to mean **11pm UK time** on 31 December 2020, when the Transition Period ends under the terms of the Withdrawal Agreement.

<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. Where sector regulators hold competition powers concurrently with the CMA, the legal framework described in this guidance applies equally to them.

**Protection EU Exit SIs**), come into effect. Further detail in respect of these pieces of legislation are provided in Section 2 below.

- 1.4 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**) – ie 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.
- 1.5 This guidance also applies to cases over which the European Commission has 'continued competence' under the terms of the Withdrawal Agreement (as explained in paragraphs 2.4, 3.4 to 3.6, and 4.1 to 4.5 below).
- 1.6 This guidance cross-refers to, and should be read alongside, existing CMA guidance and in case of conflict between an existing guidance document and the present guidance, the most recent guidance should prevail.<sup>5</sup> The CMA may issue further guidance in due course to clarify or amend elements of this guidance and explain any future cooperation arrangements agreed with the European Commission after EU Exit. The CMA expects to remove references to EU legislation and processes over time as guidance is re-issued.

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

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

- 1.7 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. Negotiations with the EU in respect of a possible free trade agreement are ongoing.
- 1.8 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 take effect after 31 December 2020 as a result of the outcome of Future Relationship negotiations.

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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](#).

## *CMA's functions*

- 1.9 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>7</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 (that is, unless and until the EU law to which these concepts relate is superseded, whether through the application of section 60A CA98 or by the ruling of any Court or Tribunal with the power to disapply or overrule these references).<sup>8</sup>
- 1.10 This guidance offers an explanation of the legal changes resulting 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 investigation into suspected anti-competitive practices or a breach of consumer protection law or may have an interest in it,<sup>9</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 further sections:
- **Section 2: Legal framework** – this section presents and explains the impact of the [European Union \(Withdrawal\) Act 2018](#) (referred to in this guidance as the **Withdrawal Act**) and consequential domestic legislation on the UK legal framework in relation to merger control, competition and consumer protection;

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<sup>7</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>8</sup> The CMA will conduct market studies and market investigation, as it currently does, under domestic legislation. When relevant, until the end of the Transition Period 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 (EU Regulation 1/2003).

<sup>9</sup> For example, complainants or customers.

- **Section 3: Merger control** – this section explains how the rules and procedures will apply to merger control after 31 December 2020, and how merger control in the UK will be affected by the relevant provisions of the Withdrawal Agreement;
- **Section 4: Competition law enforcement (antitrust, including cartels)** – this section focuses on the rules and procedures that will apply to cases with an EU cross-border element under the competition law prohibitions on anti-competitive agreements and on abuse of a dominant position after 31 December 2020. This section will also cover the way in which the CMA will approach the relevant provisions of the Withdrawal Agreement insofar as they relate to competition law enforcement;
- **Section 5: Consumer protection law enforcement** – this section focuses on the rules and procedures that will apply to consumer cases with an EU element after 31 December 2020;
- **Annex A:** this annex sets out a list of CMA guidance which is not impacted by EU Exit;
- **Annex B:** this annex provides a table listing the EU block exemptions in force at the end of the Transition Period under EU law and being retained under national law.

## 2. The legal framework

### *The Withdrawal Agreement*

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

- 2.1 The Withdrawal Agreement introduced the Transition Period, during which EU law (with the exception of certain specified provisions) continues to apply in the UK until 31 December 2020.<sup>10</sup> During the Transition Period, 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>11</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 EU competition and consumer law therefore continue to apply in and to the UK until the end of the Transition Period.<sup>12</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 until the end of the Transition Period.<sup>13</sup>
- 2.4 The Withdrawal Agreement also has certain direct implications for ‘ongoing administrative procedures’ (including competition and consumer cases), in some cases **beyond** 31 December 2020. For example:
- i. EU institutions bodies, offices and agencies will continue to be competent for certain administrative procedures (including merger, antitrust or cartel cases) initiated before the end of the Transition Period.<sup>14</sup> The CMA will

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<sup>10</sup> Articles 127(1) and (3), Withdrawal Agreement.

<sup>11</sup> Article 127(3), Withdrawal Agreement.

<sup>12</sup> Including, but not limited to, Articles 101, 102 and 106 of the TFEU, the EUMR, EU Regulation 1/2003, Regulation (EC) No 2006/2004 on Consumer Protection Cooperation and Council Directive 93/13/EEC on unfair terms in consumer contracts.

<sup>13</sup> Article 131, Withdrawal Agreement.

<sup>14</sup> Article 92(1), Withdrawal Agreement. For antitrust or cartel cases, as per 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 the EU prohibitions, but cases can be formally initiated early in the European Commission’s investigatory process.



continue to provide assistance to the European Commission for these particular cases in the same way it would have before 31 December 2020;<sup>15</sup>

- ii. Decisions adopted by EU institutions, bodies, offices and agencies before 31 December 2020 (or after 31 December 2020 for the types of cases described at sub-paragraph 2.4i) above), and addressed to the UK or to natural or legal persons residing in the UK, shall be binding on and in the UK. The legality of such a decision shall be reviewed exclusively by the CJEU;<sup>16</sup> and
- iii. The European Commission will continue to be responsible to monitor and enforce commitments given or remedies imposed in, or in relation to, the UK in connection with competition or merger proceedings. By mutual agreement the European Commission can transfer responsibility for the monitoring and enforcement of any such commitments or remedies to the CMA.<sup>17</sup>

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

2.5 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:

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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.

For merger cases, as per Article 92(3)(c) the European Commission is deemed to have initiated proceedings before the Transition Period in three circumstances:

- the merger has been notified to the European Commission in accordance with Article 1, 3 or 4 EUMR (subject to any initiated mergers referred to Member States after notification pursuant to Article 9 EUMR);
- the notifying parties have asked for the European Commission to examine a transaction that is capable of review under the national competition laws of at least three Member States and the 15 working day limit has expired without any of the Member States expressing an objection to their jurisdiction (pursuant to Article 4(5) EUMR); or
- the European Commission has accepted a reference from a Member State to examine the merger (pursuant to Article 22(3) EUMR).

<sup>15</sup> Article 92, Withdrawal Agreement.

<sup>16</sup> Articles 95(1) and 95(3), Withdrawal Agreement. It is important also to note that Article 86(1), Withdrawal Agreement provides that the CJEU will have exclusive jurisdiction in any proceedings brought by or against the UK before 31 December 2020, and 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.

<sup>17</sup> Article 95(2), Withdrawal Agreement. Antitrust commitments can also be transferred to the concurrent regulators. Further details regarding the possible 'transfer' of commitments or remedies is set out in paragraphs 3.33 to 3.36 and 4.13 to 4.17 below.

- the Withdrawal Act, which essentially repealed the European Communities Act 1972 with effect from Exit Day and brought 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 postponed the effects of the Withdrawal Act from Exit Day until 31 December 2020, gave effect to the Withdrawal Agreement and amended the Withdrawal Act.<sup>18</sup>

2.6 Using its powers under the Withdrawal Act and the Withdrawal Agreement Act, the Government has made the following statutory instruments:

- The Competition SI (see paragraph 2.16 for further detail);
- The Implementation SI (see paragraph 2.17 for further detail); and
- the Consumer Protection EU Exit SIs (see paragraph 0 for further detail).

*Key provisions of the Withdrawal Act (as amended by the Withdrawal Agreement Act)*

2.7 The Withdrawal Act repealed the European Communities Act 1972 on Exit Day. However, the Withdrawal Agreement Act inserted a savings provision into the Withdrawal Act which preserves the effects of that Act for the duration of the Transition Period.<sup>19</sup> 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 EU Regulation 1/2003, EU block exemption Regulations<sup>20</sup> and the EU Merger Regulation (**EUMR**))<sup>21</sup> continue to apply in the UK until 31 December 2020.<sup>22</sup>

<sup>18</sup> Note that references in this guidance to the Withdrawal Act are to that Act as amended by the Withdrawal Agreement Act.

<sup>19</sup> Section 1, Withdrawal Act. The European Communities Act 1972 was the principal piece of legislation passed by Parliament that gave effect to EU law in the UK. The Withdrawal Agreement Act modified the Withdrawal Act to include a saving provision that preserves the effect of the repealed European Communities Act 1972 until 31 December 2020. 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 (see sections 1 and 2, Withdrawal Agreement Act).

<sup>20</sup> See Annex B.

<sup>21</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>22</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.

After this date, as explained further in Sections 3 and 4 of this guidance, all such directly applicable EU law will no longer apply in the UK (except as specified in the Withdrawal Agreement).

- 2.8 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 the end of the Transition Period, are brought across and will form part of the UK's domestic law.
- 2.9 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.
- 2.10 Following the end of the Transition Period, 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**'.<sup>24</sup> 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>25</sup> The Government used this power when it made the Competition SI on 22 January 2019 and the Consumer Protection SI on 6 February 2019,<sup>26</sup> which would have applied from Exit Day in the event that a withdrawal agreement had not been concluded.<sup>27</sup>
- 2.11 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,

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

<sup>24</sup> For further information on the concept of 'retained EU law' under the Withdrawal Act, please refer to the public paper prepared by the House of Commons Library: [The status of 'retained EU Law'](#)

<sup>25</sup> Section 8(1), Withdrawal Act.

<sup>26</sup> Mentioned also in paragraph 2.6 above. A number of other consumer protection statutory instruments were also made.

<sup>27</sup> It is important to note that the Withdrawal Agreement Act delayed the effect of these SIs until 31 December 2020. The Withdrawal Agreement Act also amended 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.

in accordance with any case law or general principles of the CJEU laid down up until 31 December 2020.<sup>28</sup>

- 2.12 It is important to note that, under the Withdrawal Act, the UK Supreme Court and Scotland's High Court of Justiciary<sup>29</sup> are not bound by any retained EU case law.<sup>30</sup> As a result, after 31 December 2020, 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 also 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>31</sup> Subsequently, the Government laid before Parliament on 15 October 2020, the [European Union \(Withdrawal\) Act 2018 \(Relevant Court\) \(Retained EU Case Law\) Regulations 2020](#), together with a draft explanatory memorandum. These regulations, once made, will extend the power to depart from retained EU case law after 31 December 2020, in the interpretation of retained EU law, to specified appellate domestic courts including the Court of Appeal.
- 2.13 With respect to Competition Act 1998 cases specifically, a new section 60A of the Competition Act 1998 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period (see paragraphs 4.18 to 4.24 for further detail).<sup>32</sup> However, the CMA and UK courts may depart from this case law where it is considered appropriate in the light of certain specific circumstances as further discussed below.<sup>33</sup>

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<sup>28</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 (section 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.

<sup>29</sup> The highest criminal court in Scotland.

<sup>30</sup> Section 6(4), Withdrawal Act and Withdrawal Act, Explanatory Notes, Section 6: Interpretation of retained EU law.

<sup>31</sup> Sections 5A, 5B, 5C and 5D, Withdrawal Act (as introduced by section 26, Withdrawal Agreement Act).

<sup>32</sup> Previously, section 60 of the Competition Act 1998 provided that the UK competition authorities and courts must, in as far as possible, interpret UK competition law in a manner that is consistent with EU competition law and must have regard to any decision or statement of the European Commission. Section 60 was amended to correct a deficiency pursuant to s.6(3) Withdrawal Act, in line with the position set out in s.6(6) Withdrawal Act. See the [Explanatory Memorandum](#) to the Competition SI for further detail.

<sup>33</sup> Section 60A(7) CA98.

## *Key provisions of the Withdrawal Agreement Act*

- 2.14 The Withdrawal Agreement Act ensures that domestic legislation implementing or referring to EU law still has effect in the UK for the duration of the Transition Period, in accordance with the Withdrawal Agreement.<sup>34</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 until the end of the Transition Period as though the UK were still a Member State.
- 2.15 In addition, 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 allows, for example, for specific provision to be made in relation to competition cases ongoing at the end of the Transition Period.<sup>35</sup> The Government used this power to make the Implementation SI on 19 November 2020, which is designed to apply from 31 December 2020 and is further discussed below.

### *The Competition (Amendment etc.) (EU Exit) Regulations 2019*

- 2.16 The Competition SI separates the UK and EU antitrust enforcement and merger control systems and makes provision for transition to a standalone UK competition regime. In particular, the Competition SI revokes EU competition regulations, certain European Commission decisions made under EU regulations and treaty rights that will be incorporated into UK law at the end of the Transition Period. It also amends the CA98, EA02, European block exemption Regulations and other legislation containing competition provisions, as appropriate. Further explanation of the Competition SI can be found in the [Explanatory Memorandum](#) accompanying the legislation.

### *The Competition (Amendment etc.) (EU Exit) Regulations 2020*

- 2.17 The Implementation SI amends the Competition SI in order to give effect to the provisions in the Withdrawal Agreement that relate to competition law.<sup>36</sup> In

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<sup>34</sup> Section 1B, Withdrawal Act (as introduced by section 2, Withdrawal Agreement Act).

<sup>35</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).

<sup>36</sup> The Implementation SI also replaces references in the Competition SI to ‘exit day’ with ‘IP completion day’ and amends savings and transitional provisions in the Competition SI so that they can operate from the end of the Transition Period.

particular, it gives effect in domestic legislation to the European Commission's continued competence over competition cases that were initiated but not concluded before the end of the Transition Period (**Continued Competence Cases**)<sup>37</sup>; and empowers the CMA (and concurrent regulators)<sup>38</sup> to monitor and enforce EU commitments or remedies that relate to the UK in cases where, after 31 December 2020, it is agreed between the EU and the UK that responsibility for these functions in respect of such commitments or remedies should be 'transferred' to the CMA or a concurrent regulator.<sup>39</sup> Further explanation of the Implementation SI can be found in Section 4 below, and in the [Explanatory Memorandum](#) accompanying the legislation.

### *The Consumer Protection EU Exit SIs*

- 2.18 The Consumer Protection EU Exit SIs together amend the enforcement provisions in Part 8 of the EA02 (Part 8), and the investigatory powers in Schedule 5 to the Consumer Rights Act 2015 (**CRA**), to make them appropriate for a purely domestic consumer protection enforcement regime. In particular they revoke the Consumer Protection Co-operation (**CPC**) Regulation<sup>40</sup> and remove related powers in Part 8 and the CRA, to reflect the end of the UK's formal role in the EU consumer enforcement co-operation regime. They also change the nomenclature of certain infringements.
- 2.19 Further detail on what this new domestic legislation means in practice for merger control, competition and consumer law enforcement in the UK after 31 December 2020 is set out in this guidance.

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<sup>37</sup> As per Article 92 of the Withdrawal Agreement.

<sup>38</sup> These are sectoral regulators with concurrent competition powers. They include 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 the Northern Ireland Authority for Utility Regulation (gas, electricity, water in Northern Ireland). For further information, please refer to Regulated Industries: [Guidance on concurrent application of competition law to regulated industries: CMA10](#). References in the remainder of this guidance to the CMA should be read, where appropriate, as including concurrent regulators.

<sup>39</sup> As per Article 95(2) of the Withdrawal Agreement.

<sup>40</sup> The CPC Regulation having been converted to UK law under the Withdrawal Act.

### 3. Merger control

- 3.1 Prior to EU Exit (and during the Transition Period), where a merger had a Community dimension, the European Commission had exclusive competence to review that merger within the EU, including with respect to its effects on any UK market or markets.<sup>41</sup> In such a situation, the CMA did not undertake its own competition assessment, except where all or part of the case was transferred under the referral provisions of the EUMR.
- 3.2 Save for cases subject to the terms of the Withdrawal Agreement (described in further detail in this section), following the end of the Transition Period, the European Commission's review of a merger will no longer cover the merger's effects within any UK market and mergers may be subject to review by both the CMA and the European Commission.
- 3.3 This section of the guidance explains how cases which are 'live' at the end of the Transition Period are to be treated under the terms of the Withdrawal Agreement and how existing CMA guidance should be read in the light of EU Exit.

#### ***Case allocation around 31 December 2020***

##### *Cases where EUMR merger proceedings are initiated on or before 31 December 2020*

- 3.4 Under the Withdrawal Agreement, the European Commission remains responsible for **EUMR merger proceedings** (ie mergers that meet the applicable thresholds to qualify for investigation by the European Commission) that have been initiated before the end of the Transition Period.<sup>42</sup> Consequently, the CMA, like other Member States, is not entitled to examine the merger (subject to a referral request to the CMA under Article 9 EUMR). An EUMR merger proceeding will be considered to have been **initiated** before the end of the Transition Period, where any of the following three steps occurred before the end of the Transition Period:<sup>43</sup>
- the merger has been notified to the European Commission in accordance with Article 1, 3 and 4 EUMR (subject to any initiated mergers referred to

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<sup>41</sup> Article 21(3), EUMR.

<sup>42</sup> Article 92(1), Withdrawal Agreement.

<sup>43</sup> Before restructuring the transaction after EUMR merger proceedings have been initiated, parties should consider the potential effect on jurisdiction and are encouraged to discuss this with the CMA.

Member States after notification pursuant to Article 9 EUMR, as discussed in relation to the UK further below);

- the notifying parties have asked for the European Commission to examine a transaction that is capable of review under the national competition laws of at least three Member States and the 15 working day<sup>44</sup> limit has expired without any of the Member States expressing an objection to their jurisdiction (pursuant to Article 4(5) EUMR); or
- the European Commission has accepted a reference from a Member State to examine the merger (pursuant to Article 22 EUMR).

3.5 For cases where EUMR merger proceedings have been initiated before the end of the Transition Period, the CMA will continue to have access to relevant information and may 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).

3.6 Where a merger decision of the European Commission over a case initiated before the end of the Transition Period is annulled, in full or in part following an appeal, the CMA could assert jurisdiction from when it becomes clear that the UK elements of the merger would not be re-examined by the European Commission pursuant to Article 10(5) EUMR.<sup>45</sup> This is deemed to become clear when the European Commission publishes a decision or other document containing a decision to that effect, or from which a decision to that effect may reasonably be inferred, and the decision becomes final (ie is not capable of being appealed).

#### *Cases where EUMR merger proceedings are not initiated prior to 31 December 2020*

3.7 For mergers where EUMR merger proceedings are not initiated before the end of the Transition Period, the CMA is no longer prohibited by the EUMR from taking jurisdiction over the merger and UK national merger control law will apply.<sup>46</sup> This means that the CMA has jurisdiction to review the merger and its effects within the UK, if the UK jurisdictional requirements are met

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<sup>44</sup> References to 'working days' under EUMR procedure means all days other than Saturdays, Sundays and European Commission holidays as published in the Official Journal of the European Union.

<sup>45</sup> Regulation 45 of the Implementation SI inserting paragraph 19A to Part 7 of Schedule 4 to the Competition SI.

<sup>46</sup> Where a merger is not notified to the European Commission before the end of the Transition Period, but the relevant date for establishing European Union jurisdiction (in accordance with EU law) has arisen before the end of the Transition Period, the merger parties should consult the European Commission as regards the treatment of UK turnover in determining whether the EUMR jurisdictional thresholds are met.



(see section 4 in the [CMA's guidance on jurisdiction and procedure \(CMA2\)](#)<sup>47</sup> and the [CMA's guidance on changes to jurisdictional thresholds for UK merger control \(CMA90\)](#)).

- 3.8 After 31 December 2020, therefore, the CMA may formally investigate mergers notified to the CMA by merging parties or identified by the CMA's mergers intelligence function, where EUMR merger proceedings have not been initiated by 31 December 2020. The CMA's standard approach to calling in cases as described in the [Guidance on the CMA's mergers intelligence function \(CMA56\)](#) will apply to such cases.<sup>48</sup>
- 3.9 Although the UK merger control regime is voluntary (and therefore there is no obligation to notify a merger), merging parties involved in a transaction that could be subject to review around the end of the Transition Period are encouraged to engage with the CMA at an early stage, particularly where the transaction may raise potential competition concerns in the UK.<sup>49</sup> Not notifying a merger to the CMA raises certain risks for merging parties (described in more detail in CMA2), which will apply equally to cases where EUMR merger proceedings are not initiated before the end of the Transition Period. In particular, the CMA may issue initial enforcement orders in relation to completed mergers (including completed mergers which were notified to the European Commission after the end of the Transition Period and were subsequently cleared and completed).<sup>50</sup>
- 3.10 If merging parties decide to complete such mergers without notifying the CMA, there is a risk that the CMA could subsequently investigate and ultimately prohibit the merger or require other remedies to resolve competition concerns that could arise.

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<sup>47</sup> Please note that at the time of publishing this guidance a revised version of CMA2 is under consultation (see [consultation page](#) for further details) and is expected to be adopted before 31 December 2020.

<sup>48</sup> Please note that at the time of publishing this guidance a revised version of CMA56 is under consultation (see [consultation page](#) for further details) and is expected to be adopted before 31 December 2020.

<sup>49</sup> The CMA's 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 31 December 2020. 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 after 31 December 2020.

<sup>50</sup> An initial enforcement order is binding on the parties and is intended to prevent any action which might prejudice the CMA's inquiry or impede the taking of any remedial action by the CMA. The CMA's standard practice is set out in the [Guidance on initial enforcement orders and derogations in merger investigations \(CMA60\)](#).

*Pre-notification referral to the CMA from the European Commission (Article 4(4) EUMR)*

- 3.11 Article 4(4) EUMR allows merging parties to inform the European Commission by means of a reasoned submission (**Form RS**) prior to notification that they consider the whole or part of an EU merger proceeding (and would therefore otherwise be reviewed by the European Commission under the EUMR) should be referred to a Member State (or Member States) that is better placed to review the transaction.
- 3.12 Where the European Commission receives a Form RS that such a merger should be reviewed by a Member State, the European Commission shall transmit that submission to the Member State's National Competition Authorities (**NCA**s). Pursuant to Article 4(4) EUMR, the NCAs have 15 working days to express their agreement or disagreement with the request. The European Commission must take a final decision within 25 working days of receiving the Form RS as to whether the conditions for the request are met and whether it is willing to relinquish jurisdiction over the case. The European Commission will thereafter inform the Member States and the merging parties of its decision.<sup>51</sup>
- 3.13 Where, before 31 December 2020, such a request is made for the CMA to review the merger and the CMA does not disagree with the request, the European Commission may decide to refer whole or part of the case to the CMA.
- 3.14 After 31 December 2020, merging parties are not able to make a reasoned submission under Article 4(4) EUMR that a merger that meets the EUMR thresholds should be referred to the CMA.

*Post-notification referral from the European Commission to the CMA (Article 9 EUMR)*

- 3.15 Where a merger is notified to the European Commission before 31 December 2020, the European Commission is required, under Article 4(5) EUMR, to provide a copy of the Form CO notifying the merger to the CMA. Under Article 9 EUMR, the CMA may, within 15 working days of receipt of the Form CO, request that the whole or part of a merger be referred to the CMA for consideration under the EA02, if the merger:

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<sup>51</sup> If the European Commission does not take a decision within this period, it is deemed to have adopted a decision to refer the case in accordance with the Form RS.

- threatens to affect significantly competition in a market within the UK which presents all the characteristics of a distinct market (Article 9(2)(a));  
or
- affects competition in a market within the UK which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market (Article 9(2)(b)).

3.16 As the EUMR will continue to apply to cases notified to the European Commission before 31 December 2020, the CMA is able to make an Article 9 request after 31 December 2020 for such cases (subject to the 15 working day limit after the CMA's receipt of the Form CO).

3.17 The European Commission will inform the CMA and the notifying parties of its decision within 35 working days from notification of the merger or within 65 working days of such notification if the European Commission considers the merger raises serious doubts as to its compatibility with the internal market.<sup>52</sup>

3.18 If the request under Article 9 EUMR is accepted by the European Commission, the CMA will gain jurisdiction to review the merger. Section 34A EA02 requires that the CMA make its decision on whether or not to refer the merger for a phase 2 investigation (absent undertakings in lieu of a reference) within 45 working days beginning on the working day after the Article 9 referral decision is taken by the European Commission. If a request for a referral to the CMA is rejected by the European Commission, then the European Commission will retain jurisdiction to review the case.

*Pre-notification referral from the CMA to the European Commission (Article 4(5) EUMR)*

3.19 Under Article 4(5) of the EUMR, parties to a concentration that does not meet the EUMR thresholds but is capable of being reviewed under the national merger control laws of at least three Member States may, prior to notification, request that the transaction be examined by the European Commission under the 'one stop shop' principle. Transactions are deemed 'capable of being reviewed' in the UK if they meet either the share of supply or turnover test under the EA02.

3.20 Under the terms of the EUMR, any Member State competent to examine the concentration under its national competition law may, within 15 working days

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<sup>52</sup> If the European Commission does not take a decision within this 65 working day period following a request despite a reminder from the CMA, nor taken such preparatory steps, it is deemed to have adopted a decision to refer the case to the UK (Article 9(5) EUMR).

of receiving the request, express its disagreement to the European Commission taking jurisdiction over the merger. Where one Member State disagrees, the European Commission will not gain jurisdiction.

- 3.21 Where the time limit of 15 working days expires before 31 December 2020 without any Member State competent to examine the concentration under its national competition law expressing its disagreement, the European Commission will gain exclusive jurisdiction over the merger. Where that time limit has not expired before 31 December 2020 or a competent Member State has indicated it does not agree with the request, the CMA will be able to assert jurisdiction over that merger. After 31 December 2020, merging parties cannot make an Article 4(5) request to the European Commission on the basis of the CMA having jurisdiction over the merger (ie that the merger would otherwise be capable of review in the UK).

*Post-notification referral from the CMA to the European Commission (Article 22 EUMR)*

- 3.22 Under Article 22 of the EUMR, the CMA may singularly or jointly with other NCAs make a request that the European Commission review a merger that does not meet the EUMR thresholds where it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.
- 3.23 Article 22 of the EUMR stipulates that the European Commission must inform Member States without delay of the receipt of the initial request. Member States have 15 working days to decide whether to join the request. The European Commission has 25 working days after all the Member States have received the initial request from the European Commission to make its decision on referral. If the European Commission has not adopted a decision within that 25-working day period, then the European Commission is deemed to have accepted jurisdiction.
- 3.24 Where the European Commission has, by 31 December 2020, accepted or can be deemed to have accepted a referral request from the CMA (whether that request is initiated or subsequently joined by the CMA) under Article 22 EUMR, the European Commission will retain exclusive jurisdiction to review the effects of that merger in the UK until it reaches a final decision. However, if the European Commission has not accepted, or cannot be deemed to have accepted, a referral request initiated or joined by the CMA under Article 22 EUMR by 31 December 2020, the CMA will be able to exert jurisdiction in respect of that merger after 31 December 2020 (assuming that the UK jurisdictional thresholds are met). Further, if the CMA did not join a referral request made by one or more Member States, the CMA would retain

jurisdiction over the case (assuming that the UK jurisdictional thresholds are met).

- 3.25 After 31 December 2020, the CMA is not able to make or join a request under Article 22 EUMR that a case that does not meet the EUMR thresholds should be referred to the European Commission.

#### *Cases being reviewed by the CMA after 31 December 2020*

- 3.26 The CMA does not envisage that there will be any change in the procedure followed for cases that fall under UK jurisdiction in which investigations are opened before 31 December 2020. In particular, if a merger was referred to the CMA by the European Commission under the EUMR before 31 December 2020, it will progress according to a 45 EU working day timetable.<sup>53</sup>

#### *'Public interest' cases*

- 3.27 For cases where EUMR merger proceedings are initiated before 31 December 2020, the Secretary of State may intervene on public interest grounds<sup>54</sup> in cases falling for consideration under the EUMR through the use of Article 21(4) EUMR.<sup>55</sup>
- 3.28 Article 21 is invoked by means of the Secretary of State giving the CMA a European Intervention Notice (**EIN**) under section 67 EA02.<sup>56</sup> In this situation, the European Commission will examine, or continue to examine, the merger on competition grounds in the normal way, but the Secretary of State is able to make a decision on public interest grounds.<sup>57</sup> There is no competition assessment by the CMA in such cases.
- 3.29 The EIN requires the CMA to advise the Secretary of State on the considerations relevant to the making of a reference under section 22 or 33

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<sup>53</sup> The CMA has, under section 34A EA02, a maximum of 45 working days beginning on the working day after receipt of the European Commission's referral decision to inform the merging parties of the result of its preliminary competition assessment.

<sup>54</sup> See sections 58(2) and 67 EA02.

<sup>55</sup> See also *The Enterprise Act 2002 (Protection of Legitimate Interests) Order* SI 2003/1592.

<sup>56</sup> See also *The Enterprise Act 2002 (Protection of Legitimate Interests) Order* SI 2003/1592.

<sup>57</sup> See, for example, the EINs issued in relation to the Anticipated acquisition by The General Electric Company of Smiths Aerospace (2007); the Anticipated acquisition of British Sky Broadcasting PLC by News Corporation (2010-2011); and the Anticipated acquisition by Twenty-First Century Fox, Inc of Sky PLC (2017-2018); Anticipated acquisition by Advent International Corporation of Cobham Plc (2019).

EA02 which are relevant to the decision on whether to make a reference to phase 2.

- 3.30 When an EIN has been issued, the CMA will publish an invitation to comment seeking third party views on the public interest issues (but not on competition issues). The CMA's advice must contain a summary of any representations received from third parties that relate to the public interest considerations specified in the EIN.
- 3.31 The Secretary of State may make a reference for a phase 2 investigation if he or she believes that it is or may be the case that, taking account only of the public interest consideration, the creation of the European relevant merger situation operates or may be expected to operate against the public interest.
- 3.32 If the Secretary of State issues an EIN for a case where an EUMR merger proceeding is not initiated before 31 December 2020, the EIN shall be treated as a public interest intervention notice (**PIIN**) issued under section 42 EA02 after 31 December 2020. PIINs are described in more detail in CMA2. The Secretary of State is unable to issue EINs for a case where an EUMR merger proceeding is initiated after 31 December 2020, but instead would issue a PIIN provided the grounds for doing so were met.

### ***Transfer of EU merger commitments***

#### *Commitments accepted by the European Commission before 31 December 2020*

- 3.33 The Withdrawal Agreement provides that, after 31 December 2020, the European Commission will continue to be competent for the monitoring and enforcement of any UK elements of commitments given in connection with decided EU merger cases. This includes commitments given after 31 December 2020 in Continued Competence Cases. However, the Withdrawal Agreement provides an option to transfer responsibility for monitoring and enforcing the UK elements of the commitments to the CMA by mutual agreement between the European Commission and the CMA.<sup>58</sup>
- 3.34 Where the CMA and the European Commission agree to such a transfer of commitments, the CMA will be responsible for the monitoring and

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<sup>58</sup> Article 95(2), Withdrawal Agreement.

enforcement of those commitments (**transferred EU merger commitments**).<sup>59</sup>

- 3.35 The CMA must monitor whether transferred EU merger commitments are being, or have been, complied with by the addressees of those commitments. The CMA has the power to issue a notice requiring a person to provide information or documents, or to give evidence as a witness (under section 109 EA02) to assist the CMA with monitoring and enforcing transferred EU merger commitments.<sup>60</sup> The notice may specify or describe the documents and/or information that the CMA requires, and set out the offences and/or sanctions that may apply if the recipient does not comply.<sup>61</sup>
- 3.36 The CMA can enforce transferred EU merger commitments by bringing civil proceedings for an injunction or issuing directions (as discussed below). The rights of the CMA are not affected by any provisions of a transferred EU merger commitment which requires disputes to be resolved by arbitration.<sup>62</sup>

#### *CMA's powers to issue directions*

- 3.37 The CMA may issue directions in relation to the transferred EU merger commitments to:<sup>63</sup>
- take such action as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, the transferred EU merger commitment concerned; or
  - do, or refrain from doing, anything so specified or described which the relevant party is required by that commitment to do or refrain from doing.
- 3.38 The CMA has the power to vary or revoke any directions that it has issued.<sup>64</sup>
- 3.39 The CMA assesses the nature of breaches to assess the appropriate response, including whether to issue directions, by reference to a number of factors including:
- the significance of the breach;

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<sup>59</sup> Regulation 8 of the Implementation SI inserting section 95A EA02.

<sup>60</sup> Regulation 9 of the Implementation SI inserting section 109A EA02.

<sup>61</sup> The penalties for failure to comply with a section 109 request are set out in [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#).

<sup>62</sup> Regulation 8 of the Implementation SI inserting section 95A(4) EA02.

<sup>63</sup> Regulation 8 of the Implementation SI inserting section 95B EA02

<sup>64</sup> Regulation 8 of the Implementation SI inserting section 95B(3) EA02.

- the actions taken by the firm to address the breach;
- recidivism and previous conduct;
- the need for the CMA to take action to address the breach; and
- contextual factors, such as the status and age of the remedy.

3.40 Where a person has failed to comply with a transferred EU merger commitment or any directions given by the CMA, the CMA may apply to the court<sup>65</sup> for an order requiring compliance with the direction or otherwise remedying the failure, within such a time as may be specified in the order.<sup>66</sup>

### ***EUMR merger proceedings initiated after 31 December 2020***

3.41 The CMA will cease to be a competent authority of a Member State for the purposes of the EUMR in respect of EUMR merger proceedings that are initiated after 31 December 2020. Therefore, the CMA will no longer be prohibited from investigating a merger that is being reviewed by the European Commission under the provisions of the EA02.

3.42 As noted above, mergers may be subject to review by both the CMA and the European Commission after 31 December 2020.

3.43 The CMA and the European Commission (and/or any Member State(s) which may have jurisdiction where a merger does not trigger the EUMR thresholds) may therefore conduct parallel reviews of the same merger in their respective jurisdictions.

3.44 Where mergers are subject to investigation in more than one country, there can be substantial benefits to the parties and to the competition authorities in those jurisdictions from encouraging communication and cooperation between the competition authorities. This will be particularly important after 31 December 2020, as a significant proportion of mergers that will fall under UK jurisdiction will be investigated in parallel by the European Commission and other jurisdictions. Where possible and appropriate, the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission as with other competition authorities.<sup>67</sup> Where national legislation prevents the exchange of confidential information,

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<sup>65</sup> From the High Court of England and Wales or Northern Ireland, the Court of Session in Scotland.

<sup>66</sup> Regulation 8 of the Implementation SI inserting sections 95B(5), 95B(6) and 95A(7) EA02.

<sup>67</sup> See paragraph 3.56 of the [CMA Merger remedies guidance \(CMA87\)](#).



the CMA and other competition authorities may seek permission from the parties to exchange confidential information.

### ***CMA merger control guidance after 31 December 2020***

3.45 A number of CMA merger guidance documents do not contain any references to EU law or bodies and will thus be largely or wholly unaffected by EU Exit. Such guidance documents are listed at Annex A to this guidance. Some CMA merger guidance documents, published before this guidance, that contain references to EU law or bodies may remain in force after EU Exit. Where there is any difference between this guidance and the earlier documents, this guidance will take precedence. By way of illustration, at the time of this guidance being published, the following general clarifications should be considered when reading such guidance (until such time that it is updated):<sup>68</sup>

- References to referral mechanisms no longer apply (see e.g. 6.45 and 6.64 of CMA2<sup>69</sup> and 2.2 in a [Quick guide to UK merger assessment: CMA18](#)).
- References to the public interest intervention in cases under the EUMR should be read with this guidance in mind (see e.g. 16.16 to 16.22 of CMA2<sup>70</sup> and the section in Merger assessment guidelines: CC2/OFT1254).<sup>71</sup>
- Descriptions of the EUMR process should be read with this guidance in mind (see e.g. 2.12 to 2.15 and Chapter 18 of CMA2<sup>72</sup> and references in [Water and sewerage mergers: CMA49](#)).

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<sup>68</sup> Note that these are examples of general principles to assist with reading CMA guidance considering the UK's Exit from the EU and may not apply in all instances. This list is not exhaustive and must be read considering this guidance in its entirety and any updates made to CMA guidance.

<sup>69</sup> Please note that at the time of publishing this guidance a revised version of CMA2 is under consultation (see [consultation page](#) for further details) and is expected to be adopted before 31 December 2020. It is proposed to remove the references to the EU law or bodies that are contained in the current guidance.

<sup>70</sup> See FN69 above.

<sup>71</sup> Please note that at the time of publishing this guidance a revised version of the CMA's [Merger assessment guidelines \(CC2/OFT1254\)](#) is under consultation (see [consultation page](#) for further details). It is proposed to remove the references to the EU law or bodies that are contained in the current guidance

<sup>72</sup> See FN69 above.

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

### *Cases initiated by the European Commission before 31 December 2020*

- 4.1 Under the Withdrawal Agreement, the European Commission continues to be competent for antitrust cases in the UK which it has initiated under EU Regulation 1/2003 before 31 December 2020, also referred to as Continued Competence Cases.<sup>73</sup>
- 4.2 After 31 December 2020, EU Regulation 1/2003, which deals with parallel jurisdiction over competition cases between the European Commission and the competition authorities of the Member States of the EU, ceases to apply to the UK as a result of the Transition Period coming to an end, except as specified in the Withdrawal Agreement. The Withdrawal Agreement and the Implementation SI make provision for how the UK elements of Continued Competence Cases are to be dealt with in terms of jurisdiction between the UK and the EU.<sup>74</sup>
- 4.3 For Continued Competence Cases, the CMA will continue to have access to relevant information from the European Commission and will continue to be able to assist the European Commission with its UK-specific expertise, including when invited to 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).<sup>75</sup> After the end of the Transition Period, where the European Commission has ordered an Article 20 inspection, an Article 21 inspection, or an Article 22(2) inspection,<sup>76</sup> Part 2 of CA98 (which makes provision for the CMA to assist, or act on behalf of, the European Commission in connection with European Commission investigations relating to Articles 101 and 102 TFEU) continues to have effect despite its repeal by the Competition SI.<sup>77</sup>
- 4.4 Pursuant to the Competition SI (as amended by the Implementation SI), the CMA may not open or re-open an investigation into competition concerns

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<sup>73</sup> Article 92(3)(b), Withdrawal Agreement. See Footnote 14 above for more detail as to the circumstances in which the European Commission will be considered to have 'initiated' proceedings.

<sup>74</sup> Article 92, Withdrawal Agreement.

<sup>75</sup> Pursuant to Article 94(3) 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. The criteria for the UK's invitation to meetings of EU bodies is set out in Article 128(5). By way of example, the UK may be invited where it is considered necessary for the effective implementation of EU law.

<sup>76</sup> As defined in section 61 of CA98.

<sup>77</sup> Regulation 37 of the Implementation SI, inserting paragraph 8C of Part 4 of Schedule 4 to the Competition SI.

which are the subject of a Continued Competence Case. Therefore, the position with respect to Continued Competence Cases is essentially the same as when the UK was still an EU Member State: the CMA may not investigate the same conduct or agreement that is already the subject of a formally initiated investigation by the European Commission until the European Commission has concluded that investigation.

- 4.5 Once the European Commission has concluded its investigation and issued a decision in relation to a Continued Competence Case (ie after the end of the Transition Period), and the decision has not been annulled in full or in part, the CMA may not accept commitments or give directions in relation to conduct which is the subject of the European Commission decision which conflict with any commitments or directions made binding under the European Commission's decision.<sup>78</sup> The same applies to investigations concluded by the European Commission in respect of which it issued its decision before 31 December 2020.<sup>79</sup>

### ***CMA's enforcement in relation to Continued Competence Cases***

- 4.6 After 31 December 2020, the CMA may open an investigation into competition concerns which are the subject of a European Commission Continued Competence Case in so far as those concerns relate to effects arising from conduct **after** 31 December 2020.<sup>80</sup> In such circumstances, if the agreements or conduct under investigation may affect trade within the UK and are ongoing as at 31 December 2020, the CMA may investigate facts from that date onwards. Therefore, businesses that are participating in alleged infringements that are being investigated by the European Commission and that have not been brought to an end by 31 December 2020 are at risk of the CMA opening a parallel investigation into the effects of such alleged infringements as they exist following that date.
- 4.7 In deciding whether or not to open or continue with such a case, the CMA will have regard to its published prioritisation principles as applicable at the relevant time and, in doing so, will have regard to the consideration of whether a separate CMA investigation is needed to protect consumers, businesses or the economy in the United Kingdom. The CMA would also typically expect to

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<sup>78</sup> Regulation 36 of the Implementation SI, inserting paragraphs 8(3) and 8B(2) of Part 3 of Schedule 4 of the Competition SI.

<sup>79</sup> The requirement to avoid such conflict falls away in the event that the relevant European Commission decision is annulled in full or in part, provided that the annulment is substantial rather than procedural in nature. See Regulation 36 of the Implementation SI, inserting paragraph 8(2)(c) of Part 3 of Schedule 4 of the Competition SI.

<sup>80</sup> Regulation 36 of the Implementation SI, inserting paragraph 8A(3) of Part 3 of Schedule 4 of the Competition SI.

liaise with the European Commission as it would with other competition authorities in the context of parallel investigations.

### ***'Live' CMA antitrust investigations***

4.8 When the CMA is investigating conduct that may affect trade between the UK and one or more EU Member States and has not issued a decision before 31 December 2020 and the case proceeds, it will no longer apply the EU prohibitions after 31 December 2020. All actions taken before 31 December 2020 in connection with the EU elements of the investigation – such as information gathering through notices, interviews or inspections – will be treated, after that date, as having been done for the purposes of the domestic elements of the investigation.<sup>81</sup> Such actions therefore remain valid for such purposes.

### ***New CMA antitrust investigations after 31 December 2020***

4.9 After 31 December 2020, the CMA will only investigate suspected infringements of UK domestic competition law (ie the Chapter I and Chapter II prohibitions in CA98 (the **UK Prohibitions**)) in relation to conduct from both before and after 31 December 2020.

4.10 The CMA will no longer be subject to EU Regulation 1/2003. Therefore, anti-competitive behaviour may be subject to separate investigations by the CMA and the European Commission where it may affect both trade within the UK and trade between EU Member States, respectively.<sup>82</sup> The factors discussed in paragraph 4.7 above are equally relevant to the question of whether to commence such a separate investigation in parallel with a European Commission investigation started after the end of the Transition Period.

4.11 Except in relation to Continued Competence Cases (as discussed above in paragraph 4.2), Part 2 of CA98 ceases to have effect.

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<sup>81</sup> Paragraph 6(2) of Schedule 4 of the Competition SI.

<sup>82</sup> The conduct of UK businesses could still be caught by Articles 101 and 102 TFEU after 31 December 2020 and investigated by the European Commission where it has effects in the EU. Under the 'qualified effects doctrine', conduct occurring outside of the EU falls within the European Commission's jurisdiction when it has economic effects within the EU and such effects are immediate, substantial and foreseeable (*Intel Corporation Inc. v European Commission*, C-413/14 P EU:C:2017:632, judgment of the Grand Chamber of the CJEU, 6 September 2017, paragraphs 40-65).

4.12 As explained below, the CMA, concurrent regulators and the UK courts will still be required to ensure consistency between the interpretation of the UK Prohibitions and CJEU case law pre-dating 31 December 2020, but they may depart from such case law where appropriate in certain specified circumstances.

### ***Transfer of EU antitrust commitments and remedies***

4.13 The Withdrawal Agreement provides that, after 31 December 2020, the European Commission will continue to be competent to monitor and enforce commitments given or remedies imposed in or in relation to the UK in connection with EU antitrust cases. This includes commitments given or remedies imposed after 31 December 2020 in Continued Competence Cases. However, under the Withdrawal Agreement, the European Commission may transfer responsibility for monitoring and enforcing such commitments or remedies in the UK to the CMA and the concurrent regulators by mutual agreement between the European Commission and the CMA (or the relevant concurrent regulator, where applicable).<sup>83</sup>

4.14 Where the CMA and the European Commission agree to such a transfer of commitments or remedies, the CMA will obtain responsibility for the monitoring and enforcement of the transferred EU antitrust commitments and/or transferred EU antitrust directions.<sup>84</sup>

4.15 For the purposes of monitoring compliance with transferred EU antitrust commitments and/or transferred EU antitrust directions and deciding whether to make an application to enforce such commitments and/or directions, the CMA has the power to require any person to provide specified information and documents<sup>85</sup>.<sup>86</sup> The CMA may exercise this by a notice in writing, which will set out the commitments and/or directions to which the notice relates, specify or describe the documents and/or information that the CMA requires, and set out the sanctions that may apply if the recipient does not comply. The request may also give details of where and when the documents and/or information must be produced.<sup>87</sup>

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<sup>83</sup> Article 95(2), Withdrawal Agreement.

<sup>84</sup> Article 95(2), Withdrawal Agreement, as reflected in Regulation 4 of the Implementation SI inserting sections 40ZB and 40ZC CA98.

<sup>85</sup> Specified information is such information as the CMA considers relevant for the purposes of monitoring compliance with the transferred commitments and/or directions.

<sup>86</sup> Regulation 4 of the Implementation SI inserting section 40ZD CA98.

<sup>87</sup> The CMA will have regard to Chapter 6 of CMA8 which provides further details of the CMA's formal investigation powers.

- 4.16 The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request.<sup>88</sup>
- 4.17 In the event of non-compliance with transferred commitments or directions, the CMA may apply to court for an order requiring the defaulter to rectify the default, including taking any action necessary to ensure compliance.<sup>89</sup> Depending on the circumstances of the case, non-compliance may also give rise to a potential new infringement of the UK Prohibitions. The CMA may therefore also consider opening a new antitrust investigation under section 25 of CA98 in case of such non-compliance.

### ***Consideration of EU law principles***

#### *Section 60A CA98*

- 4.18 Before 31 December 2020, section 60 of the CA98 provided that, so far as possible, the CMA, concurrent regulators and the UK courts are to interpret the UK Prohibitions in a manner that is consistent with the principles of the TFEU and the decisions and principles laid down by the CJEU in relation to the EU prohibitions. Regard was also to be had to any ‘relevant decision or statement’ of the European Commission.
- 4.19 The Competition SI repeals section 60 CA98 and replaces it with a new provision, section 60A.
- 4.20 Under section 60A, the default position will remain that the CMA, concurrent regulators and the UK courts<sup>90</sup> must act with a view to securing that there is no inconsistency between:
- i. the principles that they apply, and the decisions they reach, in determining a question arising under Part 1 of CA98 in relation to competition within the UK; and
  - ii. the principles laid down by the TFEU and the CJEU before the end of the Transition Period, and any relevant decision made by that Court before the end of the Transition Period, so far as applicable immediately before

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<sup>88</sup> Section 40A CA98. Failure to comply includes failures to answer questions asked by the CMA, failures to produce documents required by the CMA, or failures to provide adequate or accurate information in response to any requirement imposed on a person under section 40ZD CA98 (as inserted by the Implementation SI). See CMA guideline Administrative Penalties: Statement of policy on the CMA’s approach (CMA4).

<sup>89</sup> Regulation 4 of the Implementation SI inserting sections 40ZB and 40ZC CA98.

<sup>90</sup> Including the Competition Appeal Tribunal.

the end of the Transition Period in determining any corresponding question arising in EU law.<sup>91</sup>

4.21 In determining any such question, they must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn.

4.22 However, 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 it 'appropriate' to do so, in light of one of the following prescribed factors:

- i. differences between the provisions of Part I of the CA98 (including the UK Prohibitions) and the corresponding provisions of EU law as those provisions of EU law had effect immediately before the end of the Transition Period;
- ii. differences between markets in the United Kingdom and markets in the European Union;
- iii. developments in forms of economic activity since the time the principle or decision was laid down or made;
- iv. generally accepted principles of competition analysis or a generally accepted application of such principles;
- v. a principle laid down or a decision made by the CJEU after the end of the Transition Period; and
- vi. the particular circumstances under consideration.<sup>92</sup>

4.23 In addition, the CMA, concurrent regulators and the UK courts will not be required to act with a view to securing that there is no inconsistency between the principles they apply or decisions they reach and TFEU or CJEU principles or decisions pre-dating the end of the Transition Period where they

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<sup>91</sup> Section 60A(8) makes clear this means principles as they have effect in EU law immediately before the end of the Transition Period, disregarding the effect of principles laid down, and decisions made, by the CJEU on or after the end of the Transition Period.

<sup>92</sup> In the CMA's interpretation, sub-section 60A(7)(f) should not be regarded as a 'catch-all': as the CMA understands it, sub-sections 60A(7)(a) to (e) represent a limited and specified set of circumstances, and although sub-section 60A(7)(f) permits departure in further limited and potentially unforeseen circumstances, it should not be interpreted expansively such that divergence from the 'no inconsistency' principle would be permitted under any particular circumstance in addition to those in sub-sections 60A(7)(a) to (e); on the CMA's interpretation, that would be at odds with the specific wording and nature of sub-sections 60A(7)(a) to (e).

are bound by a principle or decision of a court or tribunal in England and Wales, Scotland or Northern Ireland that requires them to act otherwise.<sup>93</sup>

- 4.24 Section 60A applies to all cases from 31 December 2020 onwards, ie it will apply to any CMA or concurrent regulator investigations or UK court cases which are ‘live’ on 31 December 2020 and in relation to facts pre-dating that date.<sup>94</sup>

### ***Continued application of other domestic legislation and procedure***

#### *CMA leniency regime*

- 4.25 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 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 and/or director disqualification proceedings in relation to that cartel activity in the UK. As was the case before EU Exit and during the Transition Period, 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>95</sup> and vice versa. Following the end of the Transition Period, this will be even more important than before given the possibility of parallel investigations by the European Commission and the CMA or a concurrent regulator.
- 4.26 Before the end of the Transition Period, and as set out in the CMA’s [Applications for leniency and no action in cartel cases guidance \(OFT1495\)](#), it has been possible for parties applying for leniency to the European Commission to obtain a marker from the CMA on a ‘no names’ basis pending confirmation from the European Commission as to the availability of immunity under the European Commission’s leniency policy.<sup>96</sup> However, following the end of the Transition Period ‘Commission immunity application’ cases will be

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<sup>93</sup> Section 60A(6) CA98.

<sup>94</sup> Paragraph 7 of Schedule 4 of the Competition SI.

<sup>95</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>96</sup> Paragraphs 4.36-4.39 of OFT1495.



treated in the same way as other cases, meaning that a strong justification will be needed for obtaining a 'no names' marker.<sup>97</sup>

4.27 As the CMA will no longer be a member of the European Competition Network (**ECN**), the ECN Model Leniency Programme will no longer apply and thus summary applications to the CMA in 'European Commission immunity application' cases will also no longer be available.<sup>98</sup> Similarly, where an undertaking has qualified for immunity under the European Commission Leniency Notice after the end of the Transition Period but has not also qualified for Type A immunity in the UK, for example because another undertaking has already qualified for Type A leniency in the UK, it will no longer be the case that the CMA can be expected 'normally' to grant no action letters to the implicated employees and directors of that undertaking.<sup>99</sup> In addition, references in the CMA's Applications for leniency and no action in cartel cases guidance (OFT1495) to the European Commission Notice on cooperation within the Network of Competition Authorities will no longer be relevant.

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

4.28 The disqualification of directors for infringements of competition law is set out under domestic legislation – namely, under section 9A of the Company Directors Disqualification Act 1986 (**CDDA**) – and for the most part will not be affected by EU Exit. The main change to the provisions dealing with director disqualification for competition law infringements is that references to breaches of the EU prohibitions are removed from the meaning of a breach of competition law for which a director can be disqualified.<sup>100</sup> The CMA guidance on director disqualification ([Guidance on Competition Disqualification Orders \(CMA102\)](#)) also contains references to EU law which will no longer be relevant to competition law infringements following the end of the Transition Period.

4.29 The CMA and concurrent regulators will continue to be able to rely on conduct found to have infringed the EU prohibitions (in addition to the UK

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<sup>97</sup> Based on its experience to date, the CMA would expect this to arise only rarely.

<sup>98</sup> Paragraphs 4.41-4.42 of OFT1495 should be read accordingly. Although the UK will no longer participate in the ECN Model Leniency Programme after the end of the Transition Period, any summary applications received before the end of the Transition Period will not automatically need to be replaced by a full application to the CMA after the end of the Transition Period. Rather, the CMA will assess any such applications, and the need for further information from the applicants, on a case-by-case basis, and contact applicants should it need to be provided with further information in relation to summary applications.

<sup>99</sup> Paragraph 8.4 of OFT1495 should be read accordingly.

<sup>100</sup> Section 9A Company Directors Disqualification Act 1986, as amended by the Competition SI.

Prohibitions) before the end of the Transition Period for the purposes of making an application for a director disqualification order under section 9A of the CDDA.<sup>101</sup>

- 4.30 For conduct which occurs after the end of the Transition Period, the CMA and concurrent regulators can continue to make applications for director disqualification orders under section 9A of the CDDA. However, they will be able to do so on the basis of an infringement of the UK Prohibitions only.

## **Retained EU law**

### *EU block exemption Regulations*

- 4.31 The Withdrawal Act and the Competition SI preserve the EU block exemption Regulations in the UK as ‘retained exemptions’.<sup>102</sup>
- 4.32 This means that, after 31 December 2020, the retained exemptions will operate as exemptions from UK Prohibitions (as covered by section 10 CA98). Beneficiaries of the EU block exemption Regulations and the ‘parallel exemptions’ before 31 December 2020 will continue to benefit from the EU block exemption Regulations as incorporated into domestic law after that date (and so long as they continue to comply with the retained exemptions).<sup>103</sup> The power to vary (including to extend) or revoke the application of the retained exemptions to the UK Prohibitions will lie with the Secretary of State, acting in consultation with the CMA.<sup>104</sup>
- 4.33 In addition, going forward, companies entering into new agreements after 31 December 2020 will also be able to benefit from the retained exemptions provided they meet the relevant criteria.
- 4.34 There are seven EU block exemption Regulations which will become retained exemptions when the Transition Period comes to an end (**Retained Block Exemption Regulations**).<sup>105</sup> These relate to vertical agreements, motor

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<sup>101</sup> Paragraph 36 of Schedule 4 of the Competition SI.

<sup>102</sup> Before its expiry on 25 April 2020, the application period of the EU block exemption Regulation applicable to consortium agreements between liner shipping companies was extended by the Commission Regulation (EU) 2020/436 until 25 April 2024. This renewed 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.

<sup>103</sup> The Competition SI amends section 10 CA98 by substituting ‘parallel exemptions’ by ‘retained exemptions’. This means that following the end of the Transition Period, the parallel exemptions regime ceases to exist but as explained in paragraph 4.32 of the present guidance, beneficiaries of parallel exemptions before the end of the Transition Period continue to benefit from the EU block exemptions Regulations via the retained exemptions.

<sup>104</sup> Regulation 4 of the Competition SI, inserting section 10A CA98.

<sup>105</sup> Regulation 3(9) of the Competition SI.

vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport. Details of these Retained Block Exemption Regulations can be found at Annex B to this guidance. The Competition SI however makes various amendments to the Retained Block Exemption Regulations to correct deficiencies resulting from the UK ceasing to be a Member State of the EU.<sup>106</sup> For example, references to EU Treaties and institutions will change to references to domestic legislation and references to Euros will be changed to Pounds Sterling. References to the internal market will also be changed to references to the UK, which will impact the geographic scope of these Regulations, e.g. the liner shipping Retained Block Exemption Regulation will apply to consortia only in so far as they provide international liner shipping services from or to one or more ports *in the UK*.<sup>107</sup>

4.35 Geographic scope is also relevant to certain provisions of some of the Retained Block Exemption Regulations, and in particular the concept of the restriction of 'passive sales'. For example, under the EU Vertical Block Exemption Regulation,<sup>108</sup> vertical agreements which have as their object the restriction of passive sales into an exclusive territory or customer group reserved to the supplier or allocated to another buyer are regarded as hardcore restrictions and are likely to infringe Article 101(1) (and the Chapter I prohibition) since such restrictions confer 'absolute territorial protection'.<sup>109</sup> In certain circumstances, passive sales bans affecting sales to a UK market or UK customer are capable of falling within the scope of the Chapter I prohibition. They may not satisfy the requirements of the Retained Vertical Agreements Block Exemption Regulation and may be treated as hardcore restrictions of competition.<sup>110</sup>

4.36 The guidance issued by the European Commission in relation to the EU block exemption Regulations which will become Retained Block Exemption

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<sup>106</sup> For the amendments see Competition SI, Schedule 3, Part 2.

<sup>107</sup> Article 1 of Commission Regulation (EC) 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), as amended by the Competition SI.

<sup>108</sup> Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices.

<sup>109</sup> See further Articles 4(b) and 4(c) Commission Regulation (EU) No 330/2010.

<sup>110</sup> This guidance is not meant exhaustively to cover all scenarios in relation to passive sales (or indeed other types of vertical agreements) but rather to provide an example of how geographic scope is relevant to certain provisions of the Retained Block Exemption Regulations. The CMA is currently considering its approach to the Retained Block Exemption Regulations.

Regulations will be relevant to interpreting the latter. Details of this guidance can be found at Annex B. Such guidance constitutes relevant statements of the European Commission to which the CMA, concurrent regulators and UK courts must have regard after 31 December 2020.<sup>111</sup> However, the guidance should be read with EU Exit and the amendments made by the Competition SI in mind.

### ***Application of other guidance relevant to antitrust cases***

4.37 A large body of CMA antitrust guidance documents do not contain any references to EU law or bodies and will thus be largely or wholly unaffected by EU Exit. Such guidance documents are listed at Annex A to this guidance. In relation to CMA antitrust guidance published before this guidance which is impacted by EU Exit, this guidance should prevail in relation to the specific references to EU law or bodies. By way of illustration, the following general clarifications should be considered when reading such guidance following the end of the Transition Period (until such time that it is updated):<sup>112</sup>

- As a result of EU Exit, certain changes will be needed to the [CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#). Amendments to this guidance will be consulted upon in due course and, once finalised, will be published subject to Secretary of State approval. Until such time as the CMA has published revised CMA73 guidance, we will interpret it within the appropriate context of the UK having left the European Union.
- Unless stated otherwise, references to the EU prohibitions throughout the CMA's antitrust guidance will no longer be relevant to the UK's competition enforcement regime after the end of the Transition Period. Where CMA guidance refers to either or both of the EU prohibitions together with the UK Prohibitions, after the end of the Transition Period it should be read as only referring to either or both of the UK Prohibitions as applicable.<sup>113</sup> Similarly, references to Article 101(3) should be read as references to section 9(1) of CA98 (or ignored where they are duplicative of references to section 9(1) CA98).

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<sup>111</sup> Under section 60A CA98, to the extent such decisions or statements pre-dating the end of the Transition Period are made and not withdrawn. See paragraph 4.18 to 4.24 of the present guidance.

<sup>112</sup> Note that these are examples of general principles to assist with reading CMA guidance considering EU Exit and may not apply in all instances. This list is not exhaustive.

<sup>113</sup> Unless the context clearly requires otherwise, such as where reference is made to CJEU case law.

- References to the Block Exemption Regulations should be read as references to the relevant Retained Block Exemption Regulations, as amended by the Competition SI and any future amendments.
- References to section 60 CA98 and to the primacy of EU law should be read with the new section 60A CA98 in mind.
- Sections in CMA's antitrust guidance on the CMA's relationship and/or co-operation with the European Commission and other NCAs, such as those in OFT401 Part 4, OFT402 Part 3 and OFT442, among others, will generally no longer be relevant. Similarly, references to the Modernisation Regime, throughout the CMA's antitrust guidance and in particular in OFT442, will generally no longer be relevant, given the CMA (and concurrent regulators) will no longer be enforcing the EU prohibitions. However, this is not to say such guidance ought to be ignored in its entirety; for example, discussion of the exemption regime may still be informative in relation to the UK exemption regime under section 9(1) CA98.
- References to the ability to bring standalone actions and actions for damages, such as in OFT401 Part 7, OFT402 Part 2, OFT408 Part 8 and others, and in particular in CMA55, will no longer be entirely accurate. Decisions by the European Commission reached before 31 December 2020, as well as decisions by the European Commission in respect of Continued Competence Cases, can still form the basis of follow-on damages claims, including cases that have not exhausted the appeals process. However, claimants who wish to pursue follow-on damages claims in UK courts will no longer be able to rely on an infringement decision under EU law reached by the European Commission in respect of cases which are either:
  - initiated, but not decided, **before** 31 December 2020 but are **not** 'Continued Competence Cases' for the purposes of Article 92 of the Withdrawal Agreement; or
  - cases which are initiated **after** 31 December 2020,

as a binding finding of an infringement under the CA98.<sup>114</sup> Claimants will continue to be able to rely on infringement decisions of the CMA and concurrent regulators in pursuing follow-on damages claims in the UK. In

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<sup>114</sup> UK courts will also no longer be required to treat infringement decisions of an EU Member State national competition authority as 'prima facie' evidence of an infringement.

relation to standalone actions, these can still be brought after 31 December 2020 in relation to infringements of the EU prohibitions (either on their own or in parallel with the UK Prohibitions) where these infringements occurred before 31 December 2020.<sup>115</sup> The ability to bring standalone actions in relation to infringements of the UK Prohibitions will remain unchanged.

- As set out above, the CMA is required (subject to specified exceptions) to interpret questions under Part 1 of the CA98 in a manner which is consistent with the principles laid down by the TFEU and the CJEU before the end of the Transition Period and any relevant decision made by the CJEU before the end of the Transition Period, so far as applicable immediately before that date in determining any corresponding question arising in EU law. Therefore, references to such EU case law in CMA guidance will continue to be relevant to the interpretation of the UK Prohibitions and other questions under Part 1 of the CA98 (as may be applicable) unless and until such case law is departed from under section 60A CA98 (as explained at paragraphs 4.18 to 4.24 above). For example, several CMA guidance documents refer to the definition of ‘undertaking’ as set out in EU law, which will remain relevant to the interpretation of this concept under domestic law unless and until it is departed from.

4.38 Section 60A CA98 will require regard to be had to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn. However, differences between the EU and domestic competition enforcement regimes from the end of the Transition Period onwards must be borne in mind, and European Commission decisions and guidance may contain concepts and references which are no longer relevant to the UK competition enforcement regime. An example of this is the European Commission’s Block Exemption Regulation guidance, as cited in Annex B, which has interpretative value for the Retained Block Exemption Regulation, but which refers to concepts which are not relevant for the UK regime, such as the objective of achieving an integrated internal market in the EU.

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<sup>115</sup> Paragraph 14 of Schedule 4 of the Competition SI (as amended by Regulation 39 of the Implementation SI).

## 5. Consumer protection law enforcement

### *Impact of UK's EU Exit legislation*

- 5.1 As explained in section 2 of this guidance, the effect of the Withdrawal Act is that, from 31 December 2020, EU law will be converted to UK law and EU-derived UK law will be maintained. This covers both directly effective EU legislation such as Regulations, and EU directives that have been implemented into UK domestic legislation.
- 5.2 A number of consumer protection statutory instruments were made to implement some amendments to the UK's consumer protection legislation deemed necessary for it to operate effectively after the UK's Exit from the EU. These largely leave transactions between UK businesses and UK consumers unaffected but make some changes to the law applying to UK/EU cross-border trading.
- 5.3 In the area of consumer protection, the broad effect of the EU Exit legislation is that immediately after 31 December 2020 UK businesses dealing with UK consumers will be largely subject to the same consumer protection law requirements as applied beforehand. Similarly, UK consumers buying from UK businesses will benefit from the same rights, and the CMA will have the same consumer enforcement powers regarding these domestic transactions.
- 5.4 The position will change in some respects for UK businesses selling to EU consumers, and for UK consumers buying from EU traders. For detailed explanation of these changes, see the consumer protection statutory instruments made under section 8 of the Withdrawal Act including their Explanatory Notes.<sup>116</sup>

### *Consumer protection law after 31 December 2020*

- 5.5 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

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<sup>116</sup> The following SIs can be found on [www.legislation.gov.uk](http://www.legislation.gov.uk): the Consumer Protection SI, Consumer Protection (Amendment etc) (EU Exit Regulations 2019, Consumer Protection (Amendment etc.) (EU Exit) Regulations 2020, 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. In addition to these, the UK has continued to implement EU law during the Transition Period, for example by passing the Consumer Protection (Enforcement) (Amendment etc) Regulation 2020, which implement the UK's obligations under the revised CPC Regulation (EU) 2017/2394.

reflects EU consumer law. As the effect of the EU Exit legislation is to confirm that law's status in UK law, from 31 December 2020, businesses trading with UK consumers must continue to comply with these EU-derived consumer protection laws<sup>117</sup> unless and until they are repealed or amended by the UK Parliament.

- 5.6 To a large extent the Withdrawal Act maintains the status in UK law of CJEU judgments made up to the end of the Transition Period. Most UK courts and authorities applying UK consumer protection law which derives from EU law will continue to be bound by judgments of the CJEU which pre-date the end of the Transition Period on the meaning and interpretation of the underlying EU consumer directives and regulations.<sup>118</sup> However, the UK Supreme Court, the High Court of Justiciary<sup>119</sup> and other UK courts<sup>120</sup> may depart from existing CJEU judgments having applied the same respective tests as they would when considering whether to depart from their own previous decisions.
- 5.7 UK traders directing their business activities to consumers in the EU must continue to comply with UK law, since otherwise they may face enforcement action under Part 8 EA02 for example. However, they may also face enforcement locally if they fail to comply with those consumers' local national consumer laws which will largely reflect EU law.<sup>121</sup>

#### *Consumer protection law enforcement after 31 December 2020*

- 5.8 Part 8 EA02 sets out the principal UK regime for the civil enforcement of a wide range of consumer protection law by the CMA<sup>122</sup> and by other UK

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<sup>117</sup> This includes both consumer protection laws that implement EU directives (e.g. Part 2 of the CRA implementing Council Directive 93/13/EEC on unfair terms in consumer contracts), and any EU consumer laws that are embodied in EU regulations, which were directly applicable to EU-based traders, and which will be converted to UK legislation (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>118</sup> They will not have to follow post-Exit CJEU judgments but may have regard to them where relevant.

<sup>119</sup> In cases before it where there is no further right of appeal to the Supreme Court.

<sup>120</sup> The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 allows the Court of Appeal and a range of other UK courts to depart from CJEU judgments.

<sup>121</sup> EU consumers' local law will follow EU law. 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.

<sup>122</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 for the Economy have the primary duty to enforce these Regulations).



enforcers.<sup>123</sup> Under Part 8, before 31 December 2020, the CMA could take action against infringements of a wide range of UK consumer protection law implementing European laws – known as Community infringements<sup>124</sup> - as well as taking action against infringements of purely domestic laws (known as domestic infringements). As well as covering purely domestic cases, it also allowed EU enforcers to bring proceedings against UK businesses in the UK courts to protect consumers in their jurisdiction, and UK enforcers to take proceedings against EU businesses in their local courts.<sup>125</sup>

- 5.9 By virtue of the changes to Part 8 and Schedule 5 to the CRA made by the Consumer Protection EU Exit SIs, these cross-border proceedings will no longer be provided for in Part 8, and the related investigatory powers will be removed.
- 5.10 However, the CMA and other UK enforcers will still generally be able to bring Part 8 proceedings in the UK against EU businesses that are directing their trading activities towards UK consumers and breaching UK consumer protection law.<sup>126</sup> Similarly, UK businesses directing trade activities to EU consumers and breaching EU or local national consumer law, may still find themselves subject to enforcement action by national enforcers in the courts of that Member State.

#### *Consumer enforcement co-operation with EU enforcers after 31 December 2020*

- 5.11 Until 31 December 2020, the UK is covered by the CPC Regulation.<sup>127</sup> The CPC Regulation establishes a regime for EU cross-border consumer enforcement co-operation and assistance, by prescribing reciprocal powers and duties for Member States' Competent Authorities to request and provide each other with assistance. Under the CPC Regulation, 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

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<sup>123</sup> Other UK enforcers include Trading Standards Services and Department for the Economy, the Advertising Standards Authority and sectoral regulators such as the Financial Conduct Authority and the Civil Aviation Authority.

<sup>124</sup> Community infringements will be called Schedule 13 infringements after the end of the Transition Period under the Consumer Protection EU Exit SIs.

<sup>125</sup> Former section 215(4) of the EA02 giving effect to Directive (98/27/EC) on injunctions for the protection of consumers' interests.

<sup>126</sup> While Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) will no longer apply to the UK, the UK courts may accept jurisdiction to hear such enforcement proceedings having applied existing UK common law and statutory rules in this area.

<sup>127</sup> Regulation (EC) No 2017/2394 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws.

against that local business to stop it committing infringements which are harming consumers in the other Member State.

- 5.12 In addition, the CPC Regulation provides for Member States' Competent Authorities (sometimes with the assistance of the European Commission) to co-ordinate common consumer enforcement activities to tackle businesses or infringements that span multiple Member States.
- 5.13 Until the end of the Transition Period, the CMA remains a UK Competent Authority under the CPC Regulation and the UK's Single Liaison Office responsible for co-ordinating requests coming to, and from, the UK. It has also been involved in a number of CPC common activities.<sup>128</sup>
- 5.14 After the end of the Transition Period, the CPC Regulation no longer applies to the UK and the CMA's formal role under it ceases. As noted above, the CMA's related powers under Part 8 and Schedule 5 to the CRA to assist EU enforcers with investigations of UK businesses harming EU consumers, also no longer apply.
- 5.15 However, 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 development of wider partnership working in international fora. For example, the CMA's active role in CPC Joint Actions has resulted in binding commitments from businesses which UK consumers will continue to benefit from after the transition period.
- 5.16 Following the end of the Transition Period the CMA will seek to continue to work with EU enforcers as far as possible, while developing relationships and working with all our other international counterparts, including, for example, through ICPEN. This could include sharing evidence and intelligence, for example, as provided for under Part 9 of the EA02. It could also include co-ordinating investigations. There is also scope for co-operation arrangements between the EU and the UK as a third country, to be agreed under the CPC Regulation. The extent to which the CMA is able to assist EU enforcers using its formal powers will be considered further in the context of any future agreement on cross border co-operation.

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<sup>128</sup> For example, common activities on children's apps, social media and on car hire.

## *CMA consumer protection law enforcement guidance*

5.17 Information on the CMA's consumer enforcement powers and approach is set out in CMA58<sup>129</sup> which includes a section on cases involving businesses or consumers in other Member States.<sup>130</sup> The CMA proposes to make appropriate updates to CMA58 to reflect EU exit and other recent legal developments in due course. However, in the meantime CMA 58 will continue to apply with the exception of those parts of the guidance dealing with the CPC Regulation and the CMA's role under it.<sup>131</sup>

### *Cross-border enforcement cases in progress on 31 December 2020*

5.18 The Consumer Protection EU Exit SIs provide that, in general, the changes to Part 8 and to Schedule 5 to the CRA do not apply in the case of Community infringements of consumer protection law occurring before 31 December 2020. Therefore, any Part 8 cases started by the CMA before 31 December 2020, and which relate to one or more Community infringements, will continue to be covered by this legislation as it was before it was amended. This is equally true for any Part 8 cases which the CMA may open after 31 December 2020 but which relate to Community infringements occurring before that date.<sup>132</sup>

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<sup>129</sup> [Consumer protection: Enforcement Guidance](#)

<sup>130</sup> See 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.

<sup>131</sup> These parts include, in particular, the first two bullets in paragraph 2.7, the last entry in the table under Annex A (Consumer legislation under which the CMA has enforcement powers) and the paragraphs 1 to 6 of Annex C (Wider international working).

<sup>132</sup> The Consumer Protection SI makes provision for proceedings brought in the UK under Part 8 by an EU enforcer before the end of the Transition Period. However, no such proceedings had been brought as at the date of this guidance.

## ANNEXES

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## A. CMA guidance

CMA guidance unaffected by EU Exit:

### ***Mergers guidance unaffected by EU Exit:***

- [Merger: Exception to the duty to refer \(CMA64\)](#)
- [Disclosure of information in CMA work \(CC7\)](#)
- [Review of NHS mergers \(CMA29\)](#)
- [Good practice in the design and presentation of consumer survey evidence in merger cases \(CMA78\)](#)
- [Retail mergers commentary \(CMA62\)](#)
- [Guidance on the CMA's mergers intelligence function \(CMA56\)](#)
- [Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission \(CC2com3\)](#)
- [Guidance on requests for internal documents in merger investigations \(CMA100\)](#)

### ***Antitrust (including cartels) guidance unaffected by EU Exit:***

- [The OFT and the bus industry \(OFT397\)](#)
- [Street furniture advertising: Recommendations to local authorities \(OFT1415\)](#)
- [Competition impact assessment: Part 1: overview \(CMA50\)](#)
- [Competing fairly: short guide to competition law](#)
- [Leniency: information for businesses and individuals](#)
- [Competition law: advice for company secretaries](#)
- [Competition law: information for accountants in practice<sup>133</sup>](#)

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<sup>133</sup> Also available [here](#).

- [Competition law: advice for internal auditors](#)<sup>134</sup>
- [Avoiding disqualification: advice for company directors](#)<sup>135</sup>
- [Price-fixing: guidance for online sellers](#)<sup>136</sup>
- [Resale price maintenance: advice for retailers](#)<sup>137</sup>
- [High-strength alcohol schemes: competition law issues for retailers](#)
- [Local authority initiatives: advice on competition law](#)
- [Private medical practitioners: information on competition law](#)<sup>138</sup>
- [Private medical practitioners: information about fees](#)
- [Competition law for private medical practitioners: cans, can'ts and maybes](#)
- [Competition law: dos and dont's for trade associations](#)
- [Four-step process to competition law compliance](#)

***Consumer protection guidance unaffected by EU Exit:***

- [Secondary ticket websites: information for consumers](#)
- [Unit pricing: information for consumers](#)<sup>139</sup>
- [Children's app and online games: advice for parents and carers](#)
- [Higher education providers: consumer law](#)
- [Undergraduate Students: Your Consumer Rights](#)
- [Reporting possible non-compliance with consumer law](#)
- [Online reviews: letting your customers see the true picture](#)<sup>140</sup>

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<sup>134</sup> Also available [here](#).

<sup>135</sup> Also available [here](#).

<sup>136</sup> Also available [here](#).

<sup>137</sup> Also available [here](#).

<sup>138</sup> Also available [here](#).

<sup>139</sup> Also available [here](#).

<sup>140</sup> Also available [here](#).

- Giving a balanced picture: do's and don'ts for online review sites<sup>141</sup>
- Online endorsements: being open and honest with your audience<sup>142</sup>
- Pyramid selling: advice for the public and communities
- Higher education: Undergraduate students: Your rights under consumer law (CMA33(a))
- Principle on food pricing display and promotional practices (OFT1527)

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<sup>141</sup> Also available [here](#).

<sup>142</sup> Also available [here](#).

## B. EU block exemptions in force under EU Law, becoming Retained Block Exemption Regulations<sup>143</sup>

Regulation	Expiry date	Guidance <sup>144</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 2014/C 89/03</a>	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 2010/C 130/01</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 2010/C 138/05</a>	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 Text 2011/C 11/01</a>	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 2011/C 33/08 (2/2/2011)</a>	
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).  This has been extended in force until 25 April 2024 by Commission	25/04/2024	N/A	

<sup>143</sup> Under section 10 CA98.

<sup>144</sup> These guidelines remain relevant in interpreting the relevant Retained Block Exemption Regulations.



Regulation	Expiry date	Guidance <sup>144</sup>	Date
Regulation (EU) No 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application.			
<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	