

**CMA Consultation on  
Draft guidance on the effects of the UK’s “no deal” exit from  
the European Union on the functions of the CMA**

28 January 2019

**Response by Freshfields Bruckhaus Deringer LLP**

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**Freshfields Bruckhaus Deringer**



## RESPONSE TO THE CMA'S CONSULTATION ON DRAFT GUIDANCE ON THE EFFECTS OF THE UK'S "NO DEAL" EXIT FROM THE EUROPEAN UNION ON THE FUNCTIONS OF THE CMA

of 28 January 2019

### 1. Introduction

- 1.1 Freshfields Bruckhaus Deringer LLP (*Freshfields*) welcomes the opportunity to comment on the Competition and Markets Authority's (*CMA*) public consultation on its draft guidance in relation to "*the effects of the UK's "no deal" exit from the European Union on the functions of the CMA*" (*Draft Guidance*).
- 1.2 Given levels of uncertainty faced by business in a "no deal" scenario, we believe it is vital for authorities such as the CMA to provide clear guidance on their intended approach in relation to new areas of regulatory risk and the steps companies should take to mitigate those risks and minimise the potential impact on their businesses, customers, employees and other stakeholders.
- 1.3 Separation of the EU and UK competition regimes without a transition period or cooperation agreement in place would create a number of specific challenges for business, particularly those involved in ongoing procedures before the European Commission (*EC*). These include:
  - (a) for merger reviews, uncertainty over whether the CMA will open an investigation, the timing and likely outcome of an investigation and the degree of cooperation with the EC that should be expected in order to maximise the chances of an efficient parallel review and consistent outcome; and
  - (b) for parties involved in EC antitrust investigations, uncertainty over whether it is the intention of the CMA or the concurrent regulators to open their own parallel investigations into any UK aspects of such EC investigations and the extent to which such parallel investigations may overlap. Businesses already face uncertainty as to the future of the UK antitrust regime, in particular the extent to which the proposed section 60A may lead to divergence from the principles laid down by the Treaty on the Functioning of the European Union (*TFEU*) and by the case law of the Court of Justice of the European Union (*CJEU*), which have shaped UK competition law and policy over recent decades.<sup>1</sup>

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<sup>1</sup> We note, for example, the proposals set out in the letter from the CMA Chair, Lord Andrew Tyrie, to the Secretary of State for Business, Energy and Industrial Strategy, the Rt Hon Greg Clark MP, dated 21 February 2019 (the *CMA Chair's 21 February Letter*), which could result in new areas of business behaviour that could be subject to CMA enforcement and potential divergence from established EU competition law principles.



## 2. Merger control

### EC cases opened prior to 11pm 29 March 2019 (*Exit Day or EU Exit*)

- 2.1 We estimate that, at Exit Day, around 100 companies will be party to a “live” merger case being reviewed by the EC under the EU Merger Regulation (*EUMR*). However, a large majority of these cases (approximately 70%) will benefit from the EU’s simplified procedure<sup>2</sup>.
- 2.2 We believe that the CMA and merging parties would benefit significantly from more detailed guidance on the different approaches the CMA intends to take, and the steps parties should take, in relation to different types of case where the CMA may have jurisdiction to review a merger, but the risk of the CMA deciding to open an investigation is very different. Otherwise, the CMA faces the prospect of a large number of precautionary notifications and contacts at a time when resources will already be stretched.

### *EC simplified procedure cases: the CMA’s intended approach*

- 2.3 In order to benefit from the EC’s simplified procedure, the parties will have provided the EC with information on all plausible alternative market definitions in order for the EC to be satisfied that they fall below the relevant thresholds. The EC will then have accepted the proposed merger under the simplified procedure on the basis of the parties having no (or very limited) overlaps or vertical relationships and there being no special circumstances which merit closer investigation.
- 2.4 We accept that the CMA needs to retain its discretion to review all deals which fall within its jurisdictional thresholds. However, we believe there are strong grounds for the Draft Guidance setting out:
- (a) criteria, similar to the principles of the EC’s simplified procedure, where there would be a rebuttable presumption that the CMA will not open an investigation into a merger;<sup>3</sup> and
  - (b) that parties would not be expected to engage with the CMA before completing such a merger on receipt of EU clearance, and that the CMA would not typically make an interim order in relation to mergers that have completed but satisfy these criteria (see paragraph 2.9(b) below).
- 2.5 Although the EC’s procedures are governed by the separate EU merger regime, it is difficult to identify any circumstances when a merger accepted under the simplified procedure (at a time when the UK is a member of the EU) would raise concerns in the UK.<sup>4</sup> We believe that the benefits of clear guidance setting out criteria (similar to

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<sup>2</sup> The EC in principle applies the simplified procedure to concentrations where, *inter alia*: (i) the parties are not engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from each other; or (ii) the combined market share of all the parties engaged in business activities in the same product and geographic market is less than 20% (or 30% for any vertical relationship).

<sup>3</sup> Such an approach would be consistent with the statements made in the CMA Chair’s 21 February Letter that “*consideration should also be given to the introduction of a ‘short-form notification’ process or other mechanisms to minimise the impact on businesses in relation to non-problematic mergers*” (footnote 73 on page 42 of the Letter).

<sup>4</sup> The CMA would also have access to the Form CO for such mergers, including detail on the parties’ activities in the UK and the reasons why the merger qualified for the EC’s simplified procedure.



those in the simplified procedure) when the CMA would not expect to intervene outweigh any potential downsides for the CMA or potential complainants.

## *EC cases not benefiting from the simplified procedure, but on track for phase 1 clearance*

2.6 With regard to “live” EC cases that are on track for phase 1 clearance at Exit Day, we suggest the Draft Guidance sets out:

- (a) the steps parties should take to facilitate discussions between the EC and CMA before Exit Day to enable the CMA to be fully apprised of the EC’s review and, if necessary, enable the CMA to accept a complete Merger Notice (using the parties’ Form CO as its basis) as soon as possible after Exit Day; and
- (b) the limited circumstances when the CMA would expect to open a new investigation after Exit Day, despite the EC confirming to the CMA that it is likely to decide that the merger would not significantly impede effective competition in the EU.

## *EC cases where the parties are engaged in “phase 1 remedy” discussions with the EC<sup>5</sup>, or are subject to a phase 2 investigation, at Exit Day<sup>6</sup>*

2.7 With regard to “live” phase 1 remedy and phase 2 EC cases, we suggest the Draft Guidance sets out the steps parties should take, and the approach the CMA expects to take, to facilitate cooperation with the EC with a view to ensuring:

- (a) a complete Merger Notice is submitted as soon as possible after Exit Day; and
- (b) as appropriate, a single remedy package is agreed which resolves competition concerns in the EU and UK in line with the approach taken, for example, by the EC and US antitrust agencies<sup>7</sup>.

2.8 Such steps would include, for example, the CMA appointing a case team for pre-notification discussions with a view to accepting the Form CO (together with responses to requests for information submitted by the parties during the EC process) as the basis of a complete Merger Notice, and the parties facilitating effective cooperation with the EC on the evidence, the EC’s assessment and the results of any market testing.

2.9 In the absence of such clear guidance on these different scenarios, we believe certain statements in the Draft Guidance will encourage an excessive number of precautionary notifications. For example:

- (a) **the CMA’s statutory four-month period will apply for completed mergers from EU Exit:** paragraph 3.9 describes the CMA’s power to refer a merger to phase 2 for up to 4 months after EU Exit or “*from the point at which the CMA is considered to have been provided with notice of the material facts about the merger (whichever is later)*”. For all “live” cases that have been subject to EC review, we believe that “*material facts*” about the merger will have been made public (within the meaning of section 24

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<sup>5</sup> Such cases account for around 4% of cases notified to the EC.

<sup>6</sup> Such cases account for around 3% of cases notified to the EC.

<sup>7</sup> See the best practices at: [http://ec.europa.eu/competition/mergers/legislation/best\\_practices\\_2011\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf)



Enterprise Act 2002)<sup>8</sup>. The four-month period should therefore run from EU Exit, not from any later date;

- (b) **interim orders:** paragraph 3.10 describes the CMA’s ability to make an interim order to either prevent closing of a deal subject to EC review, or integration of a deal that has closed following clearance by all other relevant authorities (including the EC). We believe that there would be significant benefits for the CMA and parties if the Draft Guidance clarified that:
- (i) for cases that do not raise competition concerns (including EC simplified procedure cases), the CMA would not follow its usual procedure of imposing an interim order on the merger at completion. We believe that such an approach would be disproportionate in the vast majority of cases;
  - (ii) for more complicated cases, the CMA’s approach would reflect the status of reviews by other authorities and the legal obligations on the parties. For example, the parties may have entered into an agreement on remedies with other authorities under which they have a legal requirement to divest a part of a business which could put them in breach of a CMA interim order. In such circumstances, we suggest the terms of any interim order should be agreed with the parties in advance so as to ensure an appropriate order is in place at EU Exit which takes account of any other legal obligations of the parties and does not result in a complex and protracted derogations process; and
  - (iii) for cases that have been reviewed and cleared by other authorities, the CMA would be willing to grant a derogation that would enable integration of the non-UK aspects of the merging parties’ businesses<sup>9</sup>.

## CMA cases opened after Exit Day

- 2.10 We welcome the statements in paragraph 3.18 that “*the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission as with other competition authorities*”. We agree that there are benefits to the parties and authorities when the authorities are communicating and cooperating with each other, provided adequate safeguards are in place.
- 2.11 We therefore encourage the CMA to seek appropriate bilateral or multilateral cooperation arrangements post-EU Exit as a matter of priority.

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<sup>8</sup> On receipt of a notification under the EUMR, the EC publishes the following information on its website: (i) the names of the parties; (ii) each of the parties’ business activities; and (iii) the relevant sector concerned (including NACE code). In addition, the CMA would have received the parties’ Form CO and accordingly will be fully apprised of the merger.

<sup>9</sup> CMA’s Guidance on initial enforcement orders and derogations in merger investigations (paragraphs 3.26 - 3.31).



## 3. Enforcement of the competition law prohibitions

### Cases being conducted by the EC prior to Exit Day

- 3.1 We acknowledge that, pursuant to the Competition (Amendments etc.) (EU Exit) Regulations 2019 (the *Competition SI*), where the EC has not issued an infringement decision prior to Exit Day, the CMA and concurrent regulators will no longer be prevented from conducting their own investigations into breaches of the domestic prohibitions with respect to the same facts.
- 3.2 However, in the interests of business certainty and in recognition of the scarcity of competition enforcement resources at both UK and EU level, we consider that the Draft Guidance should clarify that the CMA intends to exercise its discretion in relation to any such “parallel” investigations in an efficient and proportionate manner, especially as to the geographic scope of any such investigations. In particular:
- (a) for many “live” EC investigations, the EC will already have undertaken a significant amount of work prior to EU Exit and may also continue to make a decision covering both the EU27 and the UK post-EU Exit, on the basis that the UK was an EU Member State at the time of the relevant conduct;
  - (b) in such circumstances, we consider that it would generally be undesirable, as a matter of public policy and use of scarce competition enforcement resources, for the CMA to launch its own parallel investigation into the same conduct where such an investigation would overlap geographically with the “live” EC investigation;
  - (c) we consider that it would be particularly undesirable for any parallel CMA and EC investigations to result in infringement decisions in respect of the same geographic area (i.e. the UK). Regardless of the question of the lawfulness of any such overlapping infringement decisions, it would clearly be undesirable for businesses to be subject to infringement decisions by two separate competition authorities in respect of the same conduct, with resulting inefficiencies and anomalies regarding appeal rights, the defence of any follow-on damages claims, and resources expended with the relevant competition authorities, amongst other things. These issues would arise in any case of overlapping infringement decisions and regardless of the position regarding penalties imposed by the respective authorities.
- 3.3 Given the above, we consider that a parallel investigation by the CMA into UK conduct, where the EC has a “live” investigation into the same UK conduct at Exit Day, would generally not be in line with the CMA’s prioritisation principles. The relevant UK conduct will be addressed by the EC investigation and therefore the relevant deterrence and consumer welfare objectives will have been achieved without the need for CMA resources to be expended.
- 3.4 Separately, in the event that the CMA and the EC were to launch parallel investigations into the same conduct post-EU Exit, it follows from the above that we consider such investigations should be complementary and mutually exclusive in scope, rather than covering the same conduct, time period and geographic areas.
- 3.5 In light of the above, we suggest that paragraph 4.6 of the Draft Guidance be clarified to state that in liaising with the EC and taking into account the published prioritisation principles and the circumstances of EU Exit, the CMA would typically expect to have



regard to the need for any “parallel” investigations to be conducted in an efficient and proportionate manner, particularly as to the geographic scope of those infringements, and that the CMA would therefore typically expect only one of itself or the EC to continue to investigate (and potentially make infringement decisions in respect of) the UK element of any potential infringement.

## Section 60A of the Competition Act 1998 (CA98)

- 3.6 We note that, under the proposed section 60A, the CMA, concurrent regulators and the UK courts may depart from the principles of the TFEU and any pre-EU Exit CJEU case law where they consider it “appropriate” to do so, in light of one of the prescribed factors. However, as noted at paragraph 4.13 of the Draft Guidance, the “default position” under the proposed section 60A will remain that the CMA, concurrent regulators and the UK courts must interpret the CA98 Chapter I and Chapter II prohibitions in a manner which is consistent with the principles of the TFEU and the decision and principles laid down by the CJEU in relation to Articles 101 and 102 TFEU prior to EU Exit.
- 3.7 We believe that the CMA and businesses active in the UK would benefit from the CMA providing some further guidance and comfort on the high-level approach it intends to take to section 60A in the immediate term post-EU Exit. In particular:
- (a) it would be helpful for the Draft Guidance (for example, at paragraph 4.16) to describe in high-level terms whether the CMA intends to continue to maintain consistency with the CJEU case law which has shaped the UK competition regime and that applies by default under the proposed section 60A, or whether the CMA has immediate intentions to rely on any of the exceptions set out in paragraph 4.14 of the Draft Guidance in respect of **pre-EU Exit CJEU case law**. We consider that clarity and guidance in respect of the CMA’s intended approach to pre-EU Exit CJEU case law would be highly desirable in order to avoid significant uncertainty to UK businesses as at Exit Day, and that the CMA is capable of making this assessment of its intention in respect of existing CJEU case law at this stage without undertaking a speculative assessment;
  - (b) further, in order to provide greater certainty to businesses active across markets in both the UK and EU27, we would welcome high-level guidance on the CMA’s intended approach to **post-EU Exit CJEU case law**, with a view to ensuring the UK regime is not left behind in terms of the development of competition law post-EU Exit. In this regard, we consider that it is important to re-emphasise that section 60A is not (and should not be viewed as) merely a mechanism to facilitate departure from CJEU case law, but is also a mechanism to maintain consistency with post-EU Exit CJEU case law in appropriate cases where EU competition law develops in a material respect post-EU Exit.
- 3.8 In the event that the CMA is not minded to give any guidance on its intended approach to the application of section 60A to post-EU Exit CJEU case law (i.e. (b) above), we consider that the CMA can and should at least provide some additional guidance to businesses as to its intended approach to the application of section 60A to pre-EU Exit CJEU case law, and that it would be reasonable and appropriate for the CMA to do so, for the reasons set out in (a) above. In this regard, even an insertion of



the CMA's relative intention as between the two situations (i.e. pre-EU Exit and post-EU Exit CJEU case law) would be a welcome addition to paragraph 4.16 of the Draft Guidance.

- 3.9 More specifically, we note that page 21 (second bullet) of the Draft Guidance states that “*EU case law regarding the interpretation of Articles 101 and/or 102 TFEU in CMA guidance continue to have interpretative value unless and until such case law is departed from*”. We consider that the use of “*interpretative value*” in this paragraph may generate some confusion as to the status of pre-EU Exit CJEU case law, suggesting a weaker obligation than that set out as the “default position” at paragraph 4.13 and section 60A. With a view to avoiding any such confusion, we would suggest that there should be consistency of wording between paragraph 4.13 and page 21 (second bullet), i.e. “must interpret” the CA98 Chapter I and Chapter II prohibitions in a manner which is consistent with the principles laid down by the CJEU (subject to certain exceptions under section 60A).

## **Cooperation and alignment with the EC and other competition authorities**

- 3.10 We acknowledge that post-EU Exit, Council Regulation (EC) No 1/2003 will no longer apply to the UK and the CMA will no longer be a member of the European Competition Network (*ECN*). We would however urge continued cooperation between the CMA, the EC and the national competition authorities of the Member States (*NCA*s) post-EU Exit.
- 3.11 Cooperation between authorities will help avoid duplicative investigations and will maximise the degree of alignment and consistency between decisions, reducing the potential for conflicting outcomes. Such cooperation is not only in the interests of businesses active in both the UK and the EU27, but also for the CMA itself in terms of its prioritisation of cases.
- 3.12 To the extent possible, we would encourage the CMA to seek appropriate bilateral or multilateral cooperation arrangements post-EU Exit as a matter of priority. However, in the absence of such arrangements, we would still urge informal cooperation between authorities on a case-by-case basis and through working with the parties. We acknowledge that in those circumstances any sharing of detailed case information and underlying evidence (particularly any information or evidence received via leniency programmes) between the CMA and the EC (and the *NCA*s) will require the consent of the investigated parties given the CMA will no longer formally be a member of the *ECN* and Regulation 1/2003 will not apply. However, we do not consider that such constraints should prevent informal co-operation between authorities as to matters such as prioritisation and efficient allocation of resources.

## **4. Concluding remarks**

- 4.1 In the event of a “no deal” exit, clear guidance on the practical steps businesses should take to mitigate additional regulatory risk, and any intended change of approach by the CMA in relation to competition law enforcement in the UK, will be critical to minimising the extra costs and uncertainties that business and consumers are likely to face. Given increased concerns about the risk of a “no deal” exit, we believe that the benefits of clear practical guidance should not be underestimated.