

Guidance on the functions of the CMA after a 'no deal' exit from the EU

Summary of responses

March 2019
CMA102resp

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1. Introduction

Background

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
- 1.2 The CMA has prepared draft guidance explaining how EU Exit will affect its powers and processes for antitrust and cartel enforcement, merger control and consumer law enforcement after Exit Day in a 'no deal' scenario (the Guidance). The Guidance also explains the treatment of 'live' cases, which are those cases that are being reviewed by the European Commission or the CMA on Exit Day.
- 1.3 The Guidance applies to the CMA's ongoing and future:
 - (a) merger cases under the Enterprise Act 2002 (EA02);
 - (b) 'antitrust' cases, including cartels, under the Competition Act 1998 (CA98); and
 - (c) enforcement of consumer protection legislation, in particular under Part 8 of the EA02.

Purpose of this document

- 1.4 The CMA published the Guidance on its website on 28 January 2019 in order to run a public consultation from that date until 25 February 2019 (the Consultation).
- 1.5 The Consultation set out three questions on which respondents' views were sought:
 - (a) *Is the content, format and presentation of the draft guidance sufficiently clear? If there are specific parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.*
 - (b) *We are particularly interested in your views on the following areas:*
 - (i) *Does the draft guidance generally provide sufficient information and clarity in relation to the jurisdiction of merger cases which are being reviewed on Exit day (i.e. 'live' cases)? Does the draft guidance generally provide sufficient information and clarity in relation to the*

treatment of merger cases opened after Exit day? If not, please indicate if there are any aspects of the merger control rules and procedures on which further information would be useful.

(ii) Does the draft guidance generally provide sufficient information and clarity in relation to the legal framework that will govern antitrust and cartel cases opened prior to Exit Day (i.e. 'live' investigations)? Is there enough clarity provided in relation to the treatment of antitrust and cartel investigations after Exit Day? If not, please indicate if there are any aspects of the antitrust and cartel enforcement procedures on which further information would be useful.

(iii) Does the draft guidance generally provide sufficient information and clarity in relation to the CMA's understanding of the legal framework that will govern the consumer protection regime after Exit Day and its approach to the exercise of its functions?

(c) The CMA would also welcome the views of stakeholders on any other aspects of the draft guidance.

1.6 This document is intended to summarise the key issues raised by the responses to the Consultation. It is not intended to be a comprehensive record of all views expressed by respondents. Respondents' full responses are available on the consultation webpage. This document should be read in conjunction with the consultation document, which contains further background and explanation on the new Guidance.

2. Issues raised during the Consultation and our response

- 2.1 The CMA received four written responses to the Consultation. The list of respondents is at Appendix A, and non-confidential versions of all submissions are available on the consultation page.
- 2.2 Summaries of responses are set out below, together with the CMA's views on the comments in question. This document summarises responses according to the themes on which we consulted and wider points unrelated to a specific theme.

Mergers

“Live” European Commission Cases

- 2.3 One respondent suggested that the Guidance should set out criteria (similar to the European Commission's simplified procedure) where there would be a rebuttable presumption that the CMA will not open an investigation into a merger. The respondent suggested that the Guidance should make it clear that the CMA would not typically make an interim order in relation to mergers that have completed but satisfy these criteria, and that parties would not be expected to engage with the CMA before completing such a merger on receipt of EU clearance. The respondent further suggested that the Guidance should clarify the circumstances in which the CMA would expect to open a new investigation after Exit Day even where the European Commission indicated that the merger was unlikely to significantly impede effective competition in the EU.
- 2.4 The CMA's approach to calling in “live” cases that are under review by the European Commission would follow standard practice, as is already set out in the CMA's *Guidance on the CMA's mergers intelligence function* (CMA56). Furthermore, the CMA's policy in relation to initial enforcement orders for completed mergers is already addressed in the CMA's *Guidance on initial enforcement orders and derogations in merger investigations* (CMA60).¹ However, the CMA acknowledges the respondent's request for clarity and so has expanded the contents of paragraphs 3.6 and 3.7 of the Guidance in order to provide further details in this regard.

¹ See paragraphs 2.6 - 2.9 of CMA60 for further details.

- 2.5 One respondent suggested that the Guidance should set out the steps parties should take to facilitate discussions and cooperation between the CMA and the European Commission before Exit Day, and to expedite the completion of a UK merger notice if necessary.
- 2.6 The CMA's approach to "live" cases is likely to vary on a case-by-case basis. As noted in the Guidance, 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 and the CMA encourages parties to make early contact with it to discuss merger notification. Case teams would be best placed to advise on information requirements for a satisfactory merger notice on a case-by-case basis, which may include assessment of the Form CO or other submissions made to the European Commission. Parties should consider facilitating such assessment at an early stage, for example via the provision of consent. The CMA has added a footnote to paragraph 3.7 of the Guidance in order to provide further clarity on this issue.
- 2.7 A further amendment has been made to paragraph 3.9 of the Guidance in order to clarify the different timeframes applicable for mergers completed pre-Exit and mergers completed post-Exit.
- 2.8 The CMA also confirms (and has amended paragraph 3.10 of the Guidance in order to make clear) that it will follow its standard practice in relation to interim orders on a case-by-case basis, as set out in existing guidance (CMA60).

Antitrust

Cases being conducted by the European Commission prior to Exit Day

- 2.9 Two respondents noted the difficulties that could arise as a result of parallel investigations being conducted by the CMA and the European Commission. It was suggested that the Guidance should provide additional clarity on the way in which the CMA intends to act in the event any such scenario arises.
- 2.10 In deciding whether or not to open and continue an investigation in parallel to a "live" European Commission investigation into the same UK conduct, the CMA will have regard to its published prioritisation principles, taking into account the circumstances of EU Exit. The CMA has amended the Guidance to make it clear that as part of this assessment, in the context of assessing whether the CMA was best placed to act, the CMA would expect to consider, so far as possible, the likely direct and indirect effect on UK markets and UK consumer welfare, and any expected impact on efficiency, productivity and the wider UK economy that may flow from the European Commission's

actions. The CMA would also typically expect to liaise with the European Commission in respect of any potential parallel investigation.

Section 60A of the Competition Act 1998

- 2.11 One respondent suggested that businesses would benefit from the CMA providing some further guidance and comfort on the approach it intends to take to section 60A in the immediate term post-EU Exit, in particular in relation to consistency with pre- and post-Exit CJEU case law.
- 2.12 We do not consider it appropriate at this point to elaborate further on the CMA's future approach to consistency with CJEU case law. However, the CMA has amended paragraph 4.30 of the Guidance in order to make the wording of this paragraph consistent with other parts of the Guidance.

International Cooperation

- 2.13 Two respondents emphasised the importance of the CMA seeking appropriate bilateral or multilateral cooperation arrangements post-EU Exit as a matter of priority and, in the absence of such arrangements, continued informal cooperation between authorities on a case-by-case basis and through working with the parties.
- 2.14 As noted in paragraphs 3.12 – 3.13 of its Annual Plan,² the CMA intends to make full use of its existing close relationships with international agencies to work together, to seek and share information to the extent permissible, and to develop new ways of working to protect UK consumers from harm. While it is possible the CMA will not in future be a member of the European Competition Network, the CMA would expect to maintain strong and effective relationships with European competition authorities through new bilateral or multilateral arrangements with the European Commission and EU Member States.

Other

- 2.15 One respondent noted the draft Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2018 (the IP SI) in the context of the vertical agreements block exemption (Regulation 330/2010 OJ 2010 L102/1).
- 2.16 This particular issue is beyond the scope of the Guidance. However, as well as the IP SI and its accompanying explanatory memorandum, the Intellectual Property Office keeps up-to-date EU Exit Guidance on its gov.uk page

² Available [here](#).

(available [here](#)), which addresses exhaustion. The Government also issued a technical notice on this point in September last year (available [here](#)), which indicates that if there is no deal, the UK government will in the immediate term unilaterally continue to recognise the EEA regional exhaustion regime from Exit Day.

- 2.17 One further response received did not engage with the consultation questions or the content of the Guidance.

Appendix A: List of formal respondents

1. Ms Susan Singleton, Singeltons Solicitors
2. Dr Arianna Andreangeli, Senior Lecturer, University of Edinburgh
3. Freshfields Bruckhaus Deringer LLP
4. Unnamed individual