The CMA's consultation on

Draft guidance on the functions of the CMA after the end of the Transition Period

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Response by Freshfields Bruckhaus Deringer LLP

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RESPONSE TO THE CMA'S CONSULTATION ON ITS DRAFT GUIDANCE ON THE FUNCTIONS OF THE CMA AFTER THE END OF THE TRANSITION PERIOD

of 2 October 2020

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welcomes the opportunity to comment on the Competition and Markets Authority's (***CMA***) public consultation on its draft guidance in relation to "*the functions of the CMA after the end of the Transition Period*" (***Draft Guidance***).

1.2 Given levels of uncertainty faced by business, 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 minimise the potential impact on their businesses, customers, employees and other stakeholders.

1.3 Businesses face uncertainty as to the future of the UK competition regime, in particular the extent to which there may be 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.

2. Merger control

The CMA's intended approach to exercising discretion on jurisdiction

2.1 We note that the Draft Guidance does not give detailed guidance on the CMA's intended approach to exercising its discretion in relation to mergers that are governed by the EU merger regime up to the end of the Transition Period, but which are not initiated before the end of the Transition Period or which were initiated but have subsequently become open to CMA review.

2.2 Paragraph 3.6 of the Draft Guidance, for example, provides that the CMA may assert jurisdiction over the UK elements of a merger which is the subject of a merger decision by the European Commission (***EC***) which has been annulled, from when it becomes clear that the UK elements of the merger would not be re-examined by the EC. We consider that it would be helpful for the CMA to set out the approach it intends to take in these cases, particularly the weight, if any, that the CMA would give to the EC's analysis and to the Court's findings in its decision to annul the EC's decision.

2.3 In addition, the CMA's Draft Guidance does not provide any guidance on the approach the CMA intends to take to cases where there is an EC merger clearance decision (covering the UK elements of the merger) but where the parties elect to amend the proposed transactional structure prior to closing, in such a way that a new notification would be required under the EU merger regime (see Section VII of the Commission Consolidated Jurisdictional Notice). We consider that it would be helpful for the CMA to clearly set out the approach it intends to take in such circumstances.

Cases that will have otherwise qualified for the EC's Simplified Procedure

2.4 Separately, we believe the CMA should consider adopting in the Draft Guidance criteria similar to the principles of the EC's simplified procedure for mergers that would have satisfied the criteria had the case been initiated before the end of the Transition Period, taking account of the UK aspects of the merger. In order to benefit from the EC's simplified procedure, the parties would 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 could 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.

2.5 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 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 that would have been able to benefit from the EC's simplified procedure had the case been initiated[1]. As set out below at 2.10 and in line with paragraph 3.44 of the Draft Guidance, the CMA should endeavour to coordinate with the EC in relation to the same or related mergers.

2.6 Although the EC's procedures are governed by the separate EU merger regime, it is difficult to identify any circumstances when a merger that would have been accepted under the simplified procedure (at a time when the UK was a member of the EU) would raise concerns in the UK. We believe that the benefits of clear guidance setting out criteria (similar to those in the simplified procedure) when the CMA would not expect to intervene outweigh any potential downsides for the CMA or potential complainants. In particular, such an approach would likely significantly reduce the risk of a flood of informal approaches to the Mergers Intelligence Committee as parties seek comfort that the CMA will not take action in relation to these "no issues" cases (comfort that would otherwise most likely be required by the parties' commercial agreements).

Cases not initiated by the European Commission prior to 31 December 2020

2.7 Paragraph 3.9 of the Draft Guidance refers to the CMA's ability to issue initial enforcement orders (***IEOs***) in relation to completed mergers "*(including completed mergers which were notified to the European Commission after the end of the Transition Period)*". The current wording may cause confusion because any merger that is notifiable under the EUMR cannot be completed until it has been cleared by the EC. We suggest amending the part in parentheses to read: "*(including mergers which were notified to the European Commission after the end of the Transition Period and were subsequently cleared and completed)*".

2.8 Paragraph 3.10 of the Draft Guidance notes the risk that the CMA may prohibit a merger or require other remedies if merging parties decide to complete such mergers

[1] Such an approach would be consistent with the statements made in the CMA Chair's 21 February 2019 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).

without notifying the CMA. It would be useful for business if the Draft Guidance made clear that, as a matter of UK law, such prohibition or conditional clearance could in some cases affect non-UK components of the combination if the latter had an impact on the UK component.

UK turnover after the end of the Transition Period

2.9 The *Guidance on the functions of the CMA under the Withdrawal Agreement* (CMA113) stated that turnover of parties in the UK will no longer be relevant for determining whether a merger satisfies the EUMR jurisdictional thresholds after the end of the Transition Period.[2] We note that the Draft Guidance does not contain a similar statement. We believe that it would be helpful for business if the Draft Guidance provided further detail on when the parties' UK turnover will count for the purposes of the EUMR for mergers which straddle the end of the Transition Period, including mergers in which, for example, a binding legal agreement has been concluded before the end of the Transition Period (and the EC's jurisdiction may therefore have been established[3]) but the case has not been initiated by the EC before the end of the Transition Period. Although this is, strictly speaking, a question for the EC under EU law, clarity in the CMA's Guidance would be of useful corroborative value for businesses.

CMA cooperation arrangements with the EC after the end of the Transition Period

2.10 We welcome the statements in paragraph 3.44 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 As discussed below in the context of the transfer of the monitoring and enforcement of commitments, certain arrangements under the Withdrawal Agreement may also involve cooperation and coordination between the CMA and the EC well beyond the initial merger review.

2.12 We therefore encourage the CMA to seek appropriate bilateral or multilateral cooperation arrangements post-EU Exit as a matter of priority that cover the coordination of merger reviews and ongoing arrangements under the Withdrawal Agreement.

Transfer of EU Merger Commitments

2.13 The Draft Guidance describes the option in the Withdrawal Agreement for the transfer of responsibility for monitoring and enforcing UK elements of the commitments given to the EC in connection with EU merger cases. We suggest that the CMA provide greater detail on how it intends to approach such transfers and, following the transfer, its monitoring and enforcement role regarding the UK elements. In particular, the Draft Guidance would benefit from further detail in the following areas:

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[2] Paragraph 3.28 of *UK exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement* (CMA113).

[3] Paragraph 156 of the EC's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004.

(a) a description of the types of circumstances in which the CMA expects to agree to the transfer of responsibility. For example, whether the CMA is more likely to accept the transfer in certain circumstances or whether the CMA may proactively request the transfer of responsibility in certain circumstances;

(b) a detailed description of the transfer process. This should include whether the parties will receive advanced notice of the transfer and whether the parties who are the subjects of the commitments will have their views heard by the EC or the CMA on whether the transfer should occur. We consider that the parties' views should be heard in particular in relation to the disclosure of any information by the EC to the CMA as part of the transfer or to be disclosed between the authorities on an ongoing basis following the transfer;

(c) the CMA's powers and approach after the transfer. In particular, whether the CMA will have the power to vary the commitments (with respect to their application in the UK) and, if so, whether the transferred commitments will be treated the same by the CMA as commitments or undertakings first given to and accepted by the CMA in its own merger investigations. It would be useful if the CMA could confirm that it intends to follow its guidance on *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA11) or whether a different process will be adopted with respect to these transferred commitments;

(d) the extent of any cooperation between the EC and the CMA after the transfer. After the transfer, a party may be dealing with two authorities who could take diverging approaches, which could lead to inefficiency and confusion. As set out above, it would be useful for cooperation arrangements to be agreed as a matter of priority. These arrangements should also clarify the extent of any information sharing arrangements between authorities before/upon the transfer of responsibility or on an ongoing basis following the transfer of responsibility; and

(e) clarity as to the correct procedure for parties to raise disputes in relation to the monitoring, variation or termination of any transferred UK elements of EU merger commitments.

3. Enforcement of the competition law prohibitions

Continued Competence Cases

3.1 Although paragraph 4.4 confirms that the CMA may not open or re-open an investigation into competition concerns which are the subject of a Continued Competence Case, we consider that it would be helpful for the Draft Guidance to contain greater detail on how the CMA will determine whether competition concerns are "*the subject of*" a Continued Competence Case. For example, what test, if any, will the CMA apply in reaching this determination?

3.2 The Draft Guidance would also benefit from greater detail on the CMA's approach to enforcement in relation to Continued Competence Cases. Paragraph 4.6 of the Draft Guidance sets out the circumstances in which the CMA may commence its own

investigation into concerns which are the subject of a Continued Competence Case, insofar as the concerns relate to conduct after 31 December 2020. Paragraph 4.7 refers to the CMA having regard to the published prioritisation principles. 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 and the work already completed by the EC. In particular, for many "*live*" EC investigations, the EC will already have undertaken a significant amount of work prior to the end of the Transition Period 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.

3.3 In light of the above, we suggest that 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.

"Live" CMA antitrust investigations

3.4 Paragraph 4.8 states that, in relation to a CMA investigation of conduct that may affect trade between the UK and one or more EU Member States, all actions taken before 31 December 2020 in connection with the EU elements of the investigation will be treated as having been done for the purposes of the domestic elements of the investigation and that such actions remain valid for such purposes.[4] The Draft Guidance should be clarified to include further detail on:

(a) the CMA's approach where any EU elements cannot be accounted for in UK domestic legislation.

(b) the process for the return and / or destruction of any materials collected from parties which relate to the EU elements of the investigation only and which are therefore no longer relevant for the CMA's investigation.

(c) the CMA's approach to materials that have been collected on its behalf or which it has otherwise received from National Competition Authorities (***NCAs***) of the EU27 through the operation of Article 22 of Regulation 1/2003; and

(d) the standard that will be applied in relation to any challenge by a party to the procedural approach adopted before the end of the Transition Period in relation to the EU elements i.e. whether the UK standard will be applied even if the EU case law may differ.

[4] The Draft Guidance defines UK Prohibitions but does not define EU prohibitions. For consistency and completeness, the EU prohibitions should be defined clearly in the Draft Guidance.

Geographic scope

3.5 Footnote 74 of the Draft Guidance refers to the "*qualified effects doctrine*" and the EC's reach where conduct occurring outside of the EU falls within the EC's jurisdiction. Such conduct falls within the EC's jurisdiction if it has economic effects within the EU and such effects are immediate, substantial and foreseeable. It would be helpful if the CMA can confirm whether it considers that an equivalent principle applies regarding the CMA's jurisdiction for conduct occurring outside the UK and the CMA's approach to pursuing such conduct.

3.6 Further, in relation to the discussion of passive sales bans, it would be helpful if the CMA could elaborate on the consequences of the change in geographic scope of the Retained Block Exemption Regulations (***RBER***). For example, the Draft Guidance should confirm whether the CMA views a ban on sales into the EU or another country as potentially affecting competition in the UK and the circumstances in which such a ban would not benefit from the application of the RBER.[5] It would also be helpful to understand the CMA's view on whether a prohibition on distributors from the EU or other countries selling into the UK would be viewed as a potential breach and would not benefit from the application of the RBER.

Transfer of EU antitrust commitments and remedies

3.7 The Draft Guidance provides for the transfer of responsibility for monitoring and enforcing commitments or remedies in the UK to the CMA and concurrent regulators by mutual agreement. As with the transfer of commitments in relation to mergers, the Draft Guidance should provide greater detail on how the CMA intends to approach such transfers and, following the transfer, its monitoring and enforcement role regarding the UK elements. As set out above, in particular, the Draft Guidance would benefit from further detail in the following areas:

(a) a description of the types of circumstances in which the CMA expects to agree to the transfer of responsibility;

(b) a detailed description of the transfer process;

(c) the CMA's powers and approach after the transfer;

(d) the extent of any cooperation between the EC and the CMA after the transfer; and

(e) the correct procedure for parties to raise disputes in relation to the monitoring, variation or termination of any transferred commitments.

Section 60A of the Competition Act 1998 (CA98)

3.8 We note that, under section 60A, the CMA, concurrent regulators and the UK courts may depart from the principles of the TFEU and any CJEU case law from before the end of the Transition Period where they consider it "*appropriate*" to do so, in light of one of the prescribed factors. However, as noted at paragraph 4.20 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

[5] Footnote 24 in the EC's Guidelines on Vertical Restraints states that the "*list of hardcore restrictions applies to vertical agreements concerning trade within the Community*".

Chapter II prohibitions 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 that Court before the end of the Transition Period, so far as applicable immediately before the end of the Transition Period.

3.9 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 after the end of the Transition Period. Further guidance on this point would also benefit UK businesses and UK consumers. The absence of more detailed guidance could have a chilling effect on business activity for fear of the CMA or sectoral regulators taking a stricter stance under UK law than the European Commission would take when applying EU law. In particular:

(a) We acknowledge that the CMA states in footnote 84 that the factors in s.60A(7) represent a limited and specific set of circumstances. In that regard, it would be helpful to have further detail as to how the CMA will interpret these limited circumstances, in particular:

(i) s.60A(7)(d) regarding the "*generally accepted principles of competition analysis*" or "*generally accepted application of such principles*". For example, whether the CMA will refer to the analysis or approaches of other jurisdictions or particular schools of thought and at what point the CMA considers that such a principle or its application has become "*generally accepted*".

(ii) S.60A(7)(f) regarding "*the particular circumstances under consideration*". It would be helpful if the CMA could provide some illustrative examples of the type of limited circumstance where this provision may require it to depart from the "*no inconsistency*" principle.

(b) It would be helpful for the Draft Guidance to describe whether the CMA has immediate intentions to rely on any of the exceptions set out in paragraph 4.22 of the Draft Guidance in respect of **CJEU case law from before the end of the Transition Period**. We consider that clarity and guidance in this respect would be highly desirable, 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 (or else to provide concrete reassurance that it considers that the status quo will subsist in the immediate term). Transparency and adequate consultation with affected stakeholders should be the hallmarks of the CMA's approach where it contemplates fundamental legal change.

(c) 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 **CJEU case law after the end of the Transition Period**, with a view to ensuring the UK regime is not left behind in terms of the development of competition law after the end of the Transition Period. 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 CJEU case law after the end of the Transition Period in appropriate cases where EU competition law develops in a material respect after the end of the Transition Period.

3.10 In the event that the CMA is not minded to give any guidance on its intended approach to the application of section 60A to CJEU case law after the end of the Transition Period (i.e. (c) 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 CJEU case law from before the end of the Transition Period, and that it would be reasonable and appropriate for the CMA to do so, for the reasons set out in (b) above. In this regard, even an insertion of the CMA's relative intention as between the two situations (i.e. CJEU case law before and after the end of the Transition Period) would be a welcome addition to the Draft Guidance.

CMA leniency regime

3.11 The Draft Guidance notes the current practice under OFT1495 where parties applying for leniency to the European Commission can 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. The Draft Guidance states that this system will no longer be applicable after the end of the Transition Period and that "*no names*" markers will only be available where there are "strong justifications". OFT1495 and the Draft Guidance do not elaborate on what the CMA considers to be a "*strong justification*". Businesses deciding whether to apply for a marker and immunity would find it useful to understand the circumstances in which a "*no names*" marker could be available, as this scenario will become more common after the end of the Transition Period. Further clarity may encourage more parties to put in a marker, even if initially on a "*no names*" basis. Therefore, some additional detail in the Draft Guidance, or an update to OFT1495, would be helpful.

Retained EU law and the application of other guidance relevant to antitrust cases

3.12 The Draft Guidance identifies instances where references in retained EU law such as the RBER or references in other CMA guidance may no longer apply or must be interpreted with other materials (e.g. the Draft Guidance and the amendments made by the Competition SI) "*in mind*" after the end of the Transition Period. A number of examples are discussed in the Draft Guidance. However, there may be some instances which have not yet been contemplated and may only be discovered after the end of the Transition Period. We consider that it would be useful for the Draft Guidance to be amended to include a process through which parties can seek a view from the CMA on an expedited, no names basis where there is a perceived gap until such time as the relevant guidance or RBER can be formally updated.

Cooperation and alignment with the EC and other competition authorities

3.13 We acknowledge that after the end of the Transition Period, 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 NCAs of the Member States after the end of the Transition Period.

3.14 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.

3.15 To the extent possible, we would encourage the CMA to seek appropriate bilateral or multilateral cooperation arrangements after the end of the Transition Period as a matter of priority. It is encouraging that the Draft Guidance foreshadows the possibility of such arrangements between the CMA and the EC after EU Exit. 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 NCAs) 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. Consumer protection law enforcement

Consumer protection law

4.1 Paragraph 5.4 of the Draft Guidance identifies that in the area of consumer protection the position will change in some respects for UK businesses that are selling to EU consumers and where UK consumers are buying from EU traders. We would encourage a high-level explanation in the Draft Guidance regarding these changes rather than simply referring to the consumer protection statutory instruments made under section 8 of the Withdrawal Act and their Explanatory Notes.

4.2 Paragraph 5.7 of the Draft Guidance also states that UK traders which sell to consumers in the EU Member States after 1 January must "*continue to comply with UK law as a minimum*" when making sales to consumers in the EU27. This is presumably intended as a shorthand way of saying that UK law governing sales to EU consumers on 1 January will be materially the same as it is now, and so UK traders should look to UK law if they want to understand the rules governing those sales into the EU27; that would be consistent with the warning at footnote 110 that UK and EU law may diverge over time. If so, this could be more clearly stated. In particular, if and to the extent that consumer protection laws in the UK and the EU diverge, it is not the case that compliance with UK law as a minimum will be sufficient. Indeed, strictly speaking, UK law is directed at sales to consumers in the UK and so does not necessarily apply to sales to non-UK consumers at all. It is therefore legally incorrect to state that UK traders must comply with UK law "*as a minimum*" when selling abroad.[6]

[6] For example, over time, the UK might introduce additional mandatory terms for consumer contracts made with a UK consumer, and these go further than what is required by EU law or the law of individual EU Member States. In those circumstances, why should a UK trader need to ensure that its

Consumer protection enforcement

4.3 Paragraph 5.14 of the Draft Guidance notes that, as from 1 January 2021, "*the CPC Regulation no longer applies to the UK and the CMA's formal role under it ceases*". We suggest deleting the word "*formal*" here, as the CMA will have no role under the CPC Regulation after the end of the Transition Period, formal or otherwise.

4.4 Paragraph 5.15 of the Draft Guidance provides that the CMA will seek to continue to work with EU enforcers and other international counterparts. We would encourage further explanation as to what this would mean for UK businesses in practice and on what legal basis the CMA considers that such cooperation can operate. For example:

(a) The Draft Guidance should clarify whether the CMA intends to continue to assist EU enforcers with their investigations of UK businesses directing trade activities to EU consumers and breaching EU or local national consumer law, despite the fact that the CPC Regulation no longer applies. If so, the Draft Guidance should set out the legal basis on which the CMA would rely when doing so, given that – as noted at paragraph 5.9 of the Draft Guidance – the related investigatory powers will have been removed.

(b) If the CMA does intend to continue coordination with EU enforcers more generally (perhaps replicating practices under the CPC Regulation, albeit in an "*informal*" manner; paragraph 5.14), the Draft Guidance should set out the information-sharing arrangements that are envisaged. In particular, it should set out the protections that will be afforded to confidential, privileged and/or trade secret information relating to investigations (e.g. supplied by traders in response to statutory requests for information). We note, in this regard, that the CPC Regulation currently envisages that "*[i]nformation exchanged between competent authorities should be subject to strict rules on confidentiality and on professional and commercial secrecy, in order to ensure investigations are not compromised or that the reputations of traders are not unfairly harmed. Competent authorities should decide to disclose such information only when appropriate and necessary, in accordance with the principle of proportionality, taking into account the public interest… and on a case-by-case basis*".[7] Equivalent protections must be put in place in respect of any "*informal*" cooperation with EU27 authorities, and these should be spelled out in the Draft Guidance.

CMA law enforcement guidance

4.5 It would be helpful if CMA58 is updated so that it reflects the updated position after 31 December 2020.

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contract terms governing sales to e.g. French consumers contain the same level of protection as for UK consumers? That could put UK firms at a competitive disadvantage vis-à-vis their foreign counterparts.

[7] CPC Regulation, recital 41.

5. Concluding remarks

5.1 We appreciate the opportunity to respond to this consultation. Given current levels of uncertainty facing businesses operating in the UK and EU, we believe that clear practical guidance on the issues covered by the Draft Guidance is essential as we approach the end of the Transition Period and going forward from 1 January 2021. We would be happy to discuss any of the issues raised in this response with the CMA if that would assist.

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30 October 2020