

## Draft Guidance on the Functions of the CMA after the end of the Transition Period

### Submission from the Joint Working Party of the Bars and Law Societies of the UK on Competition Law (JWP) <sup>1</sup>

30 October 2020

1. The JWP welcomes the opportunity to comment on the CMA's *Draft Guidance on the Functions of the CMA after the end of the Transition Period* (the "**Draft Guidance**").
2. The JWP considers that the Draft Guidance provides a useful overview of the changes to the CMA's powers and processes brought about by the United Kingdom's exit from the European Union. It summarises, in one document, a complex set of provisions spread across various statutory instruments. As such, the Draft Guidance should prove to be very helpful to businesses in the UK and their advisers.
3. In answer to the question at para 3.1 of the consultation document, we consider the content, format and presentation of the Draft Guidance to be clear.<sup>2</sup> Likewise, in answer to the questions at para 3.2, our view is that the Draft Guidance provides sufficient information in respect of all of the issues covered by it.
4. In response to para 3.3 of the consultation document, we would make just two further comments:
  - 4.1 First, we note the CMA's view of the interpretation of section 60A(7)(f) of the Competition Act 1998, specifically that this provision should not be interpreted expansively. Whilst this is ultimately a matter for the courts, we welcome and agree with that interpretation, which we consider is consistent with the principles of legal certainty and consistency. If the CMA, concurrent regulators and the courts had wide discretion to depart from pre-Brexit case law, it would make both commercial decision-making and advising on the law more difficult, both of which would be to the detriment of businesses in the UK. We note in this respect that the other sub-clauses of section 60A(7) already provide a certain degree of leeway for the interpretation of the domestic prohibitions to diverge from the interpretation of their EU law counterparts.
  - 4.2 Second, we consider that it would be useful if, over the course of the coming months, the CMA were to update all relevant guidance documents to reflect the changes brought about by Brexit, rather than simply rely on what is said in this guidance

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<sup>1</sup> The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprise barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. The JWP is co-chaired by George Peretz QC of Monckton Chambers (GPeretz@Mockton.com; tel 020 7405 7211) and Brian Sher, partner, CMS Cameron McKenna Nabarro Olswang LLP (brian.sher@cmscmno.com; tel 020 7524 6453).

<sup>2</sup> We should state, however, that we have not conducted a forensic review of the Draft Guidance alongside the statutory instruments in question, and so we do not comment on its accuracy.

document. That too would be very helpful to businesses and their advisers. Thus, for example, it would be preferable for paras 4.41-4.42 of OFT1495 to be explicitly amended, rather than leave that guidance document to be read alongside para 4.27 and fn 89 of the Draft Guidance. To be clear, this is not intended as a criticism of the Draft Guidance but merely as a constructive suggestion for (limited) further work on the CMA's part to ensure that its suite of guidance is as comprehensible and accessible to a wide audience as possible.

**JWP**