



Law Society  
of Scotland

# Consultation response

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

October 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Competition Law Committee welcomes the opportunity to respond to the UK Government's consultation on *Guidance on the functions of the CMA after the end of the Transition Period*.<sup>1</sup> We have the following comments to put forward for consideration.

## Response to questions

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**Q1: Is the content, format and presentation of the draft guidance sufficiently clear? If there are specific parts of the draft guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

Overall, we consider that presentation of the guidance is clear. However, we are of the view that the provisions relating to mergers could be represented graphically, for example as a flowchart, in order to help users to identify the relevant allocation of responsibility and accordingly the relevant procedures which will be followed.

Additional comments on the content are set out below.

**2 We are particularly interested in your views on the following areas:**

**(a) Does the draft guidance generally provide sufficient information and clarity in relation to the jurisdiction of merger cases which are being reviewed at the end of the Transition Period (i.e. 'live' cases)? Does the draft guidance generally provide sufficient information and clarity in relation to the treatment of merger cases opened after the end of the Transition Period? If**

<sup>1</sup> <https://www.gov.uk/government/consultations/draft-guidance-on-the-functions-of-the-cma-after-the-end-of-the-transition-period>

not, please indicate if there are any aspects of the merger control rules and procedures on which further information would be useful.

**(b) 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 the end of the Transition Period (i.e. 'live' investigations)? Is there enough clarity provided in relation to the treatment of antitrust and cartel investigations after the end of the Transition Period? If not, please indicate if there are any aspects of the antitrust and cartel enforcement procedures on which further information would be useful.**

**(c) 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 the end of the Transition Period and its approach to the exercise of its functions?**

- *1.8 The CMA guidance on these functions may, however, refer to concepts under EU law and such 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.*

We presume that references to EU concepts will continue to be understood and have effect long after EU law has ceased to have effect in the UK - ie for as long as they are useful and understood and are not replaced. We also note that EU law does continue to have effect in NI for certain purposes and therefore EU law continues to have effect in the UK for a considerable period. This provision could be improved by reflecting these considerations.

- *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 UK and mergers may be subject to review by both the CMA and the European Commission.*

We were of the view that this could be clearer. The EU Merger regime will not take into account UK turnover and the EU regime will not exclude UK CMA action but the European Commission will continue to be able to review a UK merger which has effects within the EU (and meets thresholds or other bases for jurisdiction). The EU will no longer be concerned about anticompetitive effects of any merger felt solely within UK markets.

- *3.7 For cases where the European Commission has not formally initiated proceedings 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.*

We note that proceedings are "deemed" to have been initiated where notification has taken place but this wording refers to "formally initiating proceedings": there appears to be a tension here which requires to be resolved in the interests of clarity.

Again, we note that with respect to Northern Ireland, the Guidance could outline better the position of competition law enforcement there. It would also be helpful to set out how the CMA and the European Commission will liaise as regards their respective responsibilities in NI. They are mostly separate but, for example, how would the CMA deal with competition issues in relation to the single electricity market on the island of Ireland?

### **3. The CMA would also welcome the views of stakeholders on any other aspects of the draft guidance.**

We also note that additional guidance would be needed if the CMA is allocated responsibility for the UK's state aid regime following withdrawal.

[REDACTED]