

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

Summary of responses

© Crown copyright 2020

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU, or email: psi@nationalarchives.gov.uk.

This publication is also available at: www.gov.uk/cma

Contents

1. Introduction	2
2. Issues raised during the consultation and our response	5
Appendix A: list of formal respondents	16

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 United Kingdom's exit from the European Union took place at 11pm UK time on 31 January 2020. Article 126 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the **Withdrawal Agreement**)¹ provides for a 'transition period' which will end at 11pm UK time on 31 December 2020 (the **Transition Period**).²
- 1.3 The CMA has prepared draft guidance to explain how the Transition Period ending will affect its powers and processes for antitrust and cartel enforcement, merger control and consumer law enforcement after the end of the Transition Period (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 31 December 2020.
- 1.4 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.

¹ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 13 December 2019.](#)

² In the remainder of this document, we refer to the end of the Transition Period and 31 December 2020 interchangeably. References to 31 December 2020 should be taken to mean **11:00pm** on 31 December 2020, when the Transition Period ends under the terms of the Withdrawal Agreement.

Purpose of this document

- 1.5 The CMA published the draft Guidance on its website on 2 October 2020 in order to run a public consultation from that date until 30 October 2020 (the **Consultation**).
- 1.6 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 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.*
 - (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 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 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 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.*
 - (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 the end of the Transition Period 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.*
- 1.7 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. Non-confidential versions of all

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 six formal 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](#). One further response received did not engage with the consultation questions.
- 2.2 Summaries of the responses received 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.³

The legal framework

- 2.3 One respondent suggested that references to 'concepts under EU law' in CMA guidance documents will continue to be understood and have effect even after EU law ceases to have effect in the UK. The same respondent noted that EU law will continue to have effect in Northern Ireland for certain purposes pursuant to the Withdrawal Agreement. The respondent suggested that these points should be reflected in the Guidance.
- 2.4 References to any such concepts under EU law contained in CMA guidance will continue to be understood and have effect unless and until the EU law to which these concepts relate is superseded, whether through the application of section 60A CA98 or by the ruling of any Court or Tribunal with the power to disapply or overrule these references. The Guidance has been amended to reflect this point.
- 2.5 With regard to Northern Ireland, the CMA is aware of the continued application of EU law beyond the end of the Transition Period in certain specific circumstances in Northern Ireland, as set out in the Withdrawal Agreement and in particular the Protocol on Northern Ireland appended to that agreement. The Northern Ireland Protocol does not include provisions affecting the CMA's antitrust, merger control or consumer functions, and its application is beyond the scope of the CMA's Guidance.

³ We note that a number of minor amendments, primarily of an editorial nature, have also been made to the Guidance. These have been made in order to clarify certain aspects of the original draft Guidance, and to improve the general 'readability' of the document. They are not covered in this Summary of Responses.

Merger control

Parallel merger review

- 2.6 One respondent noted that while the European Commission's merger review will no longer cover anticompetitive effects that arise solely in the UK, the European Commission will remain competent to review a merger (including a 'UK merger' that is capable of being reviewed by the CMA) which has effects in the EU provided that the transaction meets the relevant EU thresholds.
- 2.7 We have clarified this position in the Guidance, which also makes clear that mergers may be subject to review by both the CMA and the European Commission.

Case allocation around 31 December 2020

- 2.8 One respondent requested more information on the CMA's approach to exercising jurisdiction over the following transactions:
- A merger covered by the EU merger regime until the end of the Transition Period which is either not initiated before the end of the Transition Period or is initiated but subsequently becomes subject to CMA review.
 - A merger which was the subject of an EU merger decision which has been annulled and it is clear that UK elements will not be re-examined by the European Commission. The query related specifically to the weight to be given by the CMA to the European Commission's analysis and Court's findings.
 - A transaction, cleared by a decision of the European Commission that covered UK elements, which is subsequently restructured by the parties before closing and, therefore, requires a new notification to the European Commission.
- 2.9 We consider that the Guidance sufficiently outlines the CMA's approach to jurisdiction over cases where EUMR merger proceedings are not initiated before the end of the Transition Period.
- 2.10 We do not consider it appropriate at this point to elaborate on the CMA's future approach to giving weight to European Commission analysis and European Court findings.
- 2.11 An amendment has been made to paragraph 3.4 to encourage merger parties to consider the potential effect that transaction restructuring could have on

jurisdiction and to discuss any intended restructuring with the CMA before implementing it.

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

- 2.12 One respondent suggested that the wording of paragraph 3.7, which concerns cases where EUMR merger proceedings are not considered initiated prior to 31 December 2020, should be clarified.
- 2.13 An amendment has been made to paragraph 3.7 to replicate the same language used in other parts of the Guidance.
- 2.14 Another respondent suggested amending paragraph 3.9 to reflect that the CMA may issue initial enforcement orders (IEOs) in relation to mergers notified to the European Commission after the end of the Transition Period and subsequently cleared and completed. The same respondent suggested that the Guidance should clarify that the CMA's prohibition or conditional clearance of a completed merger 'could in some cases affect non-UK components of the combination if the latter had an impact of the UK component'.
- 2.15 These issues are not unique to EUMR merger proceedings that are not considered initiated prior to 31 December 2020 and the CMA's approach is already set out in its published guidance. An amendment has nevertheless been made to paragraph 3.9 to clarify when the CMA may issue initial enforcement orders for completed mergers.

Simplified procedure

- 2.16 One respondent suggested the introduction of criteria similar to the European Commission's simplified procedure for cases which would have met the criteria for a simplified procedure had they been initiated before the end of the Transition Period. According to the respondent, such criteria would set a rebuttable presumption that the CMA will not intervene on a merger that would have been covered by the EU simplified procedure.
- 2.17 UK merger control is voluntary in nature and there is no requirement for merging parties to notify transactions that self-evidently do not raise competition concerns. The CMA's approach to calling in mergers for investigation is already set out in its published guidance. We do not believe that a rebuttable presumption linked to how the European Commission might have investigated a merger is an appropriate way for the CMA to fulfil its statutory duties.

Other

- 2.18 One respondent suggested the use of a flowchart to explain ‘the allocation of responsibility’ and procedures in relation to the mergers.
- 2.19 We consider the guidance already provides sufficient clarity on this point.

Enforcement of competition law prohibitions (‘antitrust’, including cartels)

Cases initiated by the European Commission before 31 December 2020

- 2.20 One respondent suggested that the Guidance should clarify the CMA’s approach to enforcement in relation to ‘Continued Competence Cases’. It was suggested that the CMA should provide additional details as to how it will determine whether ‘competition concerns’ are the subject of a Continued Competence Case, and how it will exercise its discretion in relation to parallel investigations. The respondent proposed that the CMA’s decision to investigate should be based on proportionality and efficiency.
- 2.21 The CMA has the power to ensure that UK consumers and businesses and the UK economy are protected from anti-competitive practices. As a consequence, if it appears that the intervention of the European Commission is insufficient to achieve this aim, the CMA can step in to ensure any enforcement ‘gap’ that leaves UK consumers and businesses unprotected is covered.⁴ When assessing whether such action is necessary the CMA will have regard not only to its prioritisation criteria, but also to the consideration of whether any parallel investigation is needed to protect consumers, businesses or the economy in the United Kingdom. The CMA will as usual be bound by principles of procedural propriety. It does not consider it appropriate to fetter its discretion beyond those principles in terms of how it will address competition concerns that are not the subject of a Continued Competence Case as that assessment is naturally case-specific and will depend on the relevant context.

⁴ In respect of Continued Competence Cases, the CMA will be able to take action to address competition concerns that are not the subject of the Continued Competence Case immediately and any other enforcement gap following the conclusion of the European Commission’s investigation.

'Live' CMA antitrust investigations

- 2.22 One respondent requested further details on the CMA's treatment of cases which are 'live' at the end of the Transition Period and in particular:
- the CMA's approach where no EU element can be accounted for in UK domestic legislation;
 - 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;
 - the approach to materials that have been collected on its behalf or which it has otherwise received from National Competition Authorities of Member states through the operation of Article 22 of Regulation 1/2003;
 - 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.
- 2.23 The CMA's approach to 'live' cases is likely to vary on a case-by-case basis. In the CMA's experience, it is very rare that materials are collected only for the EU elements of an investigation and in the vast majority of cases such information, where it exists, continues to be relevant to the investigation, whether because it has a direct bearing on the CMA's case or because it may be relevant to the parties' rights of defence. The Competition (Amendment etc.) (EU Exit) Regulations 2019 are, moreover, clear that *'documents and other information obtained, and representations made, before exit day for the purposes of, or in connection with, the EU elements of an investigation are to be treated as obtained or made for the purposes of, or in connection with, the domestic elements of that investigation'*.⁵ However, if parties have specific concerns relating to materials collected by the CMA that are relevant to the EU elements of the cases in which they are involved, they may contact the relevant members of the CMA case team.
- 2.24 In relation to materials obtained under Article 22 of Regulation 1/2003, the Withdrawal Agreement governs the use of such materials after the end of the Transition Period. With respect to the standard to be applied in relation to any challenge, it is not the CMA's practice to take a different procedural approach to the EU and domestic elements of a case. A case is initiated under one or more of the sub-sections of section 25 CA98 and after that is run as a single

⁵ See section 6(4)(c) of Schedule 4 to the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#).

case. Procedural concerns can be raised with the Procedural Officer and the rules governing complaints to the Procedural Officer do not distinguish between the EU and domestic elements of a case.

Geographic scope

- 2.25 One respondent queried whether the CMA considers applying the ‘qualified effects doctrine’ when determining whether it has jurisdiction to review conduct which took place outside the UK.
- 2.26 The CMA considers that this issue is beyond the scope of the Guidance.

Leniency

- 2.27 Two respondents raised the need for additional information on the leniency regime. Specifically, more details were requested on the status of summary applications made before the end of the Transition Period and whether applicants are expected to provide a full immunity or leniency application to the CMA, in particular when proceedings are not initiated before the end of the Transition Period.
- 2.28 Clarification was also sought in one of the responses in relation to the ‘strong justifications’ necessary to grant a marker on a ‘no names’ basis following the end of the system provided for in the CMA’s [Applications for leniency and no action in cartel cases guidance \(OFT1495\)](#), pending confirmation from the European Commission as to whether immunity is available at EU level.
- 2.29 The CMA notes that the provisions of paragraph 4.42 of OFT1495, which deal with summary applications, continue to apply until the end of the Transition Period. The CMA will assess on a case-by-case basis whether to request from a summary leniency applicant further information in respect of the UK aspects of the reported conduct. Additional clarification in the Guidance has been provided in this regard.
- 2.30 The CMA has also updated the Guidance to provide additional clarity on its approach to ‘no names’ markers. In short, after the end of the Transition Period ‘Commission immunity application’ cases will be treated in the same way as other cases, meaning that the CMA’s current approach to Commission immunity application cases will no longer be applicable, and a strong justification will be needed for the CMA to grant a ‘no names’ marker. Based on its experience to date, the CMA would expect this to arise only rarely.
- 2.31 The CMA expects to review and update OFT1495 in due course, including to reflect changes as a result of EU Exit.

Commitments

2.32 Two responses covered the transfer of EU commitments to the CMA and suggested that the Guidance should clarify the following:

- the circumstances in which the CMA would consider accepting the transfer of commitments;
- when the transfer of the monitoring and enforcement of UK elements of commitments to the CMA would take place;
- whether the CMA intends proactively to seek the transfer of commitments;
- whether the CMA would consider requests from affected parties to seek such a transfer and which factors would be taken into consideration by the CMA;
- what the process for the transfer of commitments would look like, in particular whether parties will be notified in advance and whether they will be consulted in relation to the transfer;
- the CMA's power and approach to the transferred commitments, including:
 - whether it would be able to vary the commitments;
 - whether transferred commitments would be treated similarly to commitments offered to and accepted by the CMA;
 - whether the CMA would follow CMA11 or adopt a different process;
- whether the CMA and the European Commission would cooperate following the transfer of commitments, for example through a cooperation agreement and information sharing; and
- how parties can raise objections in relation to the monitoring, variation and termination of any transferred UK element of EU merger commitments.

2.33 It is important to note that any decision to transfer responsibility for the monitoring and enforcement of commitments from the European Commission to the CMA (or relevant UK concurrent regulator), as envisaged by Article 95(2) of the Withdrawal Agreement, requires **agreement** between those parties. As such, it is not for the CMA to set out unilaterally how such a transfer will take place. The CMA will approach any such potential transfer – including whether proactively to seek a transfer – on a case-by-case basis. The CMA also notes that commitments decisions may differ in terms of whether they have a review clause or not and in terms of what monitoring and

reporting obligations may apply. It is therefore not appropriate to comment generally on how parties would be able to raise objections in relation to those elements.

Section 60A of the Competition Act 1998

- 2.34 Three respondents referred to section 60A of the Competition Act 1998 in their responses.
- 2.35 One respondent endorsed the CMA's view that section 60A(7)(f) should not be interpreted expansively.
- 2.36 Two respondents suggested that businesses would benefit from the CMA providing further guidance and comfort on the approach it intends to take to section 60A, at least in the immediate or short term after the end of the Transition Period. They also noted that uncertainty in this regard may have a chilling effect on commercial activities. One respondent suggested the use of open letters, warning or no-action letters in the event the CMA was planning on taking action that would diverge from pre-Exit EU law.
- 2.37 The other respondent further suggested that the Guidance should clarify the following aspects:
- the CMA's intended approach to the application of section 60A, i.e. departing from CJEU case-law pre-dating and post-dating the end of the Transition Period.
 - the CMA's interpretation of the factors in section 60A(7)(d) and (e).
- 2.38 We do not consider it appropriate at this point to elaborate further in the Guidance on the CMA's future approach to consistency with the principles of the TFEU and CJEU case law. Within the boundaries of the law, and the explanation in the Guidance, we will consider cases on their merits. We do not consider that it would be in the interests of effective competition enforcement to constrain the discretion of future decision-makers in this respect.

Block exemption Regulations

- 2.39 Two respondents suggested that the Guidance should provide more clarity on geographic scope. In particular, the respondents queried the circumstances in which a ban on passive sales may fall within the scope of Chapter I prohibition, as well as the impact of a distributor being based outside the EU and the UK.

- 2.40 One of these respondents requested more information on the extent to which a restriction on active and passive cross-supplies between two authorised distributors in a selective distribution system (one based in the UK and the other based in the EU), would fall outside the scope of the Chapter I prohibition.
- 2.41 That respondent further requested guidance on the CMA's intention to update the Retained Block Exemption Regulations, in light of the European Commission's on-going process of updating the EU Block Exemption Regulations. Another suggestion related to the creation of a CMA webpage dedicated to the consolidation of UK competition law provisions, guidance and retained EU competition law including Retained Block Exemption Regulations.
- 2.42 The CMA considers that paragraph 4.35 of the EU Exit Guidance is not meant exhaustively to cover all scenarios in relation to passive sales, but rather to provide an example on how geographic scope is relevant to certain provisions of the Retained Block Exemption Regulations.
- 2.43 The CMA is currently considering its approach to the Retained Block Exemption Regulations. Further information in this regard will be provided in due course.

Consumer protection law enforcement

- 2.44 One respondent requested timely guidance in advance of any changes in the CMA's approach to enforcement of consumer protection law.
- 2.45 Another respondent suggested that the Guidance provides a high-level explanation of the changes to consumer protection in relation to UK businesses selling to EU consumers, and for UK consumers buying from EU traders.
- 2.46 This respondent also raised concerns on the wording of paragraph 5.7 and paragraph 5.14 of the Guidance. The respondent also suggested that the Guidance should clarify how the cooperation between the CMA and EU enforcers and other international counterparts would take place, including the legal basis on which it would operate.
- 2.47 The CMA has and will continue to take an active role in international enforcement and will seek to continue to work with EU enforcers - as it already does with enforcers from elsewhere - for the benefit of UK consumers. The legal changes to Part 8 EA02 and related legislation made as part of the EU Exit process are largely of a technical nature. They will be reflected when

the CMA's [Consumer protection enforcement guidance \(CMA 58\)](#) is reviewed and updated in due course.

- 2.48 A description of the changes to substantive consumer protection law made under the Withdrawal Act is outside the scope of this Guidance.

International cooperation

- 2.49 Three respondents noted that the Guidance referred to cooperation between the CMA and the European Commission. It was suggested that the CMA should provide further guidance on how the coordination will take place whilst ensuring that confidentiality and parties' rights of defence are preserved.
- 2.50 One of these respondents suggested that the CMA should enter into bilateral or multilateral cooperation arrangements with the European Commission and National Competition Authorities of EU Member States. In the absence of such arrangements, the respondent argued for informal cooperation on a case-by-case basis, even when this involves requiring consent of the parties under investigation.
- 2.51 The CMA is not in a position, at present, to provide additional guidance on the way in which it will cooperate with the European Commission and the National Competition Authorities of EU Member States. As noted in our annual plan for 2020/21, however, we have been working closely with Government to seek to ensure that our future relationship with the EU best complements the UK competition and consumer protection regimes, ensuring wherever possible that we can continue to cooperate closely with the European Commission and our EU neighbours.

Other

- 2.52 One respondent suggested that the CMA should update all relevant guidance in order to reflect changes resulting from EU Exit. Another respondent specifically recommended the update of CMA58. This respondent noted that the Guidance refers to instances where retained EU law provisions may no longer apply or must be interpreted with other materials in mind after the end of the Transition Period. According to the respondent, the Guidance should set out a process that allows parties to seek a view from the CMA 'on an expedited, no name basis' when it is not clear how to interpret a provision until a formal update takes place.
- 2.53 One respondent suggested the CMA should publish guidance on any UK state aid or subsidy control regime, to the extent that any such regime is to exist.

2.54 The CMA proposes to make appropriate updates to CMA58 to reflect EU Exit and other recent legal developments in due course. The CMA will also continue to assess the need for other guidance documents to be updated in light of EU Exit, and will keep stakeholders updated in this regard in the normal way.

Appendix A: list of formal respondents

1. Baker McKenzie LLP
2. Freshfield Bruckhaus Deringer LLP
3. International Airlines Group and British Airways PLC
4. Joint Working Party of the Bars and Law Societies of the UK on Competition Law
5. Law Society of Scotland
6. Association of Chief Trading Standards Officers