SQUIRE PATTON BOGGS

The CMA's Draft Guidance on its Functions Post-Exit Day

UK – November 2020

Executive Summary

The Competition and Markets Authority's (**CMA**) Draft Guidance explains how the CMA intends, after 31 December 2020 Exit Day, to:

- Apply and incorporate EU rules, principles and decisions adopted up to Exit Day into the UK legal order (paragraph 3 of this client alert)
- Coordinate its approach to new cases with past, current and future EU investigations – in particular, **Antitrust** (paragraphs 9-10 of this client alert) and **Merger Control** (paragraphs 5-7 of this client alert) investigations

This Draft Guidance poses, in our view, serious risks for past and current defendants of EU Commission's investigations – in particular:

- **Antitrust** – Post-Exit Day the CMA will be able to:
  - Open a parallel inquiry to ongoing EU investigations (albeit the CMA investigation will be limited to the post-Exit UK aspects of the potential infringement); the Draft Guidance does not explain how the CMA will be able to isolate the post-Exit Day UK aspects of infringing conduct without infringing defendants' rights of defence
  - Re-open the UK aspects of certain antitrust investigations closed by the EU Commission
  - Investigate the UK aspects of EU decisions annulled by the EU Courts
- **Merger control** – Post-Exit Day:
  - The EU Commission will retain exclusive jurisdiction over transactions formally notified to the EU under the EU Merger Control Regulation (**EUMR**) prior to 23 December 2020
  - The CMA and the EU Commission will each have jurisdiction over transactions that (a) meet both the EU and the UK thresholds; and (b) have not been formally notified to the EU prior to 23 December 2020

    For deals for which signing is expected around Exit Day, merging parties should carefully consider the implications of the timing of any notification to the EU Commission on condition precedents provisions and deal timetable due to the risk of a parallel/additional CMA review starting on 1 January 2021 over deals not notified to the EU Commission before 23 December 2020)

Finally the Draft Guidance regrettably does not explain how the removal of references to EU key concepts in UK legal instruments such as "the objective of achieving an integrated internal market in the EU" (which is relevant in various instances, for example, exclusivity in distribution agreements) will impact the substance of UK competition rules.

This client alert provides a description, and a critical review, of the CMA's Draft Guidance.

Introduction

On 2 October 2020, the UK CMA issued draft guidance on how it intends to perform its statutory functions after (**Exit Day**) (the **Draft Guidance**) and invited comments by 30 October 2020.

The Draft Guidance provides an overview of the impact of the European Union (Withdrawal) Act 2018 (**Withdrawal Act**) and the related Statutory Instruments (**SI**)[1] on the UK legal framework and explains the legal changes expected for merger control and antitrust cases in the UK.

As regards the UK legal framework, the key points covered in the Withdrawal Act are:

- EU law will be converted to UK law after Exit Day, and EU-derived UK law will be maintained (together, **EU Retained Law**)
- EU Retained Law will be interpreted according to the case law of the Court of Justice of the EU (**CJEU**) adopted up to Exit Day; however, the UK Supreme Court and Scotland's High Court of Justiciary (and, in specified circumstances, UK lower courts) will no longer be bound by CJEU case law
- The EU Commission will continue to have jurisdiction over the UK aspects of merger control, antitrust and cartel proceedings formally initiated before Exit Day (**Continued Competence Cases**)
- The EU Commission's decisions in Continued Competence Cases, as well as decisions adopted before Exit Day, will be binding in the UK and subject to the jurisdiction of the CJEU
- Save for some exceptions, the CMA will be required "to act with a view to securing" that there is no inconsistency between the principles it applies and the decisions it reaches, on the one hand, and CJEU decisions, on the other

As such, the Draft Guidance does not make any direct changes to the substance of competition rules in the UK. However, removing references to key EU concepts such as "the objective of achieving an integrated internal market in the EU" will inevitably impact the enforcement of competition law in the UK over time and the UK government has already announced a review of its competition policy post-Brexit.[2]

1 Including the Competition (Amendment etc.) (EU Exit) Regulations 2019 (the **Competition SI**); the Competition (Amendment etc.) (EU Exit) Regulations 2020 (the **Implementation SI**); the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2018 (the **Consumer Protection SI**); and the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020.

2 On 14 September 2020, John Penrose MP was tasked with leading a review exploring how to bolster UK competition policy. The terms of reference of the review include the following key questions: how can the UK's competition regime best: (1) play a central role in meeting the challenges of the post-COVID-19 economy and in driving the recovery?; (2) contribute to the government's aim of levelling up across all nations and regions of the UK?; (3) increase consumer trust, including by meeting the 2019 Manifesto commitment to tackle consumer rip offs and bad business practices, and by ensuring the competition regime operates in a way which is strong, swift, flexible and proportionate?; (4) support UK disruptors taking risks on new ideas and challenging incumbents?; and (5) make best use of data, technology and digital skills that are vital to the modern economy; available at: https://www.gov.uk/government/news/john-penrose-mp-to-lead-review-exploring-how-to-bolster-uk-competition-policy

Merger Control

After Exit Day:

- If the EU Commission has formally[3] initiated a merger review before 23 December 2020 (i.e. the last working day in the EU Commission's official calendar before Exit Day), the EU will retain exclusive jurisdiction over it
- If no formal review has been initiated, the EU Commission will no longer have jurisdiction over the UK aspects (and UK turnover will not be taken into account when assessing whether the EU Commission has jurisdiction). Accordingly, mergers will potentially be subject to parallel reviews by the CMA and EU Commission when they trigger the relevant merger control thresholds set out in the UK Enterprise Act 2002 (**EA2002**) and the EUMR, respectively

Merging parties should, therefore, carefully consider the impact of the timing of any notification to the EU Commission on condition precedents provisions and deal timetable due to the risk of a parallel/additional CMA review. This risk is potentially material in light of the following factors:

- The CMA has four months to "call in" a transaction from the time that it has been made public, and review and refer it (whether the transaction is contemplated or has been completed)
- The CMA's interpretation of the EA2002 jurisdictional thresholds has expanded, which resulted in the CMA asserting jurisdiction over mergers where:
  - The Buyer[4] or the Target[5] had no or only limited UK revenue
  - The Buyer only acquired minority shareholdings in the Target[6]
- The CMA has recently toughened its assessment of mergers, which resulted in a higher proportion of mergers referred for a Phase 2 review in FY2020[7] to date (around 40%, compared to 20% in FY2019), two mergers blocked after a Phase 2 review since 1 April 2020, four mergers provisionally blocked at time of publication, and three mergers abandoned by the parties in the face of a Phase 2 review or prohibition decision; one of these cases includes a situation in which the Target had no UK revenue[8]

The Draft Guidance, unfortunately, falls short on providing clarification and/or assurances with regards to:

- **Co-operation with the EU Commission** – Although the Draft Guidance indicates that "the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the EU Commission as with other competition authorities", it is desirable for a cooperation agreement to be negotiated and put in place as soon as possible to provide for a more rigorous coordination mechanism to align proceedings, timelines and, to the extent possible, outcomes (including remedies) with the EU Commission. In particular, the disclosure/treatment of internal documents should be aligned between the CMA and the EU Commission, in particular in light of the recent CMA fines imposed for late compliance with s109 notices in relation to international deals.
- **Consistency with EU law** – The Guidance's section on merger control does not refer to the provisions of the new Section 60A CA98[9] (while it does so in the Antitrust section) which requires the CMA to ensure consistency between the interpretation of the "UK Prohibitions"[10] and EU rules pre-dating Exit Day – in particular, "to have regard to any relevant decision or statement of the EU Commission made before exit day and not withdrawn." Interestingly, the CMA recently announced that it will issue a new guidance paper for the assessment of mergers before the end of the year, i.e. before Exit Day.[11]
- **Annulled EU merger control decisions** – Paragraph 3.6 of the Guidance gives the CMA the possibility of asserting jurisdiction over the UK aspects of a merger where the EU decision over that case is annulled. The Guidance, however, does not explain how this could be reconciled with the time limits set out in Section 24 EA2002 (pursuant to which the CMA may refer a completed merger for a Phase 2 investigation until the later of four months after the date the merger completed/is made public). At the date of the annulled EU decision, the four-month window will have elapsed in all circumstances.
- **Pre-notified mergers** – As noted above, it would appear to be the case that the CMA could assert jurisdiction over mergers pre-notified to the EU before Exit Day but not formally notified. Given how lengthy and intensive pre-notifications can be (in particular in the COVID-19 context), the Guidance should either include a cooperation mechanism with the EU or reassurances for merging parties that the CMA will not unreasonably seek jurisdiction in such context, in particular, as it could derail the integration process anticipated by merging parties.

Antitrust Investigations

After Exit Day, the Draft Guidance indicates that:

- The EU Commission will retain exclusive jurisdiction to progress formally[12] initiated EU-wide investigations with an UK element, except where:
  - The conduct investigated is ongoing post-Exit Day
  - The (anticompetitive) effects of such conduct are felt in the UK

  In this scenario, the CMA will be allowed to investigate the "post-Exit Day" effects of such conduct in parallel with an investigation by the EU Commission. This is likely to be the case for ongoing investigations into abuse of dominance, which are concerned with practices that cease only (a) temporarily, as a result of an interim order, (b) when commitments are offered and accepted by the EU Commission, or (c) on the day of the infringement decision. A parallel CMA investigation in such cases would be difficult to exclude, although it would be challenging for the CMA to isolate the post-Exit Day UK conduct from the overall conduct.
- The CMA will also be able to investigate "the same conduct or agreement that is already the subject of a formally initiated investigation by the EU Commission.[13] However, no additional guidance is provided on how this could be reconciled with the principles of double jeopardy, right of defence and legal certainty.

3 Pursuant to Article 92.3(c) of the Withdrawal Agreement, EU merger control proceedings shall be considered as having been initiated at the moment at which:
"– a concentration of Union dimension has been notified to the European Commission in accordance with Articles 1, 3 and 4 of Regulation (EC) No 139/2004;
– the time limit of 15 working days referred to in Article 4(5) of Regulation (EC) No 139/2004 has expired without any of the Member States competent to examine the concentration under their national competition law having expressed its disagreement as regards the request to refer the case to the European Commission; or
– the European Commission has decided, or is deemed to have decided, to examine the concentration in accordance with Article 22(3) of Regulation (EC) No 139/2004".
4 Takeaway/Just Eat, CMA, 23 April 2020, paragraph 7.
5 Sabre/Farelogix, CMA, 9 April 2020, paragraphs 5-13 to 5.90 (under appeal to the Competition Appeal Tribunal); see also Roche/Spark, CMA, 10 February 2020, paragraphs 73 to 120.
6 E.g. 16.3% in Amazon/Deliveroo, CMA, 4 August 2020.
7 FY2020 started on 1 April.
8 Sabre/Farelogix. More statistics available on the CMA's website.
9 The new Section 60A CA98 is introduced by Section 23 of the Competition (Amendment etc.) (EU Exit) Regulations 2019.
10 The UK Prohibitions include anticompetitive agreements and abuse of dominance.
11 See Mlex Report, 21 October 2020, "Updated UK merger-review guidance to stress changed markets, need for speed, CMA official says".
12 Proceedings for the application of Article 101 or 102 TFEU conducted by the EU Commission under Council Regulation (EC) No 1/2003 will be considered as having been formally initiated at the moment at which the EU Commission has decided to initiate proceedings in accordance with Article 2(1) of Commission Regulation (EC) No 773/2004 – e.g. by issuing a Statement of Objections or a request for parties to express their interest in engaging in settlement discussions.
13 See paragraph 4.4 of the Guidance.

- The Draft Guidance does not provide any indication as regards:
  - Ongoing investigation(s) not yet formally initiated
  - Investigation(s) closed by the EU Commission before being formally initiated

    Presumably, nothing would preclude the CMA from initiating proceedings in those circumstances.

In all scenarios listed above, defendants and complainants should consider whether the CMA could open a new or parallel investigation in the UK for conduct with a pan-EU effect. This will, in turn, also have implications for potential strategies aimed at mitigating the risk of penalties being imposed by the CMA, for example by applying for immunity/leniency to the CMA on a precautionary basis, even if it has been granted immunity or leniency status before the EU Commission – this is because any application previously made to the EU Commission will not provide any protection in the UK.

As regards post-Exit Day investigations in the UK, businesses should not expect any radical changes in the CMA's approach given that:

- Only cosmetic changes will be made to the CMA's current guidance documents (primarily to remove references to EU law).
- The EU "block" exemption regulations (**BER**)[14] will become EU Retained Law and the associated EU Commission's guidance "will be relevant to interpreting" these regulations. Given the new geographic scope of the regulations (now limited to the UK territory), certain practices which were previously unlawful may now be accepted under UK competition rules. In our view, the CMA should inform businesses about such legal changes to allow business to amend existing commercial contracts post-Exit Day (e.g. via open letters).
- Pursuant to the new Section 60A CA98, the CMA will "act … with a view to securing that there is no inconsistency between" its decisions (and the principles underpinning them) and EU principles and decisions (including any decision or statement by the EU Commission)[15] – unless the CMA considers it "appropriate" not to do so in light of any of the following:
  - Differences between UK and EU legal provisions
  - Differences between UK and EU markets
  - Developments "in forms of economic activity since the time the EU principle or decision was made"
  - Generally accepted principles of competition analysis or a generally accepted application of such principles
  - A principle laid down or a decision made by the ECJ after Exit Day
  - The particular circumstances under consideration (which should not be regarded as a "catch all" provision and should permit departure only in "limited and potentially unforeseen circumstances"[16])
  - If bound by a decision of a court or tribunal in England and Wales, Scotland or Northern Ireland that requires the person to act otherwise

Other UK Competition Rules

Apart from Merger Control and Antitrust, other competition rules are less materially impacted by the Draft Guidance:

- **State Aid** – At time of publication, no consensus has been found between the UK government and the EU Commission as regards the application of state aid rules in the UK post-Exit Day. State Aid is, therefore, not dealt with in the Draft Guidance (see our firm update on the EU control of foreign subsidies).
- **Antitrust litigation** – The Draft Guidance does not deal with antitrust litigation (i.e. damage claims), which remains within the remit of UK Courts; however, it incidentally indicates that claimants who wish to pursue follow-on damages claims in the UK courts "will no longer be able to rely on an infringement decision under EU law reached by the EU Commission in respect of a case initiated after 31 December 2020 as a binding finding of an infringement under the CA98". It will be at that UK Court's discretion as to whether to take EU cartel decisions into account.
- **Consumer Protection** – Although the Draft Guidance addresses consumer protection, it recognises that the rules and enforcement in the field will be less materially impacted post-Exit Day. For further information, see Section 5 of the Draft Guidance.
- **Excluded areas** – The Draft Guidance does not address regulatory appeals, market studies, market investigations and the criminal cartel offence, and discusses only to a very limited extent director disqualification orders.

Further Guidance Required From the CMA

Certain practical aspects of the application of UK and EU competition law after Exit Day remain unresolved and additional guidance from the CMA in its final version of the Draft Guidance would be welcome.

In our view, the Draft Guidance should, therefore, provide additional clarity on the following aspects:

- Coordination mechanisms between the CMA, the EU Commission and the competition agencies of the EU member states, although this might need to be negotiated in a separate cooperation agreement[17]
- Antitrust Investigations:
  - How to isolate the post-Exit Day effects of any conduct the CMA would propose to investigate in parallel with the EU Commission?
  - How to respect the rights of defence and legitimate expectation of parties under investigation by the EU Commission where, after Exit Day, the CMA decides to initiate parallel proceedings over the same conduct, with particular regard to leniency/immunity applications and settlements procedures?
  - Similar questions will arise if the CMA were to open separate proceedings in the following scenarios: (i) annulment of a EU Commission's prohibition decision; and (ii) any other instances in which the EU Commission decided pre-Exit Day not to pursue an investigation

14 The BERs exempt from the prohibition of anti-competitive agreements (Chapter I Competition Act) certain types of agreements such as certain vertical agreements, motor vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport agreements.
15 The term "statement" is not defined.
16 See footnote 84 of Draft Guidance.
17 The recent "Five Eye" Framework Cooperation Agreement for competition law matters is an example of the type of competition enforcement agreement, which the CMA could negotiate with the EU Commission and the EU Member States' competition agencies (for more information, see our blog here).

- Merger Control:
  - Whether the CMA will seek jurisdiction over transactions pre-notified but not formally notified to the EU Commission
  - Whether the CMA will attempt to ensure consistency between UK decisions and the EU decisional practice pre-Exit Day (for example, as regards commitments entered into by parties to resolve antitrust or merger proceedings)
  - Whether the CMA would be able to review the UK aspects of a merger following the annulment of a EU Commission's prohibition decision, which will occur after the four-month statutory limitation period for the CMA's merger control review powers[18]
- The CMA should also provide a list of all legal changes that will affect the substance of UK competition rules on Exit Day to allow businesses to amend existing contractual arrangements.

Contacts

Erling Estellon
Senior Associate, London
T +44 20 7655 1180
E erling.estellon@squirepb.com

Martin H. Rees
Partner, London
T +44 20 7655 1137
E martin.rees@squirepb.com

Diarmuid Ryan
Partner, London
T +44 20 7655 1310
E diarmuid.ryan@squirepb.com

Francesco Liberatore
Partner, London
T +44 20 7655 1505
E francesco.liberatore@squirepb.com

Nicola Elam
Director, Manchester
T +44 161 830 5072
E nicola.elam@squirepb.com

18 This is likely to be a theoretical point, given that virtually no deal has ever been resumed following the annulment of a EU Commission's prohibition decision.

39774/11/20