

January 31, 2020

## UK Competition and Markets Authority Issues New Brexit Guidance

---

**The UK Competition and Markets Authority issued new guidance on January 28, 2020 to provide clarity on how Brexit affects its jurisdiction after the UK leaves the EU on January 31, 2020.**

---

### SUMMARY

The Competition and Markets Authority (the “**CMA**”) issued new guidance on January 28, 2020 with respect to the UK’s exit from the EU.<sup>1</sup> The focus of this guidance is the CMA’s jurisdiction following the UK’s exit. The Withdrawal Agreement between the UK and the EU provides the terms of the exit, including a transition period (until December 31, 2020) during which EU law continues to apply to and within the UK.

For merger control, the CMA’s position is that the EU’s “one-stop shop” rule continues until the end of the transition period. This means that transactions notified to the European Commission during the transition period continue to fall under the exclusive jurisdiction of the European Commission. The CMA would not be able to open an investigation into such transactions. This is a change in the CMA’s position from previous guidance.

For competition law enforcement, the guidance makes clear that the continued effect of EU law in the UK until the end of the transition period means that the European Commission’s jurisdiction remains intact until the transition period expires. Only then will the CMA be able to initiate investigations into alleged conduct without regard to EU law or the jurisdiction of the European Commission.

---

### I. TRANSITION PERIOD

A key feature 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**”) is a transition period from 11pm on January 31, 2020 (“**Exit Day**”) until 11pm on December 31, 2020 (the “**Transition Period**”). During the Transition Period, EU law continues to apply to and within the UK, subject to a handful of exceptions. At the end of the Transition Period, EU law

---

ceases to apply to and within the UK except to the extent it is preserved (as amended) in domestic UK law.

As a result, the practical impact of the UK leaving the EU occurs not on Exit Day, but rather at the end of the Transition Period. The new guidance from the CMA confirms how its jurisdiction will apply to competition law enforcement and merger control during the Transition Period, and after the Transition Period ends.

---

## II. MERGER CONTROL

The UK merger control regime is administered by the CMA. It is procedurally very different from the EU regime, which is administered by the European Commission (the “**Commission**”). Filings are voluntary under the UK regime, even for transactions that meet the jurisdictional thresholds. The EU regime, however, is mandatory and also imposes the “*one-stop shop*” principle. This means that the Commission has sole jurisdiction over transactions meeting the EU thresholds and explicitly precludes EU member states from applying their national merger control laws to such transactions (with some exceptions).

The CMA’s position in its new guidance is that the one-stop shop principle continues until the end of the Transition Period. This has two important consequences.

The first impact is that **if the parties to a transaction meeting the EU jurisdictional thresholds have formally notified the transaction to the Commission before the end of the Transition Period, the CMA is precluded from investigating the transaction in parallel.** This is because EU law continues to apply to the UK during the Transition Period. Once the Transition Period ends, however, the CMA will no longer be precluded from investigating transactions that have also been notified to the Commission (if the transactions were notified before the end of the Transition Period), just like any other non-EU country’s authority.

The second impact is that **until the end of the Transition Period, parties should continue counting turnover attributable to the UK when assessing whether the transaction meets the EU jurisdictional thresholds.**

In previous guidance,<sup>2</sup> the CMA states its position had there been no agreement between the UK and the EU governing the terms of the UK’s exit. In those circumstances, the CMA viewed the one-stop shop principle as ending as of Exit Day. In practical terms, this meant that transactions still under investigation by the EU after Exit Day would have been vulnerable to the CMA asserting its jurisdiction in parallel, if the transaction also met the UK jurisdictional thresholds.

The CMA has a “mergers intelligence unit”, whose role is to monitor the market and press for potentially notifiable transactions. The CMA states in the guidance that it will monitor transactions not yet formally notified to the Commission as the end of the Transition Period approaches, and may take “preparatory steps” during the Transition Period to assess whether it will “call in” those transactions. Such steps

may include the CMA formally inviting third parties to comment on a transaction prior to opening an investigation. In the months leading up to previous dates the UK might have left the EU, the CMA was actively sending enquiries to transaction parties with questions designed to determine whether the transaction was reviewable in the UK regardless of whether it was notifiable to the Commission. The new CMA guidance advises this proactive approach will again take place throughout the Transition Period.

The CMA's guidance also features an important note on the ability of the CMA to open an investigation under UK law after a transaction has closed. Currently this ability is restricted by section 24 of the Enterprise Act 2002 to up to four months after a transaction's completion. The CMA's guidance states that this limitation period "might be amended according to any guidance on the functions of the CMA after a 'deal' exit from the EU." This remark may signal a potential change to this statutory deadline in the course of 2020.

---

### III. COMPETITION LAW ENFORCEMENT

Similar to merger control, the effect of the Transition Period is to extend the application of EU competition law in the UK beyond Exit Day. This means that where the Commission opens an investigation into alleged conduct prior to the end of the Transition Period, the CMA is not able to open a parallel investigation into the same conduct. However, where this conduct *continues* past the end of the Transition Period, the position is less clear and it is possible the CMA could assume jurisdiction over this post-Transition Period portion of the conduct, regardless of whether there is an ongoing parallel investigation by the Commission. This subject is likely to be the focus of further guidance from the CMA in the future.

Likewise, the CMA's obligations to investigate conduct prohibited by EU law (if the Commission is not investigating this conduct), as well as UK law, continues throughout the Transition Period, and expires at the end of the Transition Period. The CMA will then be free to diverge from EU decisions and judicial precedent in interpreting domestic UK provisions that largely mirror similar provisions in EU law.

The existing block exemptions under EU law will be preserved past the end of the Transition Period because the UK Government legislated to preserve these in domestic law.

---

### IV. CONCLUSION

In sum, the new guidance is comprehensive and provides welcome clarity for business.

\* \* \*

ENDNOTES

---

- 1 See <https://www.gov.uk/government/publications/uk-exit-from-the-eu-guidance-on-the-functions-of-the-cma-under-the-withdrawal-agreement>
- 2 See <https://www.gov.uk/government/publications/cmas-role-in-mergers-if-theres-no-brex-it-deal/cmas-role-in-mergers-if-theres-no-brex-it-deal>

# SULLIVAN & CROMWELL LLP

## ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

## CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to [SCPublications@sullcrom.com](mailto:SCPublications@sullcrom.com).

## CONTACTS

---

### London

Juan Rodriguez	+44-20-7959-8499	<a href="mailto:rodriguezja@sullcrom.com">rodriguezja@sullcrom.com</a>
----------------	------------------	--

---

### Brussels

Michael Rosenthal	+32-2896-8001	<a href="mailto:rosenthalm@sullcrom.com">rosenthalm@sullcrom.com</a>
-------------------	---------------	--

---