

Brexit and merger control in the EU: a proposed way forward

A paper prepared by the European Competition Lawyers Forum¹

Executive summary

- 1.1 This paper considers the scenarios in which issues may arise in merger control as a result of the UK's proposed withdrawal from the European Union in March 2019 ("**Brexit**"). It sets out the ECLF's view on the legal position underpinning these scenarios, proposes ways to address any associated transitional issues and also makes suggestions on the way in which the Commission and the CMA could work together on cases raising UK issues in the period after Brexit. The guiding principles behind these proposals are that:
- (A) business should have legal certainty concerning the application of the regulatory framework;
 - (B) there should be no or minimal duplication of effort; and
 - (C) potential enforcement gaps should be avoided.
- 1.2 The UK has proposed transitional arrangements for a two year period following the Brexit Date² (the "**Transitional Period**") during which we understand that the single market rules, including the EU Merger Regulation (EC Regulation 139/2004) (the "**EUMR**") will continue to apply in full to the UK. If this is agreed, the issues highlighted by this paper will not arise until the end of the Transitional Period. We also assume that the additional time would allow for an orderly exit from the EUMR rules to be agreed, including transitional rules setting out how the EUMR would apply to cases that are ongoing at the end of the Transitional Period. If no Transitional Period is agreed, the EUMR will cease to apply to the UK on the Brexit Date. In this paper, we refer to the date the EUMR ceases to apply to the UK as the "**Effective Date**", which is either the Brexit Date or, if one has been agreed, the end of the Transitional Period.

¹ The European Competition Lawyers forum ("**ECLF**") is a group of the leading practitioners in competition law from law firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or of their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 4.

² "**Brexit date**" means 29 March 2019, unless the period for negotiations is otherwise extended by the mutual agreement of the UK and the EU's Member States or curtailed in the event that agreement is reached sooner than the end of the initial two year negotiating period.

- 1.3 “**Brexit Straddling Cases**” are concentrations in respect of which:
- (A) a legally binding agreement has been concluded, a public bid has been announced or an acquisition of control has been made, OR notification has been made to, the Commission prior to the Effective Date³; and
 - (B) the Commission has not issued a final decision under Articles 6 and/or 8 of the EUMR as at the Effective Date.

1.4 Two potentially problematic scenarios may arise in relation to Brexit Straddling Cases:

- (A) Scenario A (“**Brexit Jurisdiction Issue**”) arises where the concentration would cease to meet the jurisdictional thresholds set out in Articles 1(2) or 1(3) of the EUMR if the UK turnover generated by the undertaking(s) concerned were to be excluded.
- (B) Scenario B (“**Brexit Substantive Issue**”) arises where the Commission’s investigation suggests that a concentration may give rise to a significant impediment to effective competition (“**SIEC**”), and may therefore be incompatible with the common market, in relation to a market that either encompasses, or is located exclusively in, the UK.

In either scenario, uncertainty arises as to whether the Commission could take decisions pursuant to Articles 6 and/or 8 of the EUMR and, if so, whether its policy would be to do so. These scenarios are shown in the flowchart at Annex 1 to this paper.

- 1.5 While such scenarios are likely to arise infrequently, it is important that businesses operating in the UK and the EU have sufficient clarity, well in advance of Brexit, as to when and to whom they should notify transactions during the period leading up to the Effective Date, and what the consequences of Brexit might be for the authorities’ ongoing review of such transactions. It is also important for all EU national competition authorities (“**NCA**s”), the Commission and the CMA to know which cases will fall under their jurisdiction.
- 1.6 Sections 2 and 3 below provide a summary of the Brexit Jurisdiction Issue and the Brexit Substantive Issue.
- 1.7 Section 4 provides a summary of issues that may arise in relation to ongoing commitments approved by the Commission prior to the Effective Date.
- 1.8 In Section 5, we set out proposals for providing greater clarity and certainty to the business community as to how the review of transactions will be conducted by the Commission and the CMA in the period either side of the Effective Date. We propose that:

³ The relevant date for establishing jurisdiction is the earliest of the date of first notification, conclusion of a binding legal agreement, announcement of a public bid or acquisition of a controlling interest (the “**Jurisdiction Date**”), see paragraph 2.8 below.

- (A) The Commission publishes “**Best Practice Guidelines**” confirming:
- (i) that the terms ‘Community dimension’ and ‘common market’ shall be construed so as to include the UK (or any part thereof) in relation to Brexit Straddling Cases on the basis that the Jurisdiction Date occurred prior to the Effective Date;
 - (ii) that the Commission will continue to assess the impact of the transaction on UK markets or markets encompassing the UK in Brexit Straddling Cases unless the transaction is referred to the UK competition agency under Articles 4(4) or 9 EUMR;
 - (iii) that for cases where there may be a Brexit Jurisdiction Issue or a Brexit Substantive Issue, notifying parties are encouraged to engage in an early dialogue with the Commission and any relevant NCAs at pre-notification stage to agree which authority will be best placed to review the concentration; and
 - (iv) that the Commission will continue to enforce, monitor compliance with and review ongoing commitments accepted in EUMR cases which have a UK connection even after the Effective Date. The Commission will consult with the CMA on such cases before taking a final decision which may have a material impact on a UK market.

Draft Best Practice Guidelines are set out at Annex 2;

- (B) Provision is made in a protocol to the UK-EU withdrawal agreement, the Transitional Period arrangements and/or a separate agreement prior to the Effective Date that the EUMR will continue to apply in full to Brexit Straddling Cases, until the end of the administrative process, including any relevant appeals processes (a ‘started so you can finish’ approach).⁴ The EU, the UK and each EU Member State would be signatories to the protocol. A draft protocol on transitional merger control proceedings is set out at Annex 3;
- (C) The Commission and the CMA agree to the systematic use of Articles 4(4) and 9 in order to refer Brexit Straddling Cases with a significant UK nexus to the CMA for review; and
- (D) The CMA issues complementary and consistent guidance to the Commission’s Best Practice Guidelines, confirming its approach to Brexit Straddling Cases. Among other things, this should clarify that the CMA will not seek to open its own investigation into Brexit Straddling Cases, other than pursuant to a referral from the Commission under Articles 4(4) or 9 of the EUMR. We recommend that the

⁴ For the avoidance of doubt, for the purposes of applying the provisions of the EUMR to Brexit Straddling Cases, any references to “Member State(s)” should be construed so as to include the UK, as if the UK remained a Member State for these purposes only.

CMA and the Commission establish a dialogue as soon as possible with a view to ensuring that their respective guidance papers are properly aligned.

- 1.9 Our view is that it is desirable that transitional merger control issues are addressed in the Best Practice Guidelines and in a protocol to the UK-EU withdrawal agreement (or similar). Codifying certain of the transitional measures proposed above will provide greater business certainty and mitigate against the risk of legal challenge. Including all EU Member States as signatories to the protocol will also ensure that the transitional framework is applied uniformly across the EU. However, a formal agreement between the UK and the EU is likely to be concluded relatively late in the withdrawal process. In the interim, the Best Practice Guidelines will play an important role in providing businesses with clarity on how the regulatory framework will be applied to Brexit Straddling Cases. They will also contain more detailed practical information on how Brexit Straddling Cases will be assessed. As such, the Best Practice Guidelines and legal protocol should be viewed as complementary measures, and the Best Practice Guidelines should be adopted as soon as possible.
- 1.10 As for post-Brexit cooperation arrangements between the Commission and the CMA, the Best Practice Guidelines contain basic cooperation provisions, which we propose as a short-term arrangement to promote effective cooperation between the authorities post-Brexit pending the adoption of a formal cooperation agreement. The scope and content of such a formal cooperation agreement is outside the scope of this paper.

2. Scenario A - Brexit Jurisdiction Issue: loss of Community dimension

- 2.1 Each of the Phase 1 decisions open to the Commission (under Article 6 of the EUMR) is premised upon a finding that the concentration in question “falls within the scope of the EUMR” (or, pursuant to Article 6(1)(a), that it does not do so (a “**No Jurisdiction Decision**”)).⁵
- 2.2 A concentration falls within the scope of the EUMR if it has a ‘Community dimension’. Whether or not a concentration has a Community dimension is determined by reference to the turnover of the undertakings concerned and is based, in part, on the undertakings’ Community-wide turnover meeting the threshold amounts and, in respect of the alternative thresholds, the undertakings concerned meeting certain turnover thresholds in each of at least three EU Member States (one of which could be the UK).
- 2.3 For Brexit Straddling Cases it is arguably unclear whether the Commission should assess whether a Community dimension exists solely on the basis of the Community-wide turnover of the parties prior to the Effective Date (which would include the undertakings’ UK turnover) or whether the Commission should take account of the fact that by the time of its Phase 1 decision the UK will no longer form part of the EU (and so exclude the UK turnover). In a small number of Brexit Straddling Cases, the assessment of whether a Community dimension exists may turn on whether the undertakings’ UK turnover is included. Equally, for cases falling under the alternative turnover thresholds, the assessment may depend on whether the UK can be included as one of the three EU Member States.⁶ The timing of the Commission’s jurisdictional assessment is therefore key.

Consequences for enforcement

- 2.4 If the Commission bases its Phase 1 decision on the facts existing at the date of its decision, it might be argued that a concentration should no longer be deemed to have a Community dimension if (excluding the undertakings’ UK turnover) the concentration no longer meets the EUMR’s jurisdictional thresholds. It follows that, in such cases, the Commission could only issue a No Jurisdiction Decision, even if the Commission has concerns that the concentration may be incompatible with the common market.
- 2.5 In such circumstances, it would be open to the NCAs of other Member States to commence their own reviews of the transaction in question, provided that the transaction meets their respective jurisdictional criteria. However, NCAs (including the CMA) would be prevented from initiating their own reviews until after the Effective Date (i.e. until after the date upon which the concentration would cease to have a Community dimension), by virtue of Article 21(3) of the EUMR.

⁵ The Commission is not required to determine that a concentration “falls within the scope of the EUMR” for the purposes of reaching a Phase 2 decision pursuant to Article 8 of the EUMR. Section 2 therefore addresses the Commission’s power to issue Phase 1 Decisions only.

⁶ The UK may also be relevant when determining whether it is possible to request to refer a concentration from NCAs to the Commission pursuant to Article 4(5) of the EUMR.

- 2.6 Without clarity as to whether the Commission will retain jurisdiction in such cases, notifying parties might spend several months engaging in pre-notification discussions and a Phase 1 process with the Commission, only to have to re-start that process with any relevant NCAs after the Effective Date. This would lead to considerable uncertainty, long delays, and increased administrative complexity for the notifying parties.⁷ It would also be inefficient and duplicative for multiple agencies to be re-considering the case. The prospect of such difficulties arising may, in turn, contribute towards a chilling effect on M&A activity, discouraging businesses from pursuing such activity in the period prior to the Effective Date.
- 2.7 Our view is that the better legal interpretation is that the Commission should continue to assess jurisdiction as at the Jurisdiction Date, the “relevant date” provided for in the Consolidated Jurisdictional Notice, which is the earliest of the date of first notification or the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest. In respect of Brexit Straddling Cases, this would mean that the UK would be treated as if it were a Member State for the purposes of the Commission’s jurisdictional (and, indeed, substantive) assessments. The Commission should confirm its intention to adopt this approach in Best Practice Guidelines. Draft Best Practice Guidelines are set out in Annex 2.
- 2.8 This approach is in keeping with the Commission’s existing and past practice:⁸
- (A) Article 4(1) of the EUMR provides that notifications should be made prior to implementation but following “*the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest*”;
 - (B) The Consolidated Jurisdictional Notice states that “[t]he relevant date for establishing Community jurisdiction over a concentration is therefore the date of conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of first notification, whichever date is earlier”;⁹
 - (C) EC Regulation 1310/97 (the “**1997 Regulation**”), which amended the previous merger regulation (EC Regulation 4064/89), introduced the EUMR’s alternative

⁷ It is noted that notifying parties could, theoretically, commence pre-notification discussions with NCAs prior to the Effective Date (on the assumption that the latter will open their own reviews post-Effective Date) in order to minimise delays to some extent. However, it would not be possible for NCAs to run their formal processes in parallel with the Commission’s Phase 1 review.

⁸ Using the date of notification would also be in line with the application of transitional rules in other fields of competition law. For instance, in relation to State aid control, the Commission’s *Guidelines on Rescue and Restructuring Aid*, OJ 2014 C249/1 provide that the guidelines will apply “*with effect from 1 August 2014 until 31 December 2020, Notifications registered by the Commission prior to 1 August 2014 will be examined in light of the criteria in force at the time of notification*” (paras. 135 *et seq*).

⁹ Paragraph 156, *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentration between undertakings*. This paragraph also implicitly clarifies that any changes to the proposed concentration after the relevant date will not affect the Commission’s jurisdiction, as it states that only acquisitions, divestments or closures of part of a business which occur before the relevant date may be taken into consideration when making adjustments to the turnover figure shown in an undertaking’s audited accounts. See also the Opinion of AG Kokott in Case C202/06 *Cementbouw v Commission* (26 April 2007), paragraph 46 and footnote 35.

jurisdictional test. The 1997 Regulation provided that it would “*not apply to any concentration which was the subject of an agreement or announcement or where control was acquired [...] before 1 March 1998*” and would “*not in any circumstances apply to any concentration in respect of which proceedings were initiated before 1 March 1998 by a Member State’s [competition] authority.*”¹⁰

- 2.9 Where a Brexit Straddling Case is found, in light of the above approach, to have a Community dimension, the Commission will retain jurisdiction to review that concentration until the end of the administrative process (including any relevant appeal processes).
- 2.10 However, while our view is that this represents a continuation of the Commission’s current practice and a correct interpretation of the EUMR so that no legislative change is required, adopting such an approach for Brexit Straddling Cases would not be without risk of challenge (from private parties or NCAs seeking to initiate their own investigations into the concentration). We therefore recommend that this approach be codified in a protocol to the UK-EU withdrawal agreement, the Transitional Period arrangements and/or in a separate agreement prior to the Effective Date. The EU, the UK and each EU Member State would be signatories to the protocol. A draft protocol is set out in Annex 3.
- 2.11 For cases where there may be a Brexit Jurisdiction Issue, we propose that the notifying parties are encouraged to engage in an early dialogue with the Commission and any relevant NCAs at pre-notification stage to agree which authority will be best placed to review the concentration, with use being made of Articles 4(4) and 9 of the EUMR to refer appropriate transactions to the CMA.

¹⁰ The 1997 Regulation, Article 2.

3. Scenario B – Brexit Substantive Issue: interpretation of the ‘common market’

- 3.1 In order to take a Phase 1 decision (other than a No Jurisdiction Decision), the Commission must determine whether or not the concentration ‘*raises serious doubts as to its compatibility with the common market*’. Similarly in order to take a Phase 2 decision, the Commission must assess whether or not the transaction is compatible with the common market. Article 2(3) of the EUMR further clarifies that “*a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*”.
- 3.2 In the context of merger control, the substantive competitive assessment undertaken by the Commission should be prospective (i.e. forward-looking). Therefore, in relation to Brexit Straddling Cases that have been notified to the Commission but in respect of which the Commission is yet to take a final Phase 1 or Phase 2 decision as at the Effective Date, some may argue that, when assessing the concentration’s compatibility with the common market, the Commission should exclude the UK market from the scope of its assessment, as the UK will not form part of the common market going forward.
- 3.3 This scenario is only likely to cause substantive concerns where the Commission has identified a potential significant impediment to effective competition (“**SIEC**”) in relation to a geographic market that is:
- (A) limited to the UK (or a part thereof); or
 - (B) encompasses the UK.
- 3.4 In either case, it is possible that the removal of the UK from the common market would eliminate the SIEC in the common market (or in a substantial part thereof). In the case of (B) only, the Commission might nevertheless conclude that a SIEC may still exist in the remainder of the common market excluding the UK. However, in both scenarios, it is arguably unclear whether the Commission would be able to make any findings in connection with the UK market or to address any issues it has identified in relation to the UK.

Consequences for enforcement

- 3.5 Where the Commission identifies an SIEC which encompasses the UK, it is clear that the Commission would still be able to take a decision concerning the effects of the concentration in the remainder of the common market (excluding the UK) post-Brexit. It is possible that any remedies the Commission accepts in relation to such an SIEC would also resolve the UK competition issues at the same time.
- 3.6 However, if the exclusion of the UK eliminates the prospect of an SIEC arising in the common market, it is arguable that the Commission would be unable to address the UK issues, for example through instigating a Phase 2 investigation, accepting remedies in relation to the UK market or ultimately deciding that the merger should be prohibited as being incompatible with the common market. A further concern may arise in relation to

the Commission's ability to enforce any UK-specific remedies. This may give rise to concerns regarding a potential enforcement gap.

- 3.7 Whilst the CMA would seem to be best placed to address the UK issues in such a situation given that the focus of any competition concerns will be in the UK, it is important to have clarity as to whether the Commission's final decision in such cases does or does not cover the UK elements. In addition, as noted at paragraph 2.5, the CMA cannot start its own review until after the Effective Date (unless a referral is made under Article 4(4) or 9 EUMR), which could cause significant delays to the implementation of transactions.¹¹ There may also be uncertainty as to when after the Effective Date the CMA could open an investigation: for example, whether it could open an investigation before the Phase 1/Phase 2 decision in parallel with the Commission's investigation given that arguably Article 21(3) EUMR would no longer apply to the UK after the Effective Date. This prospect may discourage businesses from pursuing M&A activity in the period leading up to the Effective Date.
- 3.8 Our view is therefore that, for the purposes of the Commission's review of Brexit Straddling Cases, the 'common market' should be construed as encompassing the UK market, as the concentration will have been notified to the Commission on the basis that the UK forms part of the common market on the Jurisdiction Date.¹² The Commission's decision would then address any UK specific issues that had not been referred back to the UK under Articles 4(4) or 9 EUMR.¹³ The Commission should confirm its intention to adopt this approach in Best Practice Guidelines. Draft Best Practice Guidelines are set out at Annex 2.
- 3.9 However, adopting such an interpretation would not be without risk of challenge (from private parties or NCAs seeking to initiate their own investigations into the concentration). We therefore also propose that:
- (A) the Commission and the CMA agree that, where a concentration may affect competition in a distinct market comprising the UK (or parts thereof), and either the notifying parties or the CMA submits a request pursuant to Articles 4(4) or 9 of the EUMR respectively to refer the UK aspects of the concentration to the CMA for review, the Commission and/or the CMA (as applicable) will generally agree to such requests; and

¹¹ For the avoidance of doubt, the continued application of the EUMR (in full) after the Effective Date would include the preservation of the Commission's ability to refer a Brexit Straddling Case to the CMA pursuant to Articles 4(4) or 9 of the EUMR after the Effective Date.

¹² Such an approach is broadly consistent with the existing case law of the Court of Justice of the European Union, which has concluded that while the Commission's substantive assessment of the effects of a transaction should be prospective, it "must be carried out solely on the basis of the matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors the economic implications of which cannot be assessed at the time when the decision is adopted": see Case T-2/93 *Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v Commission* [1994] ECR II-323.

¹³ The Commission would also take the final decision in respect of Brexit Straddling Cases with a Community dimension that do not give rise to a potential SIEC in the common market (including the UK). We would not expect the CMA to want to request the referral of the UK aspects of such cases given the potentially significant resourcing implications of reviewing a number of non-problematic cases.

(B) the EU and the UK agree in a protocol to the withdrawal agreement, the Transitional Period arrangements and/or in a separate agreement prior to the Effective Date that the EUMR will continue to apply in full to Brexit Straddling Cases until the end of the administrative process (including any relevant appeal processes). The EU, the UK and each EU Member State would be signatories to the protocol. A draft protocol is set out at Annex 3.

3.10 In order to enable the Commission and the CMA to form a view as to whether a concentration should be referred back (in whole or in part) to the CMA in a timely manner, we recommend that notifying parties are encouraged to engage in an early dialogue with the Commission and the CMA to agree which authority will be best placed to review the concentration if it might give rise to an SIEC in a geographic market that is limited to the UK (or a part thereof) or encompasses the UK. This recommendation is included in the Draft Best Practice Guidelines set out at Annex 2.

4. Ongoing commitments

- 4.1 It is likely that on the Effective Date, there will be various ongoing commitments (e.g. divestment obligations, ongoing behavioural commitments) that relate to the UK and were accepted by the Commission in order to remove competition concerns.¹⁴ There may also be commitments accepted in relation to Brexit Straddling Cases which have a UK dimension. This gives rise to two potential issues after the Effective Date:
- (A) monitoring and ensuring compliance with the commitments; and
 - (B) review of commitments, pursuant either to a general review clause or where there has been a specific change in circumstances warranting a review of the commitments with a view to waiving, modifying or substituting them.

Consequences for enforcement

- 4.2 The Commission ensures the enforceability of the commitments offered by parties by making its approval of the concentration conditional upon the parties' compliance with the commitments.¹⁵ In respect of conditional decisions issued by the Commission prior to the Effective Date, there appears to be no legal reason why the Commission cannot continue to enforce those commitments post Effective Date given that the commitments represent an agreement with the Commission and continue to have legal effect. If a party were to breach its commitments, the Commission may – depending on the nature and circumstances of the breach – impose fines and/or periodic penalty payments, take interim measures to maintain conditions of effective competition in the relevant market(s), and/or order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures.¹⁶
- 4.3 In principle, we consider that the legal position should be the same for Brexit Straddling Cases. Provided that the Commission has jurisdiction to review such cases and to take substantive decisions relating to the UK, the conditions attached to such decisions should be similarly enforceable. However, some may argue that for such cases the Commission would not have the power to enforce UK-specific remedies after the Effective Date or that there may be some doubt about this.
- 4.4 We therefore recommend that the Best Practice Guidelines clarify that the Commission will continue to monitor and enforce such commitments. This should be reinforced by legal provisions set out in a protocol to the withdrawal agreement, the Transitional Period arrangements and/or in a separate agreement prior to the Effective Date. The EU, the UK and each EU Member State would be signatories to the protocol. We also recommend that the Commission consult with the CMA where any action they propose to take may have a material impact on a UK market.

¹⁴ Recital 30 and Articles 6(2) and 8(2) of the EUMR.

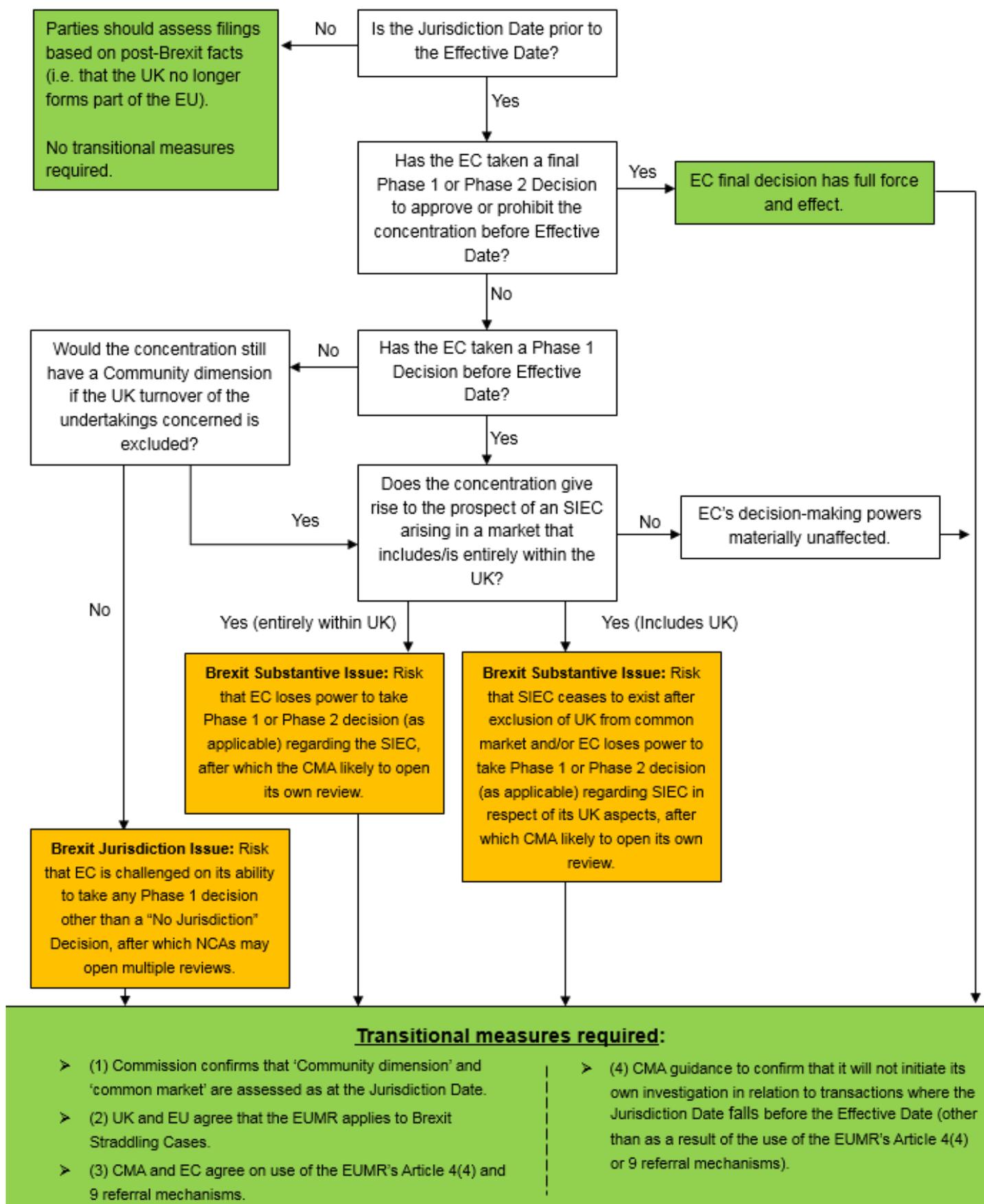
¹⁵ Paragraph 19, Commission notice on remedies acceptable under Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802 (2004) (the "**Remedies Notice**").

¹⁶ Paragraph 20, Remedies Notice.

- 4.5 Commitments usually include a review clause allowing the Commission, upon request by the parties showing good cause, to grant an extension of deadlines or, in exceptional circumstances, to waive, modify or substitute the commitments.¹⁷ It is conceivable that a party may request the Commission after the Effective Date to review commitments related to that party's activities in the UK.
- 4.6 Given that the commitments represent conditions attached to the Commission's approval decision, it is, ultimately, for the Commission to determine whether such commitments should be altered. However, where the waiver, modification or substitution of commitments may have a material impact upon a market in the UK, we recommend that the Commission first consults with the CMA to seek its views on the appropriateness of the proposed waivers, modifications or substitutions.
- 4.7 These recommendations are included in the Draft Best Practice Guidelines set out at Annex 2 and are reflected in the protocol set out at Annex 3.

¹⁷ Paragraph 71, Remedies Notice.

Annex 1: Flowchart of Potential Brexit Transitional Issues



Annex 2: Best practice guidelines in relation to EU Merger Regulation cases with a UK connection

1. Objective and scope of the Best Practices

- 1.1 The objective of these Best Practices is to provide supplementary guidance for interested parties on EU Merger Regulation¹⁸ (“**EUMR**”) cases with a UK connection in light of the UK’s decision to leave the EU (“**Brexit**”). They are not intended to replace existing UK Competition and Markets Authority (“**CMA**”) guidance on mergers¹⁹ or the general DG Competition Best Practices on the conduct of EC merger control proceedings.²⁰
- 1.2 Section A of these Best Practices applies to concentrations in respect of which:
- (A) a legally binding agreement has been concluded, a public bid has been announced, or an acquisition of control has been made, OR notification has been made to, the European Commission (the “**Commission**”) prior to the date on which the EUMR ceases to apply with respect to the UK (the “**Effective Date**”²¹); and
 - (B) the Commission has not issued a final decision as at the Effective Date.
- 1.3 Section B of these Best Practices applies to concentrations in respect of which the events referred to in paragraph 1.2(A) occur only after the Effective Date.

Section A: Arrangements with respect to concentrations straddling the Effective Date

2. Best Placed Authority

- 2.1 Subject to the exceptions noted in sections 2.2, 2.3 and 6 below, the Commission will be best placed to take a decision on the majority of concentrations where notification has been made to the Commission, or where the date of conclusion of the legally binding agreement, announcement of the public bid or acquisition of a controlling interest falls, prior to the Effective Date but the Commission has not issued a final decision as at the Effective Date (“**Transitional Concentrations**”).
- 2.2 In a small number of Transitional Concentrations, the concentration would not have a Community dimension if the UK turnover of the notifying parties were to be excluded from the calculation. The Commission assesses whether the merger has a Community dimension at the relevant date for assessing jurisdiction, which is the earlier of the date of first notification, the conclusion of a legally binding agreement, announcement of a

¹⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

¹⁹ For example, Mergers – the CMA’s jurisdiction and procedure (CMA 2) (2014), Merger Assessment Guidelines (CC2 (Revised) / OFT 1254) (2010), and Merger remedies (CC8) (2008).

²⁰ DG Competition Best Practices on the conduct of EC merger control proceedings (2004).

²¹ The Effective Date is the date of the UK’s exit from the EU, unless the UK and the EU agree transitional arrangements including the application of the EUMR with respect to the UK for a defined period of time following such date, in which case the Effective Date is the date on which the transitional arrangements come to an end.

public bid or acquisition of a controlling interest (“**Jurisdiction Date**”): see paragraph 156 of the Consolidated Jurisdiction Notice.²² UK turnover should therefore be included in the calculations for Transitional Concentrations (see section 5 below).

- 2.3 Where it is possible that a notification may become a Transitional Concentration, notifying parties are encouraged to engage in an early dialogue with the Commission and any relevant national competition authorities at pre-notification stage to agree which authority will be best placed to review the concentration. This may result in the notifying parties being encouraged to make an Article 4(4) request (see Section 6.1 below).

3. Information to be provided

- 3.1 Notifying parties are advised at pre-notification stage to make full and frank disclosure on all potentially affected markets and possible competition concerns in the UK even if they consider that they are not affected markets (for example on the basis of a wider market definition) or do not result in a significant impediment to effective competition.²³ This will enable the Commission and the CMA to identify at the outset which authority is best placed to review a Transitional Concentration.

4. Approach to Transitional Concentrations

- 4.1 In the interest of legal certainty, the EUMR will continue to apply in full to Transitional Concentrations and the Commission will continue to retain jurisdiction with respect to such concentrations if they have a Community dimension. The Commission will review such concentrations until the end of the administrative process (including any relevant appeal processes).
- 4.2 The CMA will not investigate a Transitional Concentration under the UK Enterprise Act 2002 (the “**Enterprise Act**”) unless it is referred, in whole or in part, to the CMA under Article 4(4) or 9 of the EUMR,
- 4.3 For the avoidance of doubt, the CMA will also not re-examine concentrations which have been approved by the Commission prior to the Effective Date. The CMA will continue to observe the ‘one stop shop’ principle enshrined in Article 21 of the EUMR in respect of such concentrations.

5. Relevant date for interpretation of the EUMR

- 5.1 In merger control proceedings in relation to Transitional Concentrations, references to “Community” and “common market” in the EUMR will be interpreted as references to the “Community” and “common market” as at the Jurisdiction Date.²⁴ This means that:

²² Paragraph 156, *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentration between undertakings* (2008/C 95/01).

²³ Notifying parties should note that the Commission may impose fines under Article 14(1)(b) of the EUMR where parties supply incorrect or misleading information.

²⁴ See paragraph 156 of the Consolidated Jurisdictional Notice.

- (A) UK turnover should be included when determining whether the concentration has a Community dimension;
- (B) Affected markets in, or encompassing, the UK should be covered in the notification; and
- (C) Affected markets in, or encompassing the UK, will be assessed by the Commission unless the UK aspects of the concentration are referred to the CMA under Article 4(4) or 9 of the EUMR.

5.2 This is intended to ensure (unless a reference is made under Article 4(4) or 9 EUMR which covers the UK aspects of the case):

- (A) Efficiency – Transitional Concentrations that are already under review by the Commission will continue under the EUMR merger control procedure until the end of the administrative process, including any relevant appeal processes (a ‘started so you can finish’ approach); and
- (B) Effectiveness - the Commission is empowered to assess the compatibility with the common market of Transitional Concentrations involving affected markets in, or encompassing, the UK and issue Phase 1 and Phase 2 decisions with respect to such concentrations.

6. Systematic referrals to the CMA

6.1 Where a Transitional Concentration may affect competition in a distinct market comprising the UK or part of it, notifying parties are encouraged pro-actively to seek the referral of such concentrations, in whole or in part as appropriate, to the CMA under Article 4(4) of the EUMR. The Commission and the CMA will generally agree to such a request by the notifying parties.

6.2 Where the draft Form CO submitted by the notifying parties indicates that there may be affected markets in the UK and the CMA makes a request for the UK aspects of the concentration to be transferred to it under Article 9 of the EUMR, the Commission would generally agree to such a request.

7. Cooperation

7.1 The Commission will consult the CMA, including in the period after the Effective Date, with respect to Transitional Concentrations that may affect competition in a market in, or encompassing, the UK.

7.2 The Commission will consult the CMA, including in the period after the Effective Date, on remedies it is considering in relation to Transitional Concentrations if such remedies may have an impact on competition within the UK.

7.3 In the period after the Effective Date, it will be standard practice for notifying parties to be asked to provide waivers for the sharing of information between the Commission and the CMA to facilitate, for example, the discussions referred to in 7.1 and 7.2 above.

Section B: Post--Effective Date arrangements

8. Approach to notification of concentrations post-Effective Date

- 8.1 If the Jurisdiction Date occurs after the Effective Date, the concentration will be assessed on a post-Brexit basis with the UK no longer being part of the common market. UK turnover will therefore not be included in determining whether the concentration has a Community dimension and the UK will not be a Member State for the purposes of the alternative turnover thresholds. For cases with a UK element, the parties should seek advice on whether the concentration should be notified under the UK domestic merger regime.
- 8.2 If a concentration notified to the Commission after the Effective Date also raises substantive competition issues in the UK that the CMA is considering:
- (A) The notifying parties will be asked to provide waivers allowing for the sharing of information between the Commission and the CMA to facilitate both their investigations;
 - (B) The Commission and CMA may discuss the theories of harm and substantive issues arising from the concentration;
 - (C) The Commission and CMA may discuss potential remedies to resolve the substantive issues in each of their jurisdictions with a view to ensuring that any separate remedies do not conflict with each other;
 - (D) The Commission and CMA may endeavour to ensure that the timing of the different stages of their respective investigations is aligned to the extent possible within the limits of the deadlines provided under the EUMR and the UK domestic merger regime.

9. Approach to ongoing commitments

- 9.1 The Commission will, after the Effective Date, continue to monitor and enforce compliance with commitments approved by it even where such commitments relate to activities in the UK. The Commission will consult the CMA before taking any action which may have a material impact on a UK market.
- 9.2 Where the commitments approved by the Commission relate to activities in the UK and the parties would like to request a review of such commitments after the Effective Date, they should continue to contact the Commission about this. As part of its review, the Commission will seek the CMA's views on the appropriateness of any proposed waivers, modifications or substitutions where these may have a material impact on a UK market.

Annex 3: Draft protocol on transitional merger control proceedings

PROTOCOL ON THE APPLICATION OF THE EU MERGER REGULATION IN RELATION TO THE WITHDRAWAL OF THE UNITED KINGDOM FROM THE EUROPEAN UNION

The high contracting parties to this Protocol, Member States of the European Union and the United Kingdom,

Having regard to the Treaty on European Union, and in particular Article 50 thereof,

Whereas, the European Union shall negotiate and conclude an agreement with a Member State which decides to withdraw, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the European Union,

Having regard to the results of the negotiations on the withdrawal of the United Kingdom from the European Union,

Whereas, following the [date of withdrawal / date of end of transition period] the United Kingdom shall no longer be bound by the provisions of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EUMR”), (the “Effective Date”),

Recognising that there may be proposed concentrations between undertakings in relation to which a legally binding agreement has been concluded, a public bid has been announced, an acquisition of control has been made, or notification has been made to the European Commission (the “Commission”) prior to the Effective Date and for which the Commission has not issued a final decision as at the Effective Date (“Transitional Concentrations”), which will have a connection to the United Kingdom,

Acknowledging the need for clarity and predictability for the undertakings involved and for the wider business community,

Considering that appropriate rules should be laid down on jurisdiction and mutual cooperation in relation to concentrations that straddle the Effective Date, and

Having regard to the Best Practice Guidelines agreed between the Commission and the Competition and Markets Authority (the “CMA”) (the “Best Practice Guidelines”) which provide assistance in interpreting this Protocol and which are annexed to this Protocol,

Agree as follows:

Article 1: Transitional Concentrations

- (a) In the interest of legal certainty, the EUMR shall continue to apply in full to Transitional Concentrations.
- (b) The UK, the Commission and the Member States of the European Union shall have the same rights and obligations in relation to Transitional Concentrations under the EUMR after the Effective Date as they do before.

- (c) The Commission's jurisdiction to examine a Transitional Concentration shall be determined as at the date on which, in respect of that Transitional Concentration, a legally binding agreement has been concluded, a public bid has been announced, an acquisition of control has been made or the date on which notification has been made to the Commission, whichever is earlier (the "Jurisdiction Date").
- (d) The Commission shall continue to retain jurisdiction with respect to Transitional Concentrations having a Community dimension as at the Jurisdiction Date.
- (e) The CMA shall not investigate a Transitional Concentration under the United Kingdom Enterprise Act 2002 (the "Enterprise Act") unless it is referred, in whole or in part, to the CMA under Article 4(4) or 9 of the EUMR.
- (f) For the avoidance of doubt, the CMA shall also not re-examine concentrations which have been the subject matter of a decision by the Commission prior to the Effective Date. The CMA shall continue to observe the 'one stop shop' principle enshrined in Article 21 of the EUMR in respect of such concentrations.

Article 2: Relevant date for interpretation of the EUMR

- (a) In merger control proceedings in relation to Transitional Concentrations, the terms "Community" and "common market" in the EUMR shall be defined by reference to the circumstances existing as at the Jurisdiction Date of such Transitional Concentrations. This means that:
 - (i) United Kingdom turnover should be included when determining whether the Transitional Concentration has a Community dimension on the Jurisdiction Date; and
 - (ii) Affected markets in, or encompassing the United Kingdom, will be assessed by the Commission under the EUMR unless the United Kingdom aspects of the concentration are referred to the CMA under Article 4(4) or 9 of the EUMR.

Article 3: Approach to ongoing commitments

- (a) The Commission shall have exclusive jurisdiction after the Effective Date to monitor and enforce compliance with commitments given under the EUMR, even where such commitments relate to activities in the United Kingdom. The Commission shall, after the Effective Date, consult the CMA before taking any action which may have a material impact on a United Kingdom market.

Annex 4: Members of the ECLF working group on Brexit and EU merger control

- **Allen & Overy:** Dominic Long
- **Cleary Gottlieb Steen & Hamilton:** Antoine Winckler, Paul Gilbert
- **Freshfields Bruckhaus Deringer:** Rod Carlton, Laurent Garzaniti, Sarah Jensen
- **Gleiss Lutz:** Ulrich Soltesz
- **Linklaters:** Nicole Kar
- **Nauta Dutilh:** Herman Speyart
- **Slaughter and May:** Philippe Chappatte, Jackie Holland, Alex Bulfin