

# Guidance on changes to the jurisdictional thresholds for UK merger control

Summary of responses to the consultation

© Crown copyright 2017

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/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

## Contents

	<i>Page</i>
1. Introduction .....	2
2. Issues raised during the consultation and our response .....	4
Appendix A: List of respondents to the consultation on the Draft Guidance .....	8

# 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 CMA has responsibility for the review of mergers under the Enterprise Act 2002 (the Act). Under the Act, the CMA has a duty to refer a 'relevant merger situation' for a second phase (phase 2) investigation where it believes there to be a realistic prospect that the merger will result in a substantial lessening of competition (SLC).
- 1.3 In exceptional cases, the Secretary of State may intervene if the merger affects national security, media plurality, or the stability of the financial system.<sup>1</sup>
- 1.4 The Act has been amended to introduce different jurisdictional thresholds for changes in control over enterprises that are active in three defined sectors: (1) the development or production of items for military or military and civilian use, (2) quantum technology, (3) computing hardware (**Relevant Enterprises**).
- 1.5 Specifically:
  - (a) The turnover threshold applicable to such mergers is being reduced from £70 million to £1 million, and
  - (b) The share of supply test will be met where a merger involves a target Relevant Enterprise with a share of supply of 25% or more in the relevant goods and services in the UK (as well as where the merger leads to an increase in the share of supply to, or above, this 25% threshold, as is the case at present).<sup>2</sup>
- 1.6 The purpose of these changes is to ensure that the Secretary of State is able to intervene to address any national security-related issues raised by such

---

<sup>1</sup> The CMA must bring to the attention of the Secretary of State any merger it is investigating at Phase 1, which it believes raises a material public interest consideration. The CMA must advise the Secretary of State on any mergers which might fall within the scope of the public interest or the special public interest provisions of the Act where the Secretary of State has served an intervention notice in that case

<sup>2</sup> The *Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018* (SI 2018/578) and the *Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018* (SI 2018/593).

transactions. However, the amended thresholds also apply to the CMA's jurisdiction to review such mergers on competition grounds.

- 1.7 The CMA is introducing additional guidance (*Guidance on changes to the jurisdictional thresholds for UK merger control* or the Guidance) on the circumstances in which merging parties should notify transactions affecting Relevant Enterprises to the CMA for a competition assessment. This follows a consultation, which ran from 15 March to 12 April 2018, on a draft of that guidance.

## **Purpose of this document**

- 1.8 The CMA's consultation set out three questions on which respondents' views were sought:
- Q1. Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
  - Q2. Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?
  - Q3. Do you have any other comments on the draft guidance?
- 1.9 This document is intended to summarise the key issues raised by the responses and the CMA's views on these key issues. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on the consultation page. 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 four written 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](#).
- 2.2 Respondents generally considered that the Draft Guidance was clear, in terms of content, format and presentation. Summaries of responses, which include some requests for clarification, are set out below, together with the CMA's views on the comments in question.

### Application of the Guidance

#### *Respondent views*

- 2.3 One respondent suggested that the CMA should keep the Guidance under review and add to it where appropriate. Similarly, one respondent suggested to reissue the guidance *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)* to include a comprehensive description of the new rules in the current section on public interest mergers.
- 2.4 Two respondents suggested that BEIS and the CMA issue joint guidance on the new rules. One of these respondents also suggested that parties engage in joint dialogue with the CMA and BEIS, for example by submitting a single briefing note to both bodies, in order to resolve merger control and national security queries in parallel.

#### *The CMA's view*

- 2.5 The CMA intends to include a comprehensive description of the new rules in its current guidance [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#) when it is updated later this year.
- 2.6 In line with its general approach, the Guidance sets out the CMA's current practice (and intended future practice) as of the date of publication. The Guidance may in due course be supplemented, revised or replaced.
- 2.7 As regards joint guidance with BEIS, the CMA notes that the CMA and BEIS have different roles in relation to merger review in the UK. The Guidance is intended to clarify the CMA's intended practice, reflecting the different roles of the CMA and BEIS. The CMA notes that the Guidance can be read in conjunction with the BEIS guidance and does not consider that issuing joint guidance would be necessary or advisable (given that it could raise confusion

about the different and distinct statutory functions of the CMA and the Secretary of State). Similarly, it does not consider that submitting a single briefing note to both bodies would lead to efficiencies either for the merging parties or the CMA and BEIS.

## **Explanation of jurisdictional thresholds**

### *Respondent views*

- 2.8 One respondent suggested adding further explanation to the description of the new share of supply test in paragraph 2.5(b).

### *The CMA's view*

- 2.9 The CMA notes that explanation of the share of supply test set out in paragraph 2.5(b) of the Guidance replicates the language of the Enterprise Act 2002 (Share of Supply Test) Amendment Order 2018. The CMA has, nevertheless, made some drafting changes to this paragraph of the Guidance to provide greater clarity.

## **Approach to competition assessment**

### *Respondent views*

- 2.10 One respondent asked how the statement in footnote 15 of the Draft Guidance (*'Assuming there are no public interest concerns'*) fits with the voluntary nature of the UK regime.

### *The CMA's view*

- 2.11 The CMA notes that the UK merger control regime is voluntary in nature but that, under section 44(2) of the Act, the CMA is required to give a report to the Secretary of State where a Public Intervention Notice has been issued. If a Public Intervention Notice (PIN) is issued, unless the parties voluntarily provide information to the CMA, the CMA would use its powers under section 109 of the Act to gather the information it needs to complete its report.
- 2.12 The CMA has made some drafting changes to footnote 15 of the Guidance to reflect this position.

## Interaction with de minimis exception

### *Respondent views*

- 2.13 One respondent asked whether the CMA could provide more explanation on how the revised jurisdictional thresholds would operate alongside the existing de minimis rules.

### *The CMA's view*

- 2.14 As set out at paragraph 3.10 of the Draft Guidance, the CMA may take into account the existence of statutory discretions not to refer when determining which cases to investigate. One such exception to the duty to refer arises when the CMA considers that the market in question is of insufficient importance to warrant a reference (the 'de minimis' exception). The approach that the CMA applies to all mergers (as set out in [Mergers: Exception to the duty to refer in markets of insufficient importance, CMA64](#)) would also apply to transactions involving Relevant Enterprises.
- 2.15 The CMA notes that the de minimis exception relates to the importance of the markets concerned in a merger (and takes into account considerations beyond the turnover of a target enterprise or its share of supply). In addition, the exception only applies where the duty to refer would otherwise arise (ie where a transaction gives rise to the realistic prospect of an SLC). The CMA therefore considers that de minimis exception does not apply any differently to cases brought under the jurisdiction of the CMA by the changes to the Act.
- 2.16 In cases where a PIN has been issued, the CMA is required to submit a report to the Secretary of State – it is not for the CMA to decide whether or not to refer the merger to a phase 2 investigation. The CMA will inform the Secretary of State about the applicability of any of the exceptions to the duty to refer (including the 'de minimis' exception) but the Secretary of State makes the decision on the outcome of the case, in the light of the CMA's advice.<sup>3</sup> The CMA notes that the discretion not to refer is unlikely to be exercised if the merger gives rise to public interest concerns.

---

<sup>3</sup> If the Secretary of State concludes, after receipt of the CMA's report, that there are no public interest issues that are relevant to the PIN, the CMA will be instructed under section 56 of the Act to deal with the merger as an ordinary merger case. The CMA may exercise its discretion not to make a reference.



- 2.17 The CMA has made some changes to paragraph 3.10 of the Guidance to clarify that:
- (a) the existing de minimis rules apply to all mergers, including Relevant Enterprises (where the turnover of the enterprise being acquired may be low).
  - (b) when a PIIN has been issued, the Secretary of State would generally make the decision whether to exercise the discretion not to refer (unless no public interest issues have been identified).

## **Interaction with mergers intelligence process**

### *Respondent views*

- 2.18 One respondent asked how the briefing note procedure set out in the Draft Guidance will operate alongside the existing Mergers Intelligence Committee process and whether the CMA will employ a different approach to briefing papers for mergers involving Relevant Enterprises.

### *The CMA's view*

- 2.19 The CMA notes that the option for merger parties to provide a briefing note to the CMA explaining why they do not propose to submit or have not submitted a Merger Notice applies to all mergers (whether or not they involve a Relevant Enterprise). The existing procedure is set out in the [Guidance on the CMA's mergers intelligence function \(CMA56\)](#). The CMA has made some drafting changes to paragraph 3.9 of the Guidance to make this clearer.
- 2.20 The CMA has also made some drafting changes to paragraph 3.7 of the Guidance to include a reference to CMA2 which provides further guidance on factors relevant to the self-assessment of whether to make a voluntary notification.

## **Appendix A: List of respondents to the consultation on the Draft Guidance**

Allen & Overy LLP

Eversheds Sutherland (International) LLP

Mayer Brown Europe-Brussels LLP

The Law Society of Scotland