JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UNITED KINGDOM ("JWP")[1]

RESPONSE TO THE CMA'S CONSULTATION DOCUMENT "DRAFT REVISED GUIDANCE ON MERGERS: EXCEPTIONS TO THE DUTY TO REFER"[2]

I INTRODUCTION

1. The JWP welcomes the CMA's Consultation Document on the new draft guidance on the exceptions to the duty to refer mergers for in-depth Phase 2 investigations. The draft guidance helpfully records the CMA's experience in recent cases and updates and replaces the CMA's guidance on the "de minimis" (or small markets) exception (CMA64), which increased the applicable thresholds and was published in June 2017, and Chapters 1, 3 and 4 of the CMA's previous guidance on exceptions to the duty to refer and undertakings in lieu of reference (OFT1122). The document is clear and (subject to the comments below) provides sufficient information for merging parties and their advisers.

2. The JWP has no comments on the section on the "de minimis" exception (paragraphs 7 to 60) or on paragraphs 61 to 65, which helpfully clarify the distinction between mergers which are abandoned after the decision on the SLC but before the Phase 2 reference is made, and situations where it is still uncertain whether the parties will proceed with the merger (for example, where the proposed merger suffers unexpected disruption after the Phase 1 timetable has commenced or where commercial discussions between the parties are still ongoing and there is material ambiguity about how the transaction will be structured). The comments in this response are therefore focused on the section on relevant customer benefits (RCBs) at paragraphs 66 and following.

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1 The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprise barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. The JWP is co-chaired by George Peretz QC of Monckton Chambers (GPeretz@Mockton.com; tel 020 7405 7211) and Brian Sher, partner, CMS Cameron McKenna Nabarro Olswang LLP (brian.sher@cms-cmno.com; tel 020 7524 6453). The JWP thanks the CMA for the short extension granted to submit this response.

2 CMA85con, 11 June 2018.

II RESPONSE TO CONSULTATION QUESTIONS

Question 1: Is the content, format and presentation of the draft guidance sufficiently clear? In particular, does the draft guidance clearly explain the relationship between RCBs and remedies? 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.

3. The content, format and presentation of the section on RCBs (and the explanation of the interaction between the two) is clear and rightly emphasises the importance of collecting and presenting relevant evidence to the CMA on RCBs at the earliest possible opportunity if they expect these to play a decisive role in the CMA's assessment of a merger. The guidance might usefully clarify that these matters should be raised as soon as possible during the pre-notification stage.

4. We particularly welcome the reference at paragraph 67 of the draft guidance to the fact that rivalry-enhancing efficiencies may lead the CMA to conclude that the merger does not lead to a SLC or that they may mitigate the impact of any SLC caused by the merger. This should probably refer to a "realistic prospect of a SLC" (at Phase I). It might also be helpful for the CMA to refer in this context (perhaps in a footnote) to the fact that a merger might lead to a realistic prospect of a lessening of competition, but the existence of rivalry-enhancing efficiencies may mean this is not "substantial" - drawing on the statements to this effect in the OFT's Phase I decision in the completed acquisition by Global Radio UK Limited of GCap Media plc (1 July 2009).

5. At paragraph 76 of the draft guidance, the CMA notes that, when assessing a claimed benefit's likelihood, it will consider the merging parties' incentives and their ability to implement the claimed RCBs following the merger, with the emphasis being on the merging parties to produce detailed and verifiable evidence that the anticipated price reductions or other benefits will in fact emerge. The footnote then refers to the UHB/HEFT and DTHFT/BHFT hospital merger cases where the CMA exercised its discretion not to refer the transactions to a Phase 2 investigation, emphasising that NHS Improvement advised the CMA on patient benefits and this assisted in verifying the Parties' submission on RCBs. We would encourage the CMA to supplement this footnote in order clarify that the merging parties may produce evidence which satisfies this evidential standard in other ways, perhaps cross-referring to the examples set out at paragraph 79 of the draft guidance.

6. Paragraph 82 rightly points out that cases where the CMA would clear a case on the basis of RCBS will be rare. It goes on to state that, the more powerful and more likely the anti-competitive effects of the merger, the greater and more likely the RCBs must be to meet and overcome such concerns. We agree with this statement, which is consistent with the OFT's statement at paragraph 146 of the Global/GCap case that RCBs should be judged on a sliding scale: "..[*t]hat is, the greater and more powerful the case in favour of anti-competitive effects of the merger, the greater and more powerful the countervailing claims must be to meet and overcome such concerns*". We would encourage the CMA to refer in this paragraph (or by expanding footnote 40) expressly to the OFT's Phase I decision in Global/GCap, which found that rivalry-enhancing efficiencies were sufficient to resolve residual doubts about anti-competitive effects resulting from the loss of rivalry between Global and GCap in the London region (although the reference test was met in other regions and the transaction was therefore referred to a Phase 2 investigation). This would usefully illustrate how this sliding scale has been applied in practice in a previous merger in the private sector. Without this, the guidance might (erroneously) imply that the CMA would only consider clearing a case on the basis of RCBs in the context of hospital mergers.

   Question 2: Is the draft guidance sufficiently comprehensive? In particular, does it provide enough examples of the type of evidence that the CMA requires in its assessment of RCBs? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

7. Overall, the guidance strikes a good balance between the CMA's Merger Assessment Guidelines (MAGs), which sets out more detail about the supply-side and demand-side efficiencies which the merging parties may seek to evidence.

8. As noted above, we think it would be helpful for the CMA to refer to the Global/GCap case, in addition to the two hospital mergers that it has cleared at Phase I on the basis of RCBs, in order to illustrate the way in which the "sliding scale" operates in practice and to illustrate how quantitative evidence can be provided in practice by merging parties in order to substantiate claimed benefits.

   Question 3: Do you have any other comments on the draft guidance?

9. We have no other comments on the guidance, which is clear and provides a useful summary of the CMA's current policy and how this exception has been applies in recent cases.

JWP / 23 July 2018