Merger remedies

Summary of responses to the consultation

13 December 2018

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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 is introducing new guidance to explain its approach and requirements in the selection, design and implementation of remedies in Phase 1 and Phase 2 merger investigations. This follows a consultation, which ran from 12 June 2018 to 20 July 2018, on a draft of that guidance.

1.3 The guidance seeks to provide a single source of guidance on remedies for merger investigations. It therefore supersedes the Competition Commission (CC) guidelines on merger remedies,[1] Chapter 5 of the Office of Fair Trading (OFT) guidelines on undertakings in lieu of reference (UILs)[2] and Chapters 8 and 14 of the CMA's guidelines on merger jurisdiction and procedure.[3]

1.4 The approach outlined in the guidance is consistent with these previous documents, but has been updated and extended to take account of the CMA's experience of merger investigations in recent years, judgments of the Competition Appeal Tribunal (CAT) and the CMA's research into the outcomes of remedies.[4] This guidance also takes into account the principles outlined by the International Competition Network, the work carried out by the Organisation for Economic Co-operation and Development and the European Competition Network, and recent merger remedies guidance published by other international competition regulators.

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[1] Merger Remedies: Competition Commission Guidelines (CC8) was originally published by the CC and has been adopted by the CMA.
[2] Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122) was originally published by the OFT and was adopted by the CMA. It was replaced by Mergers: Exceptions to the duty to refer (CMA64). Guidance on UILs (previously in Chapter 5 of OFT1122) is now included in the new guidance on merger remedies.
[3] Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2) was published by the CMA in January 2014. The new guidance on merger remedies replaces Chapter 8, Phase 1 remedies – undertakings in lieu of reference, and Chapter 14, Implementation of remedies, but the remainder of CMA2 remains applicable.
[4] See Understanding past merger remedies. Report on case study research, 6 April 2017.

Purpose of this document

1.5 The CMA's consultation set out three questions on which respondents' views were sought:

(a) 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.

We are particularly interested in your views on the following areas:

(i) Clear cut standard for UILs.

(ii) International constraints.

(iii) Early consideration of remedies.

(iv) Multiple UIL offers.

(v) Use of an upfront buyer.

(b) 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?

(c) Do you have any other comments on the draft guidance?

1.6 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 three 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 are set out below, together with the CMA's views on the comments in question.

2.3 We have taken into account requests for clarification in the guidance.

Purpose and principles of remedial action

Respondent views

2.4 One respondent commented that, in light of the constraints of its Phase 1 timetable, it was clear that the CMA needed to consider the complexity of assessment and implementation of UILs offered. However, the respondent cautioned against assuming that a large undertakings package would be automatically unpractical and difficult to achieve at Phase 1.

2.5 Another respondent suggested that the possible rejection of complex UILs due to the unfeasibility of their implementation within the constraints of the Phase 1 timetable would be highly subjective.

CMA view

2.6 The CMA considers that, in practical terms, UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted. The CMA considers that where UILs are complex, there is a greater need for early dialogue between the CMA and the merger parties on the specifications of the divestiture package. We have made this clear in the guidance.

Early consideration of remedies

Respondent views

2.7 The respondents requested further clarification on the CMA's approach in relation to the consideration of remedies prior to the decision on the

substantial lessening of competition (SLC) in Phase 1 or the provisional SLC decision in Phase 2. In particular:

(a) the circumstances under which the CMA would deem the early consideration of remedies to be appropriate (ie when 'exceptional cases' may arise);

(b) the role of the decision maker in the early consideration of remedies; and

(c) whether the merger parties would be informed of the CMA's decision to consider remedies prior to its SLC decision in Phase 1 or provisional SLC decision in Phase 2 and if so, whether they could request or object to such involvement.

2.8 One respondent also raised a number of concerns about the possibility for the decision maker to consider remedies before making the SLC decision. The respondent argued that from an administrative law perspective, there were compelling reasons for the decision maker to not consider remedies prior to making the SLC decision as, if there was no SLC decision, the CMA had no jurisdiction to adopt a remedy. The respondent also suggested that there was a risk that prior discussions on potential remedies may 'infect' the SLC decision by encouraging the CMA to soften its findings in relation to a market or markets where remedies may be more challenging to offer or, conversely, encourage the decision-maker to reach an SLC decision where an appropriate remedy was available.

2.9 The respondent suggested that it was difficult to envisage a situation where discussions with the Phase 1 decision maker may genuinely assist with early consideration of 'complex' remedies given that in any situation, the remedies would need to meet the 'clear cut' requirement.

2.10 The respondent also suggested that, at a minimum, it would be sensible for procedural safeguards to be put in place for any discussions on remedies prior to the SLC decision, such as:

(a) requiring discussions to be limited to defined objectives or issues;

(b) confirmation that no alternative approach could be adopted (eg discussions with another CMA decision maker or panel member with expertise in the relevant area); and

(c) requiring discussions with the decisions maker(s) (including internal discussions with the case team) to be documented in writing.

CMA view

2.11 The CMA will generally only consider remedies prior to its SLC decision in Phase 1 or provisional SLC decision in Phase 2 in exceptional cases. This could include investigations where the remedies are likely to be complex in design and/or implementation, or where competition authorities in other jurisdictions are considering remedies in a merger which the CMA is also investigating (so that the CMA could engage with other competition authorities without fettering its discretion), or where the merger parties request the early consideration of remedies.

2.12 In those cases where the decision maker decides to consider remedies prior to their SLC decision in Phase 1 or provisional SLC decision in Phase 2, the merger parties will be informed. The decision maker will engage with the merger parties, in order to maximise the chance of the CMA achieving an effective remedy to any competition concerns which might arise from the merger. The parties are not obliged to engage with the decision maker. The CMA will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early consideration of remedies does not prejudice the SLC decision in Phase 1 or the provisional SLC decision in Phase 2.

Upfront buyer in Phase 1 investigations

Respondent views

2.13 One respondent stated that the draft guidance overstated the CMA's current demand for upfront buyers. The respondent argued that, in practice, the risk profile of the remedy had often been such that the CMA had agreed UILs without any upfront buyer requirement.

2.14 Another respondent suggested that the starting position at Phase 1 of requiring an upfront buyer unless there were reasonable grounds for not imposing such a requirement would likely to weaken the (already compromised) ability of the merging parties (or a merging party) to realise a fair price for divestment assets or businesses.

2.15 Another respondent stated that the requirement for discussions with purchasers to be at an advanced stage went too far, as if the CMA's other conditions for not requiring an upfront buyer were clearly satisfied, it would often be the case that the relevant divestment business could be sold relatively quickly, such that the presence of advanced discussions with purchasers was not necessary.

CMA view

2.16 The CMA considers that its ability to require an upfront buyer in Phase 1 investigations enables it to mitigate the risk that the proposed divesture package will not be viable or attractive to purchasers (composition risk) or that there may be only a limited pool of suitable purchasers (purchaser risk).

2.17 As stated in the guidance, although the CMA's starting point at Phase 1 is to require an upfront buyer, the CMA will not impose this requirement on merger parties if it does not consider that there are reasonable grounds for doing so and, in particular, if the risk profile of the remedy does not require it. The CMA also sets out a number of examples where an upfront buyer is unlikely to be necessary:

(a) There is a liquid market for the assets or business.

(b) The assets or business are viable and profitable.

(c) There are a number of potential purchasers.

(d) Discussions with purchasers are at an advanced stage.

Appendix A: List of respondents to the consultation on the draft guidance

1. Allen & Overy LLP.
2. Ashurst LLP.
3. Clifford Chance LLP.