RESPONSE TO COMPETITION AND MARKETS AUTHORITY

Consultation document: Merger remedies

11 June 2018

This response represents the views of the law firm Allen & Overy LLP on the Competition and Markets Authority (**CMA**) draft for consultation *Merger remedies (CMA87con)*, dated 11 June 2018 (the **Draft Guidance**).

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

Response

1. We highly value the consolidation of existing guidance on merger remedies (currently in *Merger Remedies: Competition Commission Guidelines* (**CC8**), chapter 5 of *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (**OFT1122**) and chapters 8 and 14 of *Mergers: Guidance on the CMA's jurisdiction and procedure* (**CMA2**)) into one comprehensive guidance document. The use of a single document will be more efficient and also ensure valuable guidance is not inadvertently missed by merging parties.

2. We also welcome the fact that the CMA has at this pre-Brexit point in time chosen to update the guidance to reflect its more recent merger investigation experience, Competition Appeal Tribunal judgments and the CMA's research into remedies outcomes, as well as to take account of International Competition Network principles, Organisation for Economic Co-operation and Development work and recent remedies guidance published by other international competition regulators. Given the anticipated uptick in the CMA's mergers work post Brexit, we would expect the CMA to review all its mergers guidance in due course to update it with any resulting amendments to policy and process and in order to colour the guidance with further relevant precedents.

3. To ensure clear direction to relevant precedent, we suggest that the Draft Guidance provides fuller references, and in particular dates, for the cases footnoted. Whilst the online version of the CMA's guidance includes a link through to relevant material, the link will not be evident or helpful to individuals using a hard copy guidance document. It would also be valuable to have ready knowledge of the date of cases.

4. The format and presentation of the Draft Guidance is clear and follows an intuitive order.

5. However, we have the following suggestions to improve the content of the Draft Guidance further.

Preface

6. Footnote 5 summarises the identities of the decision makers in merger investigations. We suggest that the text clarifies that the Secretary of State is the decision maker at phase 1 as well as at phase 2

in public interest cases and cross refers to further details later on in the Draft Guidance (including at footnote 52 and paragraphs 4.50 and 4.51).

Purpose and principles of remedial action

7. In relation to the section on UILs, the subheading should read "Undertakings in lieu of reference to Phase 2".

8. In relation to the need for UILs to be clear cut, we support the removal of the reference (from paragraph 5.8 of OFT1122) to an undertakings package potentially being unworkable as a result of its magnitude in absolute terms (at paragraph 3.28 of the Draft Guidance). We consider that, whilst in practical terms the CMA should consider the complexity of assessment and implementation of UILs offered given the constraints of its phase 1 timetable, a large undertakings package is not automatically unpractical and difficult to achieve in phase 1. We welcome the CMA's offer of guidance to merger parties on which potential remedies may be suitably practical (paragraph 3.28(b)).

9. Paragraph 3.32 of the Draft Guidance details the CMA's approach to behavioural UILs and footnote 35 lists cases where behavioural UILs have been accepted. We note that these are not the only UIL cases involving behavioural commitments and wonder whether more recent examples, such as MasterCard/VocaLink and FirstGroup and MTR/South Western rail franchise could also be referenced. We also query whether one of the footnotes 36, on vertical concerns potentially being more suitable to some form of behavioural undertaking, should be moved to paragraph 3.32 of the Draft Guidance (rather than being referenced in paragraph 3.35 on prohibition).

10. With respect to prohibition, we note that the CMA considers the divestment or reduction of a minority shareholding to be a rare remedy measure at Phase 1 (see paragraph 3.36 of the Draft Guidance).

11. In relation to the section on divestiture, we note the introduction of data as a form of intellectual property that could be licensed or assigned as a remedy (at paragraph 3.39 of the Draft Guidance).

12. We welcome the additional guidance on international constraints and in particular the CMA's approach to consulting on remedies with competition authorities in other jurisdictions to prevent inconsistent approaches and outcomes (at paragraph 3.56). This is in line with the approach of other competition authorities and is important to ensure a result for merging parties which is as free from administrative burden as possible.

Remedies process

13. Figure 2 provides a useful summary flowchart of the remedies process. However, the text describing the possible 3-week suspension on referral to phase 2 could be clarified.

14. The section on the procedure for the submission of UILs includes new guidance on the CMA decision-making process. Paragraph 4.6 notes that the decision maker will not typically be involved in any UIL discussions until the decision on the existence and scope of a substantial lessening of competition(s) (**SLC**) has been made, but that in exceptional cases the decision maker may choose to be involved. We would appreciate further clarification. What triggers would prompt the case team to suggest UIL involvement to the decision maker? How would the decision maker become involved? Would the merger parties be informed should the decision maker become involved and could they request (or object to) such involvement?

15. We welcome the explicit recognition at paragraph 4.10 and footnote 58 that, in order to avoid the unnecessary rejection of a UIL offer, parties may formally submit two or three versions of an offer.

We note that parties must indicate clearly their preferred remedy with reasons. We consider that this approach could speed the UIL acceptance process up and avoid unnecessary referrals to phase 2. We welcome the explicit acknowledgement that the CMA will select the least intrusive effective clear-cut remedy (with footnote 59 providing an example case), especially given paragraph 3.13 of the Draft Guidance notes that "At Phase 1, the voluntary nature of the UILs process means that the CMA will not reject an offer of UILs on the basis that it forms too great a proportion of the wider transaction".

16. In relation to the Remedies Form, we suggest that the text font is altered in paragraph 4.13 to indicate the presence of links to online versions of the Remedies Form and UIL template since the guidance may be used in hard copy format.

17. We welcome the amended guidance at paragraph 4.14. In particular, at paragraph 4.14(c) on divestment of overlapping businesses, the clarification that the CMA may accept a fall-back proposal to divest another business in the event that a buyer is not found quickly for the business initially put forward for divestment. At paragraph 4.14(d) the CMA states that parties offering a divestiture remedy should state in their UIL offer whether they are proposing an upfront buyer. We assume that if the parties do not propose an upfront buyer but the CMA decides that such a requirement is necessary, this could be dealt with by the CMA's discretion to propose modifications to UIL offers (see point 18 below). In other words, the CMA will not reject a divestment remedy offer simply because an upfront buyer was not proposed. Clarification of this point would be helpful.

18. We support the CMA's policy, as outlined in paragraph 4.19, that it reserves the right to revert to merger parties, before or after the UIL 'acceptance in principle' decision, with specified minor modifications to the merger parties' existing UIL proposal. We consider that this approach could prevent the unnecessary referral of cases into phase 2. Paragraph 4.20 notes that the merger parties will be given a short period to state whether or not they wish to offer the modified UIL; it would be helpful if the CMA clarified in the Draft Guidance how long a short period is likely to be.

19. With respect to the procedure for the acceptance of UILs, and in particular upfront buyer cases, paragraph 4.32 of the Draft Guidance states that parties will be given a relatively short period after the CMA's UIL 'acceptance in principle' decision in which to identify the upfront buyer. It would be helpful if the CMA could provide further clarification as to the length of this period in practice. It would also be helpful if the CMA could clarify whether it will consult publicly on the terms of the UILs and the identity of the proposed upfront buyer at the same time in all cases. Presumably the CMA will agree with the merger parties a timetable of milestones (as it states it will for non-upfront buyer cases at paragraph 4.38 and more generally at paragraph 4.27).

20. We consider that the section on monitoring trustees should include a cross reference to chapter 8 of the Draft Guidance. It would also be useful to cross refer the paragraphs on CMA intervention to ensure fulfilment of UILs (between paragraphs 4.48 and 4.52-4.53).

21. With respect to phase 2, paragraph 4.54 provides detail on the decision making process for remedies. The guidance states that the CMA may exceptionally consider possible remedies prior to identifying the basis of a possible SLC and that the Inquiry Group may exceptionally choose to be involved in any such discussions. As noted above in relation to UILs, we would appreciate further clarification. What triggers would prompt the case team to suggest involvement to the decision maker? How would the decision maker become involved? Would the merger parties be informed should the decision maker become involved and could they request (or object to) such involvement?

22. Paragraphs 4.57 to 4.62 provide new details on response hearings. It would be helpful if the CMA clarified at paragraph 4.57 whether these hearings would only take place after publication of a notice of possible remedies, and that any hearings held with key third parties would be separate to those held with the merger parties. Paragraph 4.59 notes that hearings with third parties may be led by the

case team; could there be circumstances where third parties can request attendance by the Inquiry Group?

23. We note that the CMA anticipates publishing the remedies working paper in only some cases (at paragraph 4.63). It would be helpful if the guidance clarified the factors that would point to publication.

24. We support the inclusion of guidance on remedies implementation during litigation (at paragraphs 4.75 to 4.77). The guidance notes that the particular approach to be taken on individual cases will generally be a matter for the Inquiry Group. Please could the guidance clarify who else might be involved in that process and whether merger parties will be given an opportunity to comment?

Divestiture remedies

25. Paragraph 5.8 of the Draft Guidance notes that divestiture may take place in a single or limited number of packages, with the scope of the package reflecting the particular circumstances of the case. Please could the CMA include example cases (or at least refer back to footnote 30, which describes two relevant cases).

26. In relation to the independence criteria for suitable purchasers, we note that the CMA will consider common significant shareholders between the merger parties and possibly links between the purchaser and other market players (at paragraph 5.21(b)). In relation to capability, we note that the CMA expects proposed purchasers to have obtained all necessary approvals, licences and consents in advance (at paragraph 5.21(c)). Footnote 112 should be amended to reflect the fact that the section provides guidance in relation to divestiture remedies at phase 2 as well as at phase1.

27. We welcome the new guidance at paragraph 5.23 that confirms that merger parties may ask the CMA to evaluate the suitability of a small set of short-listed purchasers. We consider that this approach could ensure that purchasers are agreed more swiftly.

28. Paragraph 5.29 of the Draft guidance states that, at phase 1, the CMA will *generally* require an upfront buyer unless it considers that there are reasonable grounds for not doing so and, in particular, where the risk profile of the remedy does not require it. We consider that the form of wording overstates the CMA's current demand for upfront buyers. In practice the risk profile of the remedy has often been such that the CMA has agreed UILs without any upfront buyer requirement. Given the need for any UILs to be clear cut, we do not envisage any general change to the risk profile of remedies and consider that upfront buyers are unlikely to be required in the majority of phase 1 cases.

29. Paragraph 5.38 of the Draft guidance notes the use of monitoring trustees in anticipated mergers; we suggest the guidance includes a cross reference to paragraph 4.45 for further information.

Behavioural remedies

30. In relation to duration, paragraph 7.11 notes that the period for a long-stop date will depend on the circumstances of the case. It would be helpful if any relevant cases could be referenced to provide more information on factors that the CMA will take into account.

Allen & Overy LLP

20 July 2018