



**CMA'S CONSULTATION ON DRAFT GUIDANCE:
MERGER REMEDIES**

RESPONSE OF ASHURST LLP

Ashurst LLP welcomes the opportunity to respond to the Competition and Markets Authority ("CMA") consultation on the proposed guidance in the CMA's guidance publication, *Merger Remedies* ("**Draft Guidance**").

This response contains our own views, based on our experience of advising clients on UK, EU and international competition law, and is not made on behalf of any of our clients.

We confirm that nothing in this response is confidential. We also confirm also that we would be happy to be contacted by the CMA in relation to our responses.

1. **Is the content, format and presentation of the draft guidance sufficiently clear?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.**
 - 1.1 We focus in this response on the issues specifically raised by the CMA before making some additional observations.

(a) International constraints (paragraphs 3.55 to 3.56)
 - 1.2 We have no substantive comments.
 - 1.3 We note that this area is likely to require amendment and adaption in light of the changing nature of the CMA's merger workload following the UK's exit from the European Union ("**EU Exit**").

(b) Early consideration of remedies (paragraphs 4.5 to 4.7 and 4.54)
 - 1.4 The proposals in respect of early consideration of remedies address an area of potential sensitivity from a competition and regulatory perspective. It would have been helpful if the CMA had given clearer guidance on how it intends to address this sensitivity.
 - 1.5 The Draft Guidance identifies three reasons why, in "*exceptional circumstances*", a Phase 1 Decision Maker or Phase 2 Inquiry Group may need to be involved in remedies discussions prior to the SLC decision:
 - (a) The remedies are likely to be complex in design.
 - (b) The remedies are likely to be complex in implementation.
 - (c) Competition authorities in other jurisdictions are considering a merger where the CMA is also investigating.
 - 1.6 From an administrative law perspective, there are compelling reasons for the decision-maker to not consider remedies prior to making the SLC decision. If there is no SLC decision, the CMA has no jurisdiction to adopt a remedy (even if many may consider

remedies to be desirable¹). Conversely, there is 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 is available. It is for these reasons (and others) that the ordinary position is that the decision maker (whether at Phase 1 or Phase 2) is not involved in consideration of remedies *until* an SLC decision has been reached.²

1.7 We would also make the following observations:

- (a) The present wording of the Draft Guidance is very broad and does not explain precisely when "*exceptional cases*" may arise. The three considerations raised by the CMA are not exceptional – every year, the CMA will be required to consider cases with complex remedies and/or parallel international merger reviews. The risk is that the 'exceptional circumstances' the CMA refers to lead to a gradual, cumulative, deterioration in procedural safeguards. In this connection, it is not clear to us that the Draft Guidance provides an adequate framework for merging parties and the CMA to work from.
- (b) There is no guidance given as to the procedure by which the decision maker(s) (at Phase 1) or the Inquiry Group (at Phase 2) may become involved in the remedies process, and how this would be raised by the CMA case team. Would it be possible for the merging parties to oppose this process, or seek safeguards?
- (c) The Draft Guidance is also silent on the rights of third parties. Will the engagement with the decision maker before the SLC decision be made public and, if so, in what format?
- (d) The Draft Guidance does not contemplate the situation in which a Phase 1 Decision Maker or Phase 2 Panel Member may consider themselves to be unable to reach a Phase 1 or Phase 2 decision as a result of engagement with merging parties in respect of potential UILs or commitments.

1.8 We therefore encourage a degree of caution before enabling the decision maker or CMA Panel member to engage in these discussions with merging parties.

1.9 At a minimum, we think it would be sensible for procedural safeguards to be put in place for such discussions, such as:

- (a) requiring discussions to be limited to defined objectives or issues;
- (b) confirmation that no alternative approach could be adopted, e.g. 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.

¹ This issue arises in particular in relation to vertical mergers where views on appropriate outcomes can differ quite markedly.

² In addition, we note that the Draft Guidance does not differentiate between Phase 1 and Phase 2. In practice, we think it is 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. Moreover, because the 'clear cut' requirement is so inherently connected with the SLC decision, the CMA should be sensitive to the risk that the Phase 1 Decision Maker compromises his/her ability to make, and to be seen to have made, an independent decision as regards the likelihood of an SLC. The Draft Guidance is silent on these risks.

(c) Multiple UIL offers (paragraph 4.10)

- 1.10 We consider the Draft Guidance to be clear, and consistent with the CMA's recent approach. We note, however, the CMA's highly cautious approach to the upfront buyer requirement which undermines the purported flexibility suggested in this part of the Draft Guidance.

(d) Use of an upfront buyer (paragraph 5.29)

- 1.11 The Draft Guidance goes further than previous guidance by introducing a hitherto unheard of requirement that the starting position at Phase 1 is that an upfront buyer will generally be required unless there are reasonable grounds for not imposing such a requirement. This is tantamount to making an up-front buyer a third limb of the 'clear-cut' remedy requirement. Such a move would be a departure for UK merger control and is 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. We would therefore suggest that the CMA departs from this position in the final guidance.

2. **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?**

- 2.1 We note below some additional observations on the text of the Draft Guidance.

Prohibition

- 2.2 We note that the Draft Guidance states "Full prohibition of an anticipated merger will generally be an effective remedy ... " (paragraph 3.35). We consider that the guidance would be clearer if "generally" were deleted given that the CMA does not have jurisdiction to impose measures upon parties to an anticipated merger that go beyond full prohibition.
- 2.3 We find the following paragraph 3.36 in relation to minority shareholdings confusing. Although the two leading decisions on this issue are both Competition Commission ("**CC**") decisions, the two subsequent appeals of those decisions to the Competition Appeal Tribunal ("**CAT**") have provided detailed elaboration of the law. We therefore think it is incorrect to state that the issue with such a divestment is that it must act as a "*clear cut remedy*", given that it is very difficult to envisage circumstances when a divestment to a 5% shareholding would not be adequate (assuming no cross-shareholdings or other competitor shareholdings). We therefore think it may be preferable to either delete the final sentence of paragraph 3.36 or reflect more accurately the real issue which is that parties have been unwilling to offer the divestment required at Phase 1. We would also suggest that it may be helpful to briefly expand footnote 38 to note the outcome of the CC/CAT reviews, including the level of minority shareholding deemed acceptable.

Selection of remedies

- 2.4 In footnote 43, we think it would be helpful if the footnote could indicate the seven Phase 2 merger investigations that did not require structural remedies, and if information on the total number (and name) of Phase 1 merger investigations not involving structural remedies could also be given.

CMA discretion to propose modifications to UIL offers

- 2.5 We note the following section of the Draft Guidance, at paragraph 4.19:

"However, the CMA is mindful of the significant public policy benefits achieved through the UILs process. Therefore, the CMA reserves the right, where appropriate, to revert to the merger parties following receipt of their UIL offer to inform them that it could be suitable to address the SLC identified, subject to specified modifications."

- 2.6 The footnote to this sentence clarifies "*Such modifications relate to the substance of the UIL offer and not to the text of the undertakings*". We think it would be helpful if the CMA were able to elaborate upon the type of modifications that may be proposed, drawing upon past experience. We would suggest that this reflected in paragraph 4.19 or, alternatively, a footnote.
- 2.7 In addition, given the significant consequences that may follow from rejecting proposed modifications to UIL offers, we think it would be helpful if the CMA could make explicit in paragraph 4.20 of the Draft Guidance that the merging parties will have the opportunity to make written or oral representations if they do not agree to the proposed modifications (in full or part).
3. **Do you have any other comments on the draft guidance?**
- 3.1 As a minor procedural point, it would have been helpful if the CMA had provided a table or other document summarising the amendments in the Draft Guidance from the original guidance documents. For example, the CMA has provided a mark-up summarising the amendments to the CA98 Investigations guidance.³ This would have saved responding parties' time in reviewing the Draft Guidance and establishing the precise boundary of what has and has not changed.

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20 JULY 2018

³ "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8" ("**CMA8**"). We note that the CMA8 consultation is different in that the CMA8 guidance is being revised and it is therefore relatively straightforward for the CMA to prepare a blackline. The Draft Guidance combines multiple guidance documents and it may therefore be more straightforward to prepare a table summarising relevant changes, as suggested.