

Guidance on the CMA's mergers intelligence function Draft for consultation

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CMA56con

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1 INTRODUCTION

- 1.1 This guidance is concerned with the mergers intelligence function of the Competition and Markets Authority (CMA). It is intended for legal advisers advising on a merger. For more general information on how the CMA deals with mergers, see the *Quick guide to UK merger assessment* (CMA18) and *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2).
- 1.2 In the interests of avoiding an excessive regulatory burden, the Enterprise Act 2002 (the Act) does not oblige merger parties to notify the CMA of a merger. However, the CMA has a duty to track merger activity to determine whether any unnotified merger may give rise to a substantial lessening of competition. The CMA therefore has mergers intelligence staff who scan sources of information on mergers¹ and present potential candidates for investigation to the mergers intelligence committee, which meets weekly. The mergers intelligence committee is chaired by a Director of Mergers who also oversees the CMA's mergers intelligence function. The CMA will take a decision to investigate if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met. The threshold for the CMA to open an investigation is therefore lower than the threshold for reference. The CMA may investigate and take action against mergers that have completed provided the completed merger has taken place not more than four months before the reference is made.²
- 1.3 Under section 105 of the Act, there is a distinction between deciding whether to investigate a matter (which the CMA does through its mergers intelligence function) and deciding whether to make a reference (which the CMA does following a phase 1 investigation). If the CMA decides to investigate, then it must publish an invitation to comment. In addition, once the CMA has decided to investigate, section 107 of the Act generally requires it to publish a reasoned decision setting out why it has decided to make a reference or decided not to make a reference. Neither the duty to publish an invitation to comment nor the duty to publish a reasoned decision applies while the CMA is still deciding whether to investigate.

¹ The CMA also maintains an active dialogue with Governmental departments and other regulatory bodies (including UK regulators and other international competition agencies) to obtain intelligence about merger activity.

² See section 24 of the Act. If the merger took place without having been made public and without the CMA being informed of it, the four-month period starts from the earlier of the time that material facts are made public or the time the CMA is told of material facts.

- 1.4 This guidance explains how the mergers intelligence function operates in the light of the distinction drawn in section 105 of the Act.

2 INFORMATION REQUESTS TO THE PARTIES TO THE MERGER OR TO THIRD PARTIES

- 2.1 Where the CMA believes that an investigation is warranted, it will often open an investigation without any prior engagement with either the merger or third parties.
- 2.2 Where the CMA has identified a transaction that may qualify for investigation and raises potential concerns, it may ask parties to provide information to help it determine whether to open an investigation. These requests will usually be to the parties involved in the transaction but can also be to third parties. They are made under section 5 of the Act, which gives the CMA a general power to obtain information about matters relating to the carrying out of its functions. One of these functions is determining whether it should investigate a transaction (so as to enable it to decide whether to make a reference). The CMA will typically send such requests for information to a publicly-available email address for the relevant companies in the first instance (but can use specific contact details where these have previously been provided by the company in question).³
- 2.3 Requests to merger parties will usually relate to the turnover and share of supply tests set out in section 23 of the Act, but may also relate to whether the target is an enterprise, when the transaction completed, and/or preliminary information to explain the businesses of the merger parties or the sectors in which they operate. Where a merger is subject to review by a competition authority outside of the UK, requests may also relate to the current status of those proceedings. If the initial response to these questions is insufficient, the CMA might ask supplementary clarifying questions without opening an investigation, but the CMA will not typically engage in more than two rounds of questions before taking a decision whether or not to investigate.
- 2.4 Requests to third parties will be made rarely. Where requests to third parties occur, they are likely to relate to understanding the nature of the businesses of the merger parties and the sectors in which they operate and any overlap for the purpose of applying the share of supply test. The CMA will only contact third parties in relation to transactions that are in the public domain and have either completed or been signed and announced.

³ Recipients who wish to check the veracity of an email purportedly from the CMA can do so by contacting general.enquiries@cma.gov.uk.

- 2.5 If the CMA determines that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met after asking these questions, and that further information is required to investigate the potential competition concerns, then it will take a decision to investigate so as to enable the CMA to decide whether to make a reference under section 22 or 33 of the Act.

3 HOW THE CMA WILL RESPOND TO PARTIES CONTACTING THE CMA

- 3.1 The CMA invites parties to provide it with intelligence in relation to merger activity that affects UK markets, and welcomes both short briefings from merger parties about their transactions and complaints from concerned third parties.⁴
- 3.2 Merger parties are welcome to submit a short briefing note (maximum five pages) to the CMA, explaining why they do not propose to submit or have not submitted a Merger Notice to the CMA. The note may address:
- (a) Whether there may be a relevant merger situation;
 - (b) Whether any relevant merger situation may give rise to a substantial lessening of competition;
 - (c) Whether the merger has been or is being investigated by any competition authority outside of the UK and, if so, whether the parties intend to offer (or otherwise expect to be subject to) remedies in those proceedings that the merger parties consider would prevent any substantial lessening of competition in the UK;
 - (d) With respect to completed mergers, the note should include when the merger was completed. With respect to anticipated mergers, the note should also include details of the likely completion date and the key remaining steps prior to completion.
- 3.3 As a general rule, the CMA will only consider a briefing note after there is a signed merger agreement.⁵ This is to ensure that the CMA's mergers intelligence function does not commit resources to transactions that may not ultimately be agreed and reviews only those transactions which have not

⁴ To be sent by email to mergers.intelligence@cma.gov.uk.

⁵ The CMA does not wish its willingness to review a briefing note to change the duty on parties to self-assess, which is a key feature of a voluntary mergers regime. However, there may be exceptional circumstances in which the CMA is willing to consider a briefing note prior to a signed merger agreement – eg in the case of some public offers. Where a signed merger agreement has not yet been concluded, the merger parties should set out the evidence which demonstrates their binding intention to merge or, in the case of a public offer, the binding nature of the offer. The CMA would typically not review a briefing note where the merger parties (or at least the offeror, in the case of a public bid) have not yet entered into a binding commitment but merely have a good faith intention to proceed.

been or are not going to be notified on the basis of the parties' self-assessment.⁶ The submission of a briefing note does not attract a merger fee, although a fee may be payable if the CMA subsequently opens an investigation.

- 3.4 Third parties are welcome to set out their concerns about a merger to the CMA. Complainants should explain clearly why they believe the merger raises competition concerns and, where possible, provide supporting evidence.
- 3.5 The CMA may then follow up with the person submitting the briefing note or complaint to understand the submission better. In these cases, the questions raised by the CMA may relate either to jurisdiction or to the overlaps between the merger parties, but will typically remain short as they are still only for the purpose of deciding whether to investigate.

⁶ For this reason, the appropriate point at which to provide a briefing note to the mergers intelligence committee is later than the appropriate point at which to submit a case team allocation form (see CMA2, paragraphs 6.12 to 6.19).

4 WHAT THE CMA WILL DO FOLLOWING ENGAGEMENT WITH THE MERGER PARTIES

- 4.1 Where, following engagement with the merger parties, either at the CMA's own initiative or as a result of a briefing note from the parties, the CMA decides to open an investigation to decide whether to make a reference, it will generally inform the parties of this decision within a week of the last contact. If the merger is anticipated the CMA will typically provide the merger parties with the option to notify the transaction.⁷ Alternatively, the CMA will send the merger parties an enquiry letter under section 109 of the Act.⁸ The extent of information requested by the CMA in its enquiry letter will vary depending on the circumstances of the case in question.
- 4.2 Alternatively, the CMA might decide not to open an investigation immediately. In such cases the CMA will contact the merger parties and indicate that it has no further questions at this stage. This does not preclude further questions at a later stage and, if further information comes to light, the CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Act. This period commences when enterprises have ceased to be distinct and that fact becomes public or is drawn to the attention of the CMA.⁹
- 4.3 One circumstance in which the CMA might decide not to open an investigation immediately is where a transaction is subject to review by a competition authority outside the UK and any remedies imposed or agreed in those proceedings, in the event that competition concerns are found, would be likely to address any competition concerns that could arise in the UK. This could be the case, for example, where all of the markets that are relevant to the transaction are broader than national in scope. In this circumstance, merger parties are encouraged to engage with the CMA at an early stage, and may be invited to update the CMA on the progress of proceedings in other jurisdictions and to provide waivers to the CMA to discuss these proceedings with other competition authorities. The CMA may

⁷ In this circumstance, the merger parties will typically be expected to commit to submitting a draft merger notice to the CMA within 10 working days.

⁸ The template used as the starting point for the enquiry letter used by the CMA when initiating investigation of a non-notified merger is available on the government publications website: <https://www.gov.uk/government/publications/merger-enquiry-letter-template>.

⁹ Where the mergers intelligence committee has considered a briefing note submitted by the merger parties and taken no immediate action, this does not exclude that the CMA will open an investigation until the expiry of the four-month statutory period.

consider whether to open a formal investigation at any point before expiry of the four-month statutory period, and merger parties run the risk that, where remedies in other jurisdictions do not fully eliminate any competition concerns relating to the UK, the CMA opens a formal investigation at a later stage.

- 4.4 If the parties consider it is important to have complete certainty as to whether their transaction might be the subject of a reference before expiry of the four-month statutory period set out in section 24 of the Act, then they should submit a case team allocation request form and a Merger Notice requesting the CMA to open a formal investigation.