Mergers: Guidance on the CMA's jurisdiction and procedure

Summary of responses to the consultation

January 2014
CMA2resp

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This publication is also available at: www.gov.uk/cma.

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1 INTRODUCTION AND SUMMARY

Background

1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's competition and consumer authority. The CMA will take on the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT). The CMA was established on 1 October 2013 and will gain its full functions and powers on 1 April 2014, when the OFT and CC will be abolished. The CMA will be a single centre of expertise in UK markets focusing on public competition and consumer enforcement, guidance, advocacy and leadership for the UK. Its primary duty will be to seek to promote competition, both within and outside the UK, for the benefit of consumers.

1.2 The CMA will have a range of statutory powers to address problems in markets. These include the ability under the Enterprise Act 2002 (EA02) (as amended by the ERRA13) to investigate mergers which could potentially give rise to a substantial lessening of competition and to specify measures which the merger parties must take to protect competition between them while the investigation takes place.

1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMAcon2) (the Draft Guidance) was one of a number of draft guidance documents published for public consultation on 15 July 2013.[1] The CMA's consultation (the Consultation) on these documents closed on 6 September 2013.

1.4 The Draft Guidance describes the approach followed and procedure used by the CMA in exercising its merger control powers under the EA02. The Draft Guidance sought to build on the past success of the OFT and CC's merger regime and to implement improvements where appropriate. The existing OFT and CC jurisdictional and procedural guidance documents were used as the starting point for the Draft Guidance. Those documents were combined into a single document and amended as and where required to:

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[1] These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-1

- reflect procedural changes, developments in case law and experience, and incremental improvements to policies and procedures, and

- eliminate duplication between those two existing documents and provide a single point of reference for those seeking guidance on the CMA's core merger control procedures.

1.5 At the same time, drafts of the following documents related to the Draft Guidance were also consulted on:

- Draft Remedies Form for offers of undertakings in lieu of reference (UILs)

- Draft Merger Notice

- Draft Template Interim Order (together, the Ancillary Documents).

Key changes

1.6 The key changes to the merger regime reflected in the Draft Guidance and Ancillary Documents were:

- the transfer of the OFT and CC's merger control functions under the EA02 to the CMA

- the introduction of statutory time limits for all parts of the merger review process, including:

  - a 40 working day time limit for Phase 1 investigations by the CMA

  - a new, time-limited, process for parties to offer, and the CMA to consider and decide whether to accept, UILs, and

  - following any Phase 2 inquiry, a 12-week period (extendable by six weeks for special reasons) for the CMA to make an order or accept undertakings to implement any final remedies it considers necessary to address its competition concerns

- a new ability for the CMA to suspend its investigation of an anticipated merger for up to three weeks at the start of Phase 2 if the parties so request and the CMA considers abandonment of the merger to be a possibility

- updated processes for notifying mergers to the CMA

- formal information gathering powers applying to all stages of the CMA's investigation, with an associated ability to impose financial penalties for failure to comply with such powers, and

- extended powers for the CMA to agree or impose interim measures and to impose financial penalties for breach of interim measures.

Purpose of this document

1.7 The consultation document accompanying the Draft Guidance and Ancillary Documents (the Consultation Document) set out a series of specific questions on which views of respondents were sought. This document sets out a summary of the responses received to each of those questions, and the CMA's views on those responses.

1.8 In parallel with the Consultation, the Department for Business, Innovation and Skills (BIS) consulted on draft secondary legislation on the CMA's exercise of its merger control functions.[2] Although referred to in this document, the proposed secondary legislation fell outside the scope of the Consultation Document. BIS will be publishing a separate response to its consultation.

Responses to the Consultation Document

1.9 17 written consultation responses referring to the Consultation Document were received.[3] The Draft Guidance was also discussed at a launch event for the CMA draft guidance on 24 July 2013, attended by members of the legal, academic and business communities.

Consultation questions

1.10 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised and the CMA's views on them set out.

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[2] Available at www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation

[3] In total, written responses to the Consultation were received from 24 organisations. Annexe A lists the 17 organisations that provided responses referring specifically to the Consultation Document.

Question		Chapter
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1.11 Finally, chapter 7 of this document summarises certain general or further comments made by respondents which fell outside the specific scope of questions 1-10 above, and the CMA's views on these.

1.12 This document should be read in conjunction with the Consultation Document and cross refers to relevant sections of the Consultation Document throughout. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available

on www.gov.uk/cma. Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures in relation to the exercise of its merger control functions. Parties seeking guidance on those procedures should refer to the final published version of *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), also available on www.gov.uk/cma.

2 EXISTING OFT AND CC DOCUMENTS PROPOSED FOR ADOPTION BY THE CMA

Question 1: Do you agree with the list in Annexe D of the Draft Guidance of existing merger control-related OFT and CC guidance documents and publications proposed to be put to the CMA Board for adoption?

2.1 In the Consultation Document, the CMA sought respondents' views on the draft list of existing OFT and CC mergers-related guidance proposed to be put to the CMA Board for adoption, which was annexed to the Draft Guidance.

Summary of responses

2.2 The majority of respondents broadly agreed with the list of guidance documents and publications proposed for adoption. Several respondents expressly agreed with the CMA's proposal to replace, rather than supplement, the principal OFT and CC guidance documents on jurisdiction and procedural mergers issues (OFT527, CC18 and Appendix A to CC8), and otherwise to adopt the existing OFT and CC joint guidance on substantive mergers issues. Respondents thought the proposed approach would help to promote continuity, stability and legal certainty in the initial period of the CMA.

2.3 One respondent suggested that the OFT and CC's joint publication *A Quick Guide to UK Merger Assessment* (OFT1313/CC2(summary)) should be updated prior to its adoption by the CMA Board in April 2014 to avoid confusion for businesses (who would be the primary users of such a 'quick guide').

2.4 Two respondents suggested that *Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122) should be amended prior to adoption. It was also suggested that the Draft Guidance should address the interaction between undertakings in lieu and the exercise of the de minimis discretion.

The CMA's views

2.5 In light of the views received, the CMA Board has decided – contrary to the proposal in Annexe D of the Draft Guidance – not to adopt

OFT1313/CC2(summary).[4] The CMA will instead publish prior to April 2014 an updated 'quick guide', which will include an overview of the updated procedures detailed in the Final Guidance.

2.6 Annexe D of the Draft Guidance also proposed that the CC *Rules of procedure for merger reference groups, market reference groups and special reference groups* (CC1) would be put to the CMA Board for adoption. However, the CMA considers it would be helpful to make some minor revisions to CC1 to reflect recent changes to legislation and current CC practice. It therefore proposes to conduct a short consultation, prior to April 2014, on the minor revisions it proposes to the rules in CC1. The proposed rules are referred to in the Final Guidance as 'Rules of procedure for CMA Groups'.

2.7 Given respondents' broad agreement with the remainder of the list of guidance in Annexe D of the Draft Guidance, the CMA has chosen not to make any additional amendments to that list. To that end, the guidance documents in that list (other than CC1 and OFT1313/CC2(summary), as explained above) have now been adopted by the CMA Board. A full list of the OFT and CC guidance documents adopted by the CMA Board will be published on www.gov.uk/cma.

2.8 The CMA is mindful of the need to minimise risks of confusion arising from the continued existence of guidance which does not take account of the creation of the CMA or the other changes to the mergers regime introduced by the ERRA13.

2.9 The CMA will therefore seek, when making such adopted documents available on www.gov.uk/cma, to state clearly the basis on which those documents should be read (including by adding 'health warnings' to those documents where appropriate).

Question 2: What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?

2.10 The Consultation Document also sought views on what, if any, additional mergers guidance the CMA should produce once it is operational.

[4] For the avoidance of doubt, the OFT/CC joint *Merger assessment guidelines* (OFT1254/CC2), of which OFT1313/CC2 (summary) provides a summary, has been adopted by the CMA, as was proposed in Annexe D of the Draft Guidance, and will continue to apply after 1 April 2014.

Summary of responses

2.11 Most respondents did not request that further, new guidance be produced, although several suggested that guidance adopted by the CMA Board should be updated after an appropriate period to reflect the CMA's early experience.

2.12 Suggestions from those that sought further guidance included the online publication by the CMA of a list of the adopted OFT and CC guidance, and of statistics relating to the CMA's review of mergers.

The CMA's view

2.13 The CMA notes the suggestions made by respondents. Once it is operational, the CMA will – as part of its wider review of its portfolio of guidance and based on any relevant developments in practice, practical experience, or case law – consider whether specific merger-related guidance documents produced or adopted by the CMA require amendment, and what, if any further guidance on the UK mergers regime it may be appropriate to produce.

2.14 The CMA also expects to continue the OFT's current practice of publishing on its web statistics on the number of cases it reviews, and their outcome.

3 UNDERTAKINGS IN LIEU OF REFERENCE (UILS)

The draft Remedies Form

Question 3: Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?

3.1 The CMA sought respondents' views on the proposed draft Remedies Form for offers of undertakings in lieu of reference (UILs), which parties will use if they wish to offer UILs to remedy the CMA's competition concerns without the need for a reference for Phase 2 investigation.

Summary of responses

3.2 A number of respondents considered that the draft Remedies Form requested information that was broadly appropriate and in line with other competition agencies.

3.3 Several other respondents, however, felt that some information requested in the Remedies Form appeared to go beyond that required by the CMA to take an 'in principle' decision on UILs,[5] particularly given the limited time period for submission of those UILs. It was suggested that the CMA be more flexible in the information that it requests parties to provide, and engage promptly with parties, after providing them with the reasons for its decision that its duty to make a reference applies (the SLC decision), to discuss the extent of information required.

3.4 Some respondents suggested that the CMA:

- increase, or clarify, the threshold for requiring an upfront buyer or a monitoring trustee (and clarify the process in cases in which an upfront buyer is required), and/or
- adopt a less restrictive approach to the offer of behavioural remedies (and provide greater clarity for those who do wish to submit a behavioural remedy).

[5] That is, the CMA's confirmation (within ten working days of providing parties with its reasons for considering that its duty to refer is met) that it considers that a party's offer of UILs (or a modified version of it) might be acceptable as a suitable remedy. This is referred to in the Final Guidance as the UILs Decision.

3.5 In addition, a number of respondents provided drafting comments on certain specific questions in the Remedies Form.

The CMA's views

Scope of the Remedies Form

3.6 The CMA notes the concerns raised by respondents regarding the perceived extent of information requested in the draft Remedies Form. In light of these, the CMA wishes to clarify (and has now noted expressly in both the Final Guidance and the final Remedies Form) that the Remedies Form is not intended to constitute a mandatory list of information that parties are obliged to provide in every case in order for an offer of UILs to be valid. Rather, the Remedies Form indicates the information that the CMA considers will assist it in its assessment as to whether the parties' remedies offer meets the test for acceptance of UILs. The CMA will also be prepared, where possible, to engage with parties to discuss the scope of information necessary for it to assess an offer of UILs in a given case, and has made amendments to Chapter 8 of the Final Guidance to reflect this more clearly.

The CMA's approach to behavioural remedies, upfront buyers and monitoring trustees at Phase 1

3.7 The CMA has amended the Remedies Form and the Guidance to clarify its approach to behavioural remedies, and to explain the information that parties should provide in the Remedies Form if they do wish to submit behavioural undertakings (notwithstanding that such undertakings will be highly unlikely to be suitable as UILs).

3.8 The CMA continues to consider that making its acceptance of UILs contingent on sale to an upfront buyer is an appropriate means of managing risks resulting from the fact that, once it accepts UILs, the CMA loses its duty (and ability) to refer the merger to Phase 2. However, in view of respondents' comments, the Final Guidance seeks to clarify when the CMA will typically seek an upfront buyer.[6] The CMA has also:

- provided additional wording in the Final Guidance to clarify the circumstances in which a monitoring trustee or hold-separate manager

[6] That is, where the divestiture package is not an existing standalone business and/or where the risk profile of the remedy requires it: see paragraph 8.34 of the Final Guidance.

may be likely to be required to be appointed (see, for example, paragraphs 8.37-8.38 of the Final Guidance), and

- similarly, clarified the descriptions in the Draft Guidance of the processes both for divestments to upfront buyers and for the appointment of monitoring trustees, in response to concerns raised in this regard.

Procedure for the offer and acceptance of UILs

Question 4: Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?

3.9 Respondents were asked for their views on the guidance set out at paragraph 8.23 to 8.24 of the Draft Guidance on the CMA's ability to extend by up to 40 working days the timetable for final acceptance of offers of UILs, when there were 'special reasons' for doing so.

Summary of responses

3.10 Several respondents considered the Draft Guidance to be clear and understandable in this regard, and particularly welcomed the CMA's confirmation that it would consider using the power to extend the timeframe for accepting UILs in cases involving upfront buyers.

3.11 A few respondents, however, requested greater explanation of the residual 'exceptional circumstances' in which the Draft Guidance indicated that the CMA might make an extension.[7] One respondent thought the period should be extended only in case of upfront buyers or where there is an unforeseen need to conduct a second consultation on UILs (that is, limited to the scenarios listed in the first and second bullet points in paragraph 8.24 of the Draft Guidance).

The CMA's views

3.12 The CMA is pleased that the majority of respondents felt the guidance on extension of the UILs timetable to be clear and understandable.

[7] Draft Guidance, paragraph 8.24, third bullet.

3.13 Having considered respondents' views on the examples provided in paragraph 8.24 of the Draft Guidance, the CMA has decided to retain these in the Final Guidance.[8] In particular (and especially given that the CMA has not yet had the opportunity to implement the new UILs process and timeframes in practice), the CMA considers it appropriate to allow for the possibility of extending the period for acceptance of UILs in the event of (currently unforeseen or un-specifiable) exceptional circumstances.

Question 5: Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described [in paragraphs 3.9 to 3.15 of the Consultation Document]?

3.14 Respondents were also asked to provide any further comments on the new remedies time limits and processes, which were described in full in chapter 8 and paragraphs 14.3 to 14.8 of the Draft Guidance.

Summary of responses

3.15 While several respondents welcomed the proposals in the Draft Guidance for the CMA to engage with parties regarding the offer of UILs, some felt that the CMA should commit to even greater direct engagement with parties on UILs issues (including engagement with the Phase 1 decision maker).

3.16 Some respondents also requested that the CMA adopt a more flexible approach to UILs, including by: (a) considering sequential or multiple alternative UIL offers by the parties; and/or (b) committing to revert to parties to propose 'modifications' to UIL offers in a wider range of scenarios (including, for example, where the CMA considered that the UILs offered by the parties went beyond the minimum necessary to provide a clear cut solution to the competition concerns identified by the CMA). A few respondents commented on the need to ensure that the UILs process would adequately accommodate the time limits of the City Code and other rules on bids for publicly listed companies.

3.17 Some respondents also submitted that the period of 15 **working** days which the Draft Guidance indicated that the CMA would 'generally try'[9] to give third

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8 Final Guidance, paragraph 8.25.

9 Draft Guidance, footnote 163. This was included to mirror the existing policy of the OFT, under the previous (that is, pre-ERRA13) statutory process for final acceptance of UILs. That process was not subject to the time limits that will now apply to the CMA.

parties to respond to a first consultation on UILs should be reduced to the statutory minimum of 15 **calendar** days.

The CMA's views

The CMA's engagement with parties

3.18 The CMA recognises the benefit of engagement between the CMA and the parties in relation to possible UILs. To this end, and as stated in the Draft Guidance, the CMA is prepared to engage with parties where possible to discuss UILs, both before the SLC decision and during the period for the offer and consideration of UILs. In view of respondents' comments, the CMA has amended the Final Guidance to provide more firmly for that willingness to engage where possible (including to offer guidance on UILs being considered by the parties).[10] However, the Final Guidance continues to make clear that, given the period of time between the SLC decision and the deadline for offering UILs is short, parties should not expect to engage in iterative discussions or negotiations with the CMA over UILs.

3.19 Given the limited statutory time-limits that will apply to the offer and consideration of UILs, and the fact that the reasons for the CMA's SLC decision will have been made clear to the parties in writing, the CMA does not anticipate that the Phase 1 decision maker will be present at any meeting between the parties and the CMA during the five to ten working day period for the offer or consideration of any UILs.[11] Rather, any engagement will principally be with the case team and CMA staff specialising in remedies. The CMA considers those staff to be best placed to discuss with the parties (in the light of the decision maker's reasoned decision, once made and communicated to the parties) matters such as the scope of information to be provided in the Remedies Form, and the practical operation (and thus suitability as a Phase 1 remedy) of any UILs that the parties are considering offering.

Greater flexibility

3.20 The CMA has carefully considered respondents' requests for greater flexibility in the UILs process. In general, however, the CMA considers that the processes envisaged in the Draft Guidance provide as much flexibility as

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[10] See, for example, paragraphs 8.8 and 8.11 of the Final Guidance.

[11] The same will be true of any engagement with parties regarding possible UILs that occurs prior to the SLC decision.

is practicable within the legislative timeframe, and that many of the respondents' concerns can equally be addressed by clarification of the description of those processes in the Final Guidance.

3.21 As to the suggestion that the CMA should consider multiple (alternative or sequential) UIL offers, the CMA is not inclined to revert to a practice similar to the 'envelope' procedure previously utilised by the OFT. Although such a process was appropriate under the previous legislative scheme,[12] the CMA does not consider it appropriate in circumstances where the parties will receive the CMA's written reasons for its SLC decision, and thus be well placed to identify and offer within the statutory time period the UILs that would provide a clear cut remedy to the concerns. As explained in the Final Guidance (paragraph 8.11), submitting a range of alternative remedy options is likely to slow the process and lead to a risk of the CMA being unable to decide whether the UIL offer (or a modified version of it) might be acceptable, within the time constraints imposed by the EA02. As explained in the Final Guidance (paragraphs 8.20 – 8.21), the CMA is however mindful of the public policy benefits that can be achieved through the UILs process, and therefore may, where it considers appropriate, revert to parties (or their legal advisers) following receipt of a UIL offer to inform them that their offer may be suitable to address the competition concerns identified, subject to specified modifications.[13]

Other comments

3.22 In light of respondents' comments on the period provided for consultation with third parties, the CMA has amended the relevant wording of the Final Guidance to mirror the statutory minimum of 15 calendar days.[14] The CMA considers that the consultation period in a given case may need to be no greater than that statutory minimum, given in particular the new statutory deadlines for final acceptance of UILs and the need to give merger parties sufficient time within this timeframe to address any issues raised by the consultation.

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[12] Under which, parties were required to offer any UILs before the SLC decision (and so would be unaware of whether or not the decision maker would consider that the OFT's duty to refer the case to Phase 2 was met, or – where he/she considered that it was – which issues he/she considered to trigger that duty, and which any UILs would therefore have to remedy).

[13] As the Final Guidance notes, these modifications will not amount to a different remedy but a modification of the existing proposal.

[14] Final Guidance, paragraph 8.29.

3.23 The CMA has also made several further amendments to Chapter 8 of the Final Guidance to simplify and clarify the explanation of the various stages of the UILs process, in particular with regard to the functioning of statutory timeframes, the process for identifying an upfront buyer and the timing for divestments. In cases to which the City Code applies, the CMA will be alive to the parallel operation of the CMA's Phase 1 process (including the UILs phase) and the Code timetables, and advises parties to discuss with the case team any specific Code milestones or deadlines to which they are subject (see also paragraph 4.24 below).

4 THE MERGER NOTIFICATION PROCESS

The Merger Notice

Question 6: Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?

4.1 The CMA asked respondents for their views on the volume and type of information requested in the draft Merger Notice at Annexe E of the Draft Guidance.

Summary of responses

4.2 Several respondents welcomed the flexibility created by the CMA's proposal to allow parties to supply information required by the Merger Notice by way of a written submission in a format of their choosing (together with a signed and annotated version of the Merger Notice template completed to indicate clearly where in the bespoke submission the information responsive to each question in the Merger Notice could be found). The CMA's statement that it may modify the Merger Notice from time to time was also welcomed, as a means to ensure that the Merger Notice continues appropriately to reflect the CMA's developing case experience.

4.3 A large number of respondents expressed concerns that the Merger Notice appeared to request a large amount of information, and more than that presently required by the OFT.[15] Concerns were expressed that this would make the notification process slower[16] and more burdensome for business, particularly in non-complex ('no issues') cases that were unlikely to give rise to competition concerns.[17] Several respondents suggested that it would be

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[15] Certain respondents commented that the information requested similarly went beyond that sought by competition authorities in merger cases in comparable European jurisdictions. Others submitted that certain categories or specific pieces of information requested, may not – in many cases – be either necessary for or relevant to the CMA's Phase 1 investigation, and could, in certain instances, risk misleading the CMA (for example, where draft documents were requested and provided).

[16] When coupled with the extent of pre-notification discussions and discussion of possible derogations from the Merger Notice envisaged by the Draft Guidance.

[17] And so were likely to be cleared by the CMA at Phase 1 without the need for an issues letter or case review meeting. Several respondents suggested that the CMA should acknowledge that the information required in a Merger Notice would be reduced in such no issues cases, and that the CMA's proposed process for considering derogations from the need to provide such information

preferable for the CMA to begin its investigation with a more targeted request, and to request further information if and when required once the 40 working day period for the CMA's Phase 1 review had formally commenced (in particular by using its powers under section 34ZB(1) of the EA02 to 'stop the clock' on that 40 working day timetable).

4.4 Numerous respondents also referred to individual questions or categories of information in the draft Merger Notice which they specifically felt should be reduced in scope[18] so as to reduce the perceived information burden on parties. Many respondents raised particular concerns with the perceived extent of contact details requested, while others suggested methods for narrowing the requests for, for example, market documents[19] or information on other transactions involving the merger parties.

4.5 Several respondents expressed the view that the derogations process proposed by the CMA[20] would not be sufficient to alleviate concerns about the volume of information required by the Merger Notice. In particular, some felt that that process would be lengthy, or that the CMA would be unduly cautious in deciding whether to grant a derogation. Other respondents requested that the Final Guidance clarify the derogations process further, including, for example, the circumstances in which (or categories of information for which) derogations might be available on a regular basis.[21]

4.6 Finally, several respondents also commented on specific details and wording of the Merger Notice, and provided suggestions for minor amendments.

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(see further paragraph 4.5 below) should also cater specifically for such cases (including to indicate that derogations would be more readily granted).

[18] For example, through the introduction of market share or materiality thresholds below which information would not need to be provided.

[19] For example, by specifying a shorter time period for which information was required, or by limiting requests to markets in which there was a material overlap between the merger parties.

[20] Under which the CMA may be willing to grant derogations from the obligation to provide specific pieces or categories of information specified in the template Merger Notice and to discuss such derogations with parties during pre-notification discussions (see paragraph 6.59 of the Draft Guidance).

[21] Examples suggested by respondents included cases where information on the acquired enterprise's business was not available or accessible to the notifying party (such as in hostile takeover cases) or where the City Code timetables apply.

The CMA's views

4.7 The CMA notes the concerns raised by respondents as to the perceived scope of the information requested in the draft Merger Notice.

4.8 In drafting that Merger Notice, the CMA sought to balance:

- the need (pursuant to the EA02 and the Government's legislative intention) for the Merger Notice to provide a single means of notification capable of use in all merger cases (whether complex or non-complex,[22] anticipated or completed) with
- a desire to take a 'substance over form' approach that allowed the nature and extent of information sought to be tailored to reflect the specific nature and complexity of each case,[23] and so to minimise risks of imposing an undue burden on notifying parties.

4.9 To this end, the questions in the draft Merger Notice were drafted in relatively high-level, broad terms with the accompanying Guidance Notes[24] intended to assist parties in understanding the specific nature and extent of information which the CMA would, in their individual case, be likely to regard as constituting ‘prescribed information’ necessary for the commencement of the CMA's 40 working day review period (see sections 96 and 34ZA(3) of the EA02).

4.10 Furthermore, the introduction of a statutory time limit for all Phase 1 investigations means that the CMA will not have the flexibility that the OFT previously had to extend its administrative review timetable should there be delays in receiving information it considers to be required for its review. The CMA notes the views of certain respondents that this concern could be addressed once the 40 working day period has been commenced, through the CMA's use of its formal information gathering powers. However, the CMA considers that reliance on those powers, and the resultant delay in receiving

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[22] By comparison, the OFT's statutory Merger Notice was used in a small minority of cases, and typically only for cases that would manifestly not raise competition concerns.

[23] While still providing parties with clarity as to the information that would need to be provided for a Merger Notice to be considered 'complete' (that is, to contain the 'prescribed information' required by the EA02) in a given case.

[24] The Guidance Notes provide guidance on how the CMA will (and how parties completing the Notice should) assess what, and how much, information is necessary for the purposes of the CMA's investigation in the case at hand (and thus will constitute a satisfactory response to the question in the Notice).

that information, may be detrimental to the progression of the CMA's review and to its ability to undertake that review within the 40 working day statutory limit.[25] Rather, the CMA considers that pre-notification discussions between the CMA and the parties provide an efficient and effective means of the CMA establishing with parties the precise nature and extent of information required by the CMA in order to undertake its investigation as expeditiously as possible.

4.11 However, the CMA acknowledges that aspects of the way in which the draft Merger Notice and accompanying Guidance Notes were drafted may have created the impression that the CMA would, in many cases, require merger parties to provide significantly more information than has typically been required by the OFT in equivalent cases under the former Enterprise Act regime.

4.12 This was not the CMA's intention. The extent of information to be provided will vary from case to case, and the CMA will be reasonable in assessing whether the information provided by parties is sufficient in a given case.[26] Amendments have therefore been made to the final Merger Notice (and in particular the accompanying Guidance Notes) to seek to reflect this and to address any misconceptions previously created. The CMA has, for example, sought to provide additional clarity in the Guidance Notes on the levels and nature of information likely to be appropriate in a specific case. Where appropriate, this has included providing indicative 'thresholds' below which the CMA would generally not seek to gather the information referred to in the relevant part of the Merger Notice.[27]

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[25] Although the CMA will have the power to 'stop the clock' on that 40 working day review period (where it has formally requested information in a party's custody or under its control, and that information has not been provided within the deadline set by the CMA), the CMA considers frequent recourse to such clock-stopping to be undesirable. In particular, the CMA considers that it would risk limiting parties' ability to anticipate when the CMA will complete its review, which the statutory timetables were in part designed to enhance, and which may be important for parties' commercial deal planning.

[26] As previously noted, the CMA considers that pre-notification discussions provide the most effective means for parties and the CMA to resolve any questions, and to agree the appropriate extent of information to be provided.

[27] See, for example, Guidance Notes to questions 10 and 14 of the Merger Notice. The CMA may, however, nonetheless require the information specified in the Notice to be provided in a case falling below such indicative thresholds before confirming that a notification contains the prescribed information and commencing the 40 working day period, if it considers there to be specific features of the case that justify requiring that information. The CMA encourages parties to use pre-

4.13 The CMA has also made specific drafting amendments to the Merger Notice intended to:

- clarify the potential scope of specific questions in the Merger Notice or the Guidance Notes' descriptions of the information sought, and
- provide further guidance on the circumstances where the CMA is likely to consider a notice to be complete notwithstanding that parties may have either provided more limited information in relation to a specific question, or indicated that they consider that question not to be relevant to their case.

4.14 In order to enhance the usability of the Merger Notice, the CMA will also publish a version of that Notice that sets out individual Guidance Notes next to the question(s) in the Merger Notice to which they relate, rather than separately.

Merger fees

Question 7: Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?

4.15 Respondents' views were sought on the proposal to seek amendments to the relevant secondary legislation, so as to harmonise across all cases the point in time at which a merger fee becomes payable. Under the CMA's proposed changes, any such fee would be payable upon publication of the CMA's decision whether or not to refer the case (rather than on submission of a statutory merger notice, as has previously been the case).

Summary of responses

4.16 The CMA's proposed harmonisation was widely support by respondents, who considered that it would reduce complexity and avoid the need for repayment of fees to parties (for example, where a notified transaction was found by the CMA not to qualify as a relevant merger situation). Some suggestions were made for possible clarifications to the description of the arrangements for payment of fees in Chapter 20 of the Draft Guidance.

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notification discussions to allow them to establish with the CMA whether this may apply to their particular case.

The CMA's views

4.17 The CMA welcomes respondents' positive responses on the proposed harmonisation, and has discussed those responses with BIS. BIS has separately consulted on draft secondary legislation (the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014), which BIS intends to make early in 2014 and which would then come into force on 1 April 2014.

Further comments on the updated merger notification process

Question 8: Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?

4.18 Respondents were asked for any further comments on the updated merger notification process envisaged by the Draft Guidance.

Summary of responses

Pre-notification

4.19 A number of respondents noted the benefits of pre-notification and welcomed the CMA's commitment to engagement with parties (where necessary) during the pre-notification process.

4.20 However, others expressed concerns that the Draft Guidance appeared to indicate an increase in the need for, and length of, pre-notification compared with the OFT's past practice (in particular in relation to cases where there were no likely substantive competition issues).[28] Some respondents were concerned that the lack of certainty or control for parties over the length of pre-notification discussions risked delaying the commencement of the 40 working day timetable, extending the duration of the Phase 1 process.

Other comments

4.21 Other comments made by respondents included:

[28] Some respondents commented that any associated increase in the volume of information gathered and requiring analysis by the CMA as a result of such pre-notification also risked creating material burdens on CMA resources.

- concerns as to the length of time[29] that the CMA would take to review draft submissions or confirm that a submitted Merger Notice was complete[30]

- some concerns as to the interaction of the proposed new process for notification with the requirements of the City Code timetable, and

- requests for clarification or further guidance on the CMA's approach to specific aspects of the notification process, such as the CMA's use of its power to reject a Merger Notice, and the thresholds it would apply in deciding when to open an investigation and thus to proceed to an SLC decision.

The CMA's views

4.22 The CMA notes that a number of respondents referred to the benefits of pre-notification discussions and the CMA's commitment to engage with parties through such pre-notification. As emphasised in the Draft Guidance,[31] the CMA strongly believes that pre-notification contacts can benefit both the merger parties and the CMA's review,[32] and strongly encourages parties to make use of that process.

4.23 The Draft Guidance also made clear that the likely duration of pre-notification discussions will vary from case to case (depending in particular on the extent of potential competition concerns to which the case is likely to give rise). In some cases, therefore, extensive pre-notification will be appropriate, and may be critical to resolving the case without the need for a Phase 2 investigation. However, the CMA is conscious of the need to take care that such discussions do not extend for longer than is appropriate, and that they

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[29] See paragraphs 6.49 and 6.58 of the Draft Guidance and Guidance Note 14 of the Draft Merger Notice, which indicated that the CMA would seek to inform parties whether a submitted Merger Notice was a satisfactory notification 'within five to ten working days' of its submission to the CMA.

[30] Particularly in cases where the CMA has already reviewed draft versions of that document during pre-notification discussions.

[31] See, in particular paragraph 6.41.

[32] For example, by helping parties to ensure their notification is satisfactory and complete (and identifying information which does not need to be provided), and – for mergers which could give rise to competition concerns – to allow the CMA and parties to discuss any specific categories of (additional) evidence that, notwithstanding those possible concerns, could enable the CMA to conclude that it is able to clear the merger at Phase 1.

do not undermine the greater certainty for parties as to the timing of the Phase 1 review process that has been provided by the statutory timetables.

4.24 The CMA is also mindful of the potential impact of the timetable and other requirements of the City Code on notification to the CMA of anticipated mergers subject to that Code. Where a proposed merger will be subject to the Code,[33] parties are advised to bring this to the CMA's attention at the earliest opportunity. This will assist the CMA case team in engaging with parties to discuss the Code timetables to which the parties are operating, and their interrelation with the CMA's review.

4.25 The CMA has considered carefully respondents' specific suggestions for areas of possible clarification or further guidance. Where practicable, the CMA has sought to amend the Final Guidance to accommodate such requests. In other cases, the CMA considers that the extent of guidance provided in the Draft Guidance is appropriate and proportionate to the nature of the guidance document,[34] or that it is more appropriate to consider providing in future (once it has greater practical experience of applying new processes and procedures) guidance that reflects the benefits of that experience.

[33] Or where the merger is subject to other specific regulatory requirements, such as the special regime for mergers in the Water Industry Act 1991 (as amended).

[34] In particular, given that the Final Guidance applies to all merger cases, and thus is necessarily constrained in its ability to provide extensive guidance on the full range of circumstances that may arise.

5 INTERIM MEASURES

Question 9: Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?

5.1 Respondents were asked for comments on the CMA's (or, in public interest cases, the Secretary of State's) proposed use of its new or extended powers under sections 72, 80 and 81 of, and Schedule 7 to, the EA02 (as amended) to impose interim measures to prevent or unwind pre-emptive action in respect of both anticipated and completed mergers.

5.2 Respondents' views were also sought on the proposal that the CMA adopt a template order (as the starting point for orders imposed), a draft of which (the Draft Template Order) was annexed to the Consultation Document.

Summary of responses

5.3 Several respondents raised concerns with the way in which, based on the Draft Guidance (and the Draft Template Order), it appeared that the CMA would use its new interim measures powers in Phase 1 of merger investigations. Broadly, respondents' concerns centred on a belief that the CMA would impose interim measures more often (and, in some respondents' view, too often) and/or frequently at an early point in time, when the CMA would have very little information about the transaction in question. Views were also expressed that the measures imposed under the Draft Template Order were too wide in scope, and that the CMA's proposal to grant derogations from those measures was insufficient to address concerns.

Comments on the threshold for making interim orders

5.4 Numerous respondents believed that the threshold in the Draft Guidance which the CMA would apply when deciding whether to impose interim orders in **completed** mergers[35] was too low (compared with the use of initial

[35] See paragraph 7.35 of the Draft Guidance ('The threshold the CMA applies to consider whether it is appropriate to make an interim order at Phase 1 is a low one. The CMA will not have sufficient information to form a detailed judgement on the precise risks of pre-emptive action at such an early stage in its assessment process.[...] In a completed merger, the CMA will normally make an interim order at the same time as an enquiry letter is sent out or after being informed of the merger by the parties.')

undertakings under the OFT regime) and might result in orders being imposed unnecessarily on non-problematic mergers.

5.5 Several respondents also raised concerns that the CMA would routinely make interim orders at Phase 1 in respect of **anticipated** mergers, and that this risked deterring potential acquirers from (potentially pro-competitive) mergers and having a negative impact on their deal planning (including due diligence). Further guidance was therefore sought as to the circumstances in which an order would be imposed in anticipated merger cases, and, in particular, when, if at all, it was envisaged that such an order would include provisions preventing parties from completing transactions.[36]

5.6 Many respondents submitted that the proposal in the Draft Guidance to implement interim orders without notice ('normally [...] at the time an enquiry letter is sent out or after being informed of the merger by the parties')[37] was problematic. Those respondents typically suggested that the CMA should instead allow for a period of engagement with the parties on the need for and scope of an order before making it effective.

5.7 Some respondents considered the CMA's proposal to grant derogations from interim orders in certain circumstances to be insufficient to address concerns about the scope or effect of such orders. Some of those responses stated that they believed that the Draft Guidance's[38] thresholds for the grant of such derogations were unduly restrictive (particularly given the CMA's low threshold for imposing orders). Others were concerned that parties' requests for derogation would not be considered sufficiently quickly (notwithstanding the statement in the Draft Guidance that the CMA would consider such requests 'promptly').

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[36] Certain respondents felt that the CMA should state that it would never include such provisions, or questioned whether such provisions were within the scope or purpose of the order-making powers which CMA had been granted.

[37] Paragraph 7.35 of the Draft Guidance.

[38] 'The CMA is unlikely to grant derogation requests unless it can be shown that the request is necessary to safeguard the viability of the acquired business which would otherwise be at significant risk, to ensure the effective operation of the interim measures as a whole, or to meet a regulatory, statutory or other obligation. Requests that relate solely to bringing forward merger synergies are unlikely to be granted. Arguments that integration can subsequently be unwound are not on their own sufficient reasons to allow such integration; the CMA will instead focus in the first instance on the factors above and whether the integration increases the risk of pre-emptive action.' (Annexe C to the Draft Guidance, paragraph C.18).

Other comments

5.8 One respondent considered that the circumstances in which the CMA would appoint a hold separate manager or monitoring trustee to ensure compliance with interim orders should be limited, and that the Draft Guidance was too permissive in this respect.

5.9 Finally, various respondents suggested specific amendments to the wording of the Draft Order itself.

The CMA's views

5.10 The CMA appreciates that the extended powers it will have to make interim orders at Phase 1 represent a change from the powers previously available to the OFT, and understands respondents' desire for clarity in the Final Guidance as to the way in which the CMA will use those powers.

The threshold for making interim orders

5.11 The CMA notes that, in extending the powers in relation to interim measures, it was the Government's stated intention to make it easier for the CMA to suspend integration of the merger parties during a Phase 1 investigation (and to do so at an earlier stage) and, more generally, to resolve the difficulties the OFT and CC have faced in reviewing and dealing with the effects of completed mergers.[39] While the CMA will act reasonably in considering whether an interim order is appropriate in any given case, and will be mindful of the need to seek to avoid burdening business with unnecessary regulatory cost, it considers the processes and approaches set out in the Draft Guidance to be consistent with the legislative intention. In particular, the CMA considers its stated approach to the making of orders in completed merger cases to be a manifestation of the Government's objective and to reflect appropriately the generally increased risk of pre-emptive action in completed merger cases.[40]

5.12 However, the CMA recognises the importance to business of understanding how the increased power will be applied and has therefore made various amendments to that drafting, including changes to:

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[39] See the Explanatory Notes to the ERRA13, paragraph 232.

[40] As well as reflecting the range of forms that such pre-emptive action can take and the information asymmetry between parties and the CMA at the preliminary stages of merger inquiries.

- reiterate that the purpose of interim measures is to freeze integrative action and prevent pre-emptive[41] action occurring in the future, and so to make clear that integration that has already occurred prior to an interim order being made, and any unavoidable consequential effects of that integration, will not be in breach of that order

- clarify the process for the consideration and grant of derogation requests, and to set out a broader range of circumstances in which such grant will be more likely**,** and

- set out the key risks that the CMA is generally concerned about in assessing the need for interim orders, and to provide examples of the situations in which the CMA is more (or less) likely to make an interim order.

5.13 Thus, the Final Guidance distinguishes more clearly between the CMA's approach to making interim orders in relation to anticipated mergers on the one hand, and completed mergers on the other. It clarifies in particular that it considers the risk of pre-emptive action generally to be much lower in the former than the latter case and that, as such, the CMA would expect to make an interim order at Phase 1 in an anticipated merger only in those (relatively rare) cases that it considers raise concerns about pre-emptive action that is difficult or costly to reverse. Additionally, the Final Guidance notes that, in those cases, the CMA would typically engage with parties before making an order.[42]

5.14 Similarly, the CMA has clarified that, in respect of anticipated mergers, it would not expect to impose an interim order that limited parties' ability to complete the merger unless it both: a) has strong reasons to believe that completion will occur prior to the end of the Phase 1 inquiry; and b) considers that the act of completion of itself (as opposed to any integrative actions following, or permitted by such completion) might amount to 'pre-emptive action' under the EA02, which would be difficult or costly to reverse.[43]

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[41] The EA02 defines pre-emptive action as ‘action which might prejudice the reference concerned or impede the taking of any action ... which may be justified by the CMA’s decisions on the reference [that is, any Phase 2 remedy]’.

[42] The Final Guidance also emphasises that any such interim orders in anticipated mergers will usually be tailored, rather than being based on the CMA's template interim order, and may focus on a more limited number of specific concerns.

[43] The Final Guidance also provides possible examples of such circumstances (see footnote 349).

Other comments

5.15 To further enhance the clarity of the Final Guidance, the CMA has also eliminated some duplication of text which previously existed between paragraphs 7.28 to 7.42 and Annexe C of the Draft Guidance. As such, detailed information on the content and timing of interim measures, the circumstances in which they may be made by the CMA, and how the CMA will handle requests from parties for derogations from specific provisions of such measures, is now set out in Annexe C to the Final Guidance alone, and has been deleted from chapter 7.

5.16 The CMA has considered respondents' specific drafting comments on the Draft Template Order, and has, where appropriate, made amendments to reflect those suggestions or to improve the clarity of the Template Order. In particular, to address specific concerns raised by some respondents, the order now notes that the 'ordinary course of business' carve-out from the restrictions on the passing of information of a confidential or proprietary nature between the acquiring and acquired companies (paragraph 6(l) of the Template Order) includes action required to be taken to comply with regulatory requirements.

5.17 Having considered further the operation of the Draft Template Order, the CMA has made further revisions to that template to provide that certain provisions relating to the maintenance of businesses will relate to both the acquiring and the acquired business.[44] This is consistent with the OFT's past practice in relation to initial undertakings, and will ensure that, if remedial action is ultimately considered necessary, the CMA is able to order the remedy that is most effective to address the competition concerns it has identified.[45] In those cases in which the CMA issues an interim order without having previously engaged with the parties, and the acquiring entity considers there to be objective reasons why its businesses should not be

[44] As noted in the Final Guidance, the Template Order represents the CMA's starting point for **completed** mergers, and the CMA accepts that certain provisions of the template will not be relevant to those (more limited) cases where the CMA considers an order to be necessary in respect of an **anticipated** merger.

[45] For example, the CMA may consider that divestment of businesses or assets belonging to the acquiring company, rather than the acquired company, is necessary to remedy its competition concerns.

subject to those provisions, the CMA will engage promptly with parties to discuss those reasons and consider derogations.[46]

[46] Particularly if the acquirer has further businesses that do not relate to the acquired business or the markets in which it operates, and in respect of parts of the parties' businesses with no relevance to the UK.

6 TRANSITIONAL ARRANGEMENTS

Question 10: Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?

6.1 Respondents were asked for their views on the proposed transitional arrangements set out at Annexe E of the Draft Guidance,[47] which will be translated into law by way of secondary legislation.

Summary of responses

6.2 The majority of respondents welcomed the transitional arrangements proposed.

6.3 Two respondents considered that the CMA's powers in relation to interim measures should apply only to transactions for which legally binding obligations were entered into on or after 1 April 2014. One respondent also suggested that the 'old powers' in relation to interim measures (that is, those applicable before 1 April 2014) continue to apply in all cases where Phase 2 of an investigation is ongoing at the effective date.

The CMA's views

6.4 Given the broad support from respondents for the CMA's proposed transitional arrangements, the CMA considers it appropriate to retain these. It falls to BIS to make the transitional provisions by secondary legislation, and BIS intends to do so early in 2014. The overview of the CMA's proposed approach included in Annexe E of the Draft Guidance has been moved into a separate document, *Transitional Arrangements: Guidance on the CMA's proposed approach – Part 1* (CMA14) along with transitional arrangements related to other CMA functions, and published on www.gov.uk/cma.

6.5 OFT and/or CC case teams will explain to parties to merger cases that will be ongoing on 1 April 2014 how these transitional arrangements will apply in the parties' case.

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[47] A separate consultation (*Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance: consultation document* (CMAcon12)) on the full list of existing OFT/CC guidance documents proposed to be adopted by the CMA Board was held between 17 September and 11 November 2013. The responses to that consultation did not suggest any further changes to the list in Annexe E of the Draft Guidance.

7 FURTHER COMMENTS

Summary of responses

7.1 Several respondents made further comments not related specifically to the consultation questions listed above. In addition to individual respondents providing specific drafting queries/suggestions, the following matters were raised by a numbers of respondents.

The Phase 1 decision-making process

7.2 A number of respondents felt that the Phase 1 decision maker should attend the issues meeting held with parties in more complex Phase 1 investigations,[48] contrary to the approach proposed in the Draft Guidance (which replicated the policy adopted by the OFT). Respondents felt that parties themselves were best placed to put their case to the decision maker and that his/her attendance (and consequent ability to ask questions of the parties directly) would help to reduce the risk that he/she might misunderstand, or be unaware of, material information about the merger or the parties involved. Respondents believed that this would allow for more robust Phase 1 decisions by the CMA.

7.3 While some respondents acknowledged that such a policy would increase the resource burden on the CMA, they felt that this was outweighed by the benefits that they anticipated that in-person engagement between the merger parties and the Phase 1 decision maker would bring (for both parties and the CMA).

Capturing the benefits of a unitary authority

7.4 Respondents broadly welcomed the proposals in the Draft Guidance that sought to capture the procedural benefits provided by the creation of the CMA, in particular those proposals intended to enhance the efficiency of, or reduce repetition between, the first and second phases of an investigation (for example regarding the provision of information by parties and its use by the CMA).[49]

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[48] See paragraphs 7.45 – 7.59 of the Draft Guidance

[49] Some respondents also expressly welcomed the retention of certain aspects of the OFT and CC's existing practice which also facilitated this, such as the possibility for 'fast track references'.

7.5 Many respondents appreciated the CMA's proposals to avoid unnecessary duplication and to facilitate an efficient end-to-end merger review process by typically retaining at least some of the Phase 1 case team to work alongside newly assigned staff in the (larger) Phase 2 case team. However, certain respondents sought additional clarity as to which (or how many) members of the Phase 1 case team would continue on to Phase 2, or felt that the CMA should commit to a certain degree of change in personnel on referral, in order to further protect against risks of perceived confirmation bias.[50]

Structure of the Draft Guidance

7.6 Finally, several respondents welcomed the clarity of the Draft Guidance and felt it to be well structured.[51]

The CMA's views

The Phase 1 decision-making process

7.7 The CMA considers that the Phase 1 decision-making system it proposed in the Draft Guidance represents a fair, robust, open and efficient process.[52] As such, the CMA sees strong reasons for retaining that approach, and has, in principal part, replicated it in the Final Guidance.

7.8 However, the CMA has noted and carefully considered the strong views of respondents that the Phase 1 decision maker should not be excluded from issues meetings in cases. The CMA also considers that such attendance, so far as it is practicable for the CMA, would further pursue the CMA's stated organisational goal of maintaining or, where the CMA considers it appropriate, enhancing the already high existing standards of openness and engagement with parties to cases.

7.9 The CMA has therefore amended the Draft Guidance, to set out the CMA's intention that in cases in which an issues meeting is held, that meeting will

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[50] Those respondents felt the introduction of new decision makers at Phase 2 and likely expansion of the case team to be insufficient to fully protect against those risks and identified specific members of the Phase 1 case team (or a certain proportion) that they considered should not continue at Phase 2.

[51] In particular, respondents appreciated the inclusion of the diagram and tables summarising the typical milestones of Phase 1 and Phase 2 investigations.

[52] In particular, the fact that parties would have access throughout the Phase 1 investigation to senior members of the case team and the CMA's Mergers Unit.

be attended by the Phase 1 decision maker (along with other senior members of the Mergers Unit, the case team and the Devil's Advocate), unless the CMA considers that, in the specific case at hand, it would be impractical for the decision-maker to do so. The CMA notes that, in the light of the tighter, less flexible timetables to which it will be subject, this revised approach may mean that parties are offered fewer alternatives for the timing of that issues meeting than has previously been the case under the OFT process.

7.10 The CMA also considers that the ability for parties to use the issues meeting to discuss with the CMA the possible offer of UILs (should the decision-maker decide that the CMA's duty to refer the merger is met) can have significant benefits,[53] and a number of respondents welcomed the CMA's proposed continuation of that policy. In order to retain that ability without the risk that such discussions (and thus the knowledge that parties may be willing to offer a remedy) would improperly impact the decision maker's decision on whether the duty to refer was met, the Final Guidance states that where the decision maker attends the issues meeting, he or she will leave the meeting before parties are asked whether they wish to discuss possible UILs, and will not be informed whether any such UILs were discussed.[54]

7.11 As noted above, the CMA considers the arguments for and against the decision maker's attendance at the issues meeting to be finely balanced. The CMA will keep the operation of its new approach under review and may reverse that policy if, for example, its early experience indicates that the decision maker's attendance at the issues meeting (and parties' use of that opportunity to engage) is compromising either the effectiveness of that meeting, the efficiency of the CMA's Phase 1 process, or the quality or robustness of the decision maker's decision.

Capturing the benefits of a unitary authority

7.12 The CMA considers that the clear separation of decision making responsibility between Phase 1 and Phase 2 of a CMA merger investigation, with a group of CMA panel members appointed on referral to take the final Phase 2 decision, is of itself sufficient to protect against risks of confirmation bias. The CMA does not consider that this is compromised by the transfer of some of the Phase 1 case team into the larger Phase 2 case team (which

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[53] Particularly given the statutory timeframes being introduced for the offer and consideration of UILs once the parties have received the reasons for the CMA's Phase 1 decision.

[54] Footnote 159 of the Final Guidance.

will thus involve some new members). Moreover, it believes that such a transfer can generate significant efficiencies that will benefit both the CMA and the parties to the investigation.

7.13 The CMA notes the concerns expressed by respondents regarding the transfer of staff on a case. However, given in particular the significant variety in the nature, size, complexity and investigative focus of merger cases that may be referred to Phase 2, the CMA considers that such efficiency benefits are best achieved by a flexible, case by case approach to whether any – and if so which – Phase 1 case team members could usefully transfer to the Phase 2 team. The CMA has therefore retained the approach set out in the Draft Guidance.

7.14 The CMA has adopted an equivalent approach to that above in relation to the transfer of staff between the phases of its market studies and market investigations work.

Other comments

7.15 More generally, the CMA has given careful consideration to the range of comments and suggestions in respondents' submissions and has endeavoured to address these in the Final Guidance where appropriate, including by seeking to provide clarifications of aspects of the Draft Guidance which were felt to be ambiguous or risked misinterpretation.

7.16 The Final Guidance also reflects the now-confirmed organisational structure of the CMA, resulting in some consequential amendments from the Draft Guidance.

ANNEXE(S)

A. List of respondents to the consultation on the Draft Guidance and Ancillary Documents

- Allen & Overy LLP
- Ashurst LLP
- Baker & McKenzie LLP
- Berwin Leighton Paisner LLP
- Bird & Bird LPP
- City of London Law Society
- Cleary Gottlieb Steen & Hamilton LLP
- Clifford Chance LLP
- Dickson Minto W.S.
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Hogan Lovells LLP
- International Bar Association
- Joint Working Party of the Law Societies and Bar Councils of the United Kingdom
- Linklaters LPP
- Maclay Murray & Spens LLP
- Simmons & Simmons LLP