Dickson Minto W.S.

RESPONSE TO THE CMA TRANSITION TEAM'S GONSULTATION ON DRAFT CMA GUIDANCE – FIRST TRANCHE (EXCLUDING MERGERS)

A. Introduction

1. Dickson Minto W.S. welcomes the opportunity to respond to the CMA Transition Team ("**Transition Team**")'s consultation on the following draft CMA guidance documents:

   - Guidance document CMA1: "Towards the CMA" (the "**Towards the CMA Consultation Document**");
   - Guidance document CMA3con : "Market Studies and Market Investigations: Supplemental guidance on the CMA's approach" (the **Market Studies and Investigations Consultation Document**");
   - Guidance document CMA4con: Administrative Penalties: Statement of Policy on the CMA's approach" (the "**Administrative Penalties Consultation Document**"); and
   - Guidance document CMA6con: "Transparency and disclosure: Statement of the CMA's policy and approach" (the "**Transparency and Disclosure Consultation Document**").

2. In this response we also refer to the following documents:

   - the draft guidance document CMA2con "Mergers: Guidance on the CMA's jurisdiction and procedure" (the "**Mergers Consultation Document**");
   - the Enterprise Act 2002 (the "**Act**").

3. We are providing a separate response to the Mergers Consultation Document.

4. The views expressed in this response are solely ours and should not be attributed to any of our clients.

B. The Towards the CMA Guidance Document

5. Para 3.10 of the Towards the CMA Consultation Document states: "*It is clear that the business community attaches great importance to the speed, transparency and predictability of the competition regime…*". Whilst we agree with this statement, we would suggest that the CMA includes in this list a recognition of the relevance of the "proportionality" concept. In setting its policies and making decisions, the CMA should weigh many relevant factors including resourcing, the nature of the companies involved (e.g. when deciding whether to send an information request), the extent of the burden that would be imposed on the relevant businesses, taking into account the principle of proportionality. It would be helpful if this could be made explicit in the final version.

6. At para 3.15, the CMA states that details of the decision-making structures and other related enhancements will be set out in the second set of guidance (to be published for consultation in September). However, we note that paras 7.43 to 7.59 of the Mergers Consultation Document set out the Phase 1 decision-making procedures for merger cases. Do we understand correctly that the guidance referred to in para 3.15 will ***not*** contain details of the decision-making structures in merger cases?

C. The Market Studies and Investigations Consultation Document

7. At paras 1.21 and 1.22 of the Market Studies and Investigations Consultation Document, the CMA discusses decision making in markets cases. It will be important for the CMA to minimise the risk of confirmation bias as far as possible in markets cases that result in market investigation references. However, operational overlap will also be key in practice, in order to ensure efficiency and to avoid duplication. It therefore seems that he CMA will have to find a suitable balance between the need for a fresh pair of eyes (to avoid confirmation bias) and the need to ensure a degree of case team continuity. In general terms we believe that a single "remaining" case team member should be responsible for continuity, whilst ensuring that the rest of the team are "fresh" to the case.

D. The Administrative Penalties Consultation Document

8. Section 2.3 of the Administrative Penalties Consultation Document sets out the legal framework relating to criminal offences. We understand it is implicit in the text that criminal offences fall outside the scope of the Administrative Penalties Consultation Document (as the title of the document would also suggest), which is why they are not dealt with any further. Query whether this could be stated expressly at section 2.3, together with a reference to any separate guidance that deals with criminal offences?

9. At para 4.3, the CMA states that it is more likely to consider that there is a reasonable excuse for a party's failure to comply with the CMA's investigatory requirements where the failure is due to "*a significant and genuinely unforeseeable or unusual event beyond P's control*". On this subject, we would urge the CMA to bear in mind the administrative, resourcing, financial, logistical and practical burdens which are often placed on parties by CMA investigations, and to be reasonable in its decisions on penalties. We would be grateful if the CMA could more clearly recognise in this section of the guidance the burdens which CMA investigations tend to place on parties.

10. Annex A contains helpful practical examples of how the CMA is likely to apply the approach set out in this document. In the fourth example, the CMA mentions an interim order under section 72 of the Act. The example states that "*this order is formally executed by both companies*". Is this correct? Section 72 of the Act does not refer to a requirement for execution by the parties (suggesting that the order can be made just by the CMA).

11. We welcome the helpful table contained in Annex B which sets out an overview of the CMA's investigatory powers and available penalties.

E. The Transparency and Disclosure Consultation Document

12. At para 1.8 of the Transparency and Disclosure Consultation Document, the CMA states: "*Anyone in doubt about whether they may be affected by the points covered here should consider seeking legal advice*". In our view, the CMA should also be open to approaches from parties who have specific concerns or questions regarding the CMA's approach to transparency, particularly in cases where legal advisers would be unlikely to be in a position to provide parties with

additional insight (for example because the guidance documents are silent and there are no published precedents). We would ask the CMA to reflect this in the guidance document.

13. We strongly welcome the CMA's commitment in para 2.6 that it will aim to be reasonable in its approach to formulating information requests, and in determining whom to address information requests to and the date by which information should be provided. We note also the CMA's specific examples of how it intends to adopt this reasonable approach, e.g. by avoiding the imposition of unnecessary burdens (para 4.2), by discussing draft information requests with parties where possible (para 4.5) and by setting reasonable deadlines for information requests (para 4.6). We are, however, concerned that this commitment to adopt a reasonable approach does not come through sufficiently in the Mergers Consultation Document (and our view is also discussed specifically in our response to that consultation document).

14. In para 3.5, the CMA states that a Phase 2 merger investigation will be formally opened by the case team sending a "first day letter" to the parties. We suggest that this may be at odds with para 3.3, second bullet, which seems to state that a Phase 2 merger case will be formally opened when the CMA issues a Phase 1 reference decision. In addition, para 3.5 does not cover the opening of a Phase 1 merger case; perhaps the CMA could include a cross reference to the first bullet of para 3.3?

15. Para 3.14 helpfully states that "*the CMA will seek to ensure that the parties directly involved are aware of the decision making procedures which apply to their case and the identity of the person or persons within the CMA who will be responsible for key decisions during the course of the case*". We welcome this commitment to ensure transparency as regards decision making and the identity of the decision maker. Taking account of this, our response to the Mergers Consultation Document contains further suggestions for transparency in merger investigations, including publication of a list of the individuals who have been appointed to act as decision makers at Phase 1.

16. The second bullet of para 3.16 states that the three possible outcomes of a Phase 2 merger are: clearance, prohibition or cancellation. We wonder whether this is entirely accurate, as the statement fails to capture cases where the CMA finds that there is a SLC but is willing to accept remedies to address the competition concerns (i.e. there is no "prohibition"). Would it not be more accurate to describe the three outcomes as "clearance, a finding of an SLC or cancellation"?

17. Para 4.13 states that "*when providing key or substantial submissions, parties should also provide a second, non-confidential version*". This is not currently the case in relation to all key/substantial submissions; for example parties are not required to provide a non-confidential version of their OFT informal submission. Should an exception not be made in this paragraph for, in any event, Phase 1 merger submissions?

18. In the first bullets of paras 4.15 and 4.16, the CMA states that financial information that is less than two years old will be considered to be confidential. There is a risk that this could be interpreted as implying that any financial information that is more than two years old will no longer be confidential. However, this latter statement is not necessarily correct. Financial information such as for example margin information may remain sensitive for several years; margins will not necessarily change substantially over a two-year period and so will remain sensitive as publication of margin information could have a negative impact upon a party's business.

19. We consider that there is an additional category that should be included in the list of types of confidential information at para 4.16: there may be information/data which the parties are prevented from making public due to licensing constraints. It would be helpful if this could be added to the list or at least recognised in a footnote.

20. Para 4.17 states that "*the CMA may use any information that it obtains during a case for the purposes of facilitating the exercise of any of its statutory functions*". Does the CMA mean to suggest that, for example, it may use information received during a merger case for a Competition Act 1998 case, or for another mergers case, or in a market study? We would be grateful for clarification of this statement.

21. The last sentence of para 4.24 seems to suggest that a data room set up by the CMA will always be a physical data room (rather than a virtual online data room). Is this understanding correct?

22. According to footnote 47, at Phase 1 of a merger case, the Procedural Officer's role is limited to resolution of disputes regarding confidentiality. We consider that the Procedural Officer could, and should, have a broader role, for example including resolution of complaints made by the parties regarding the procedures followed by the CMA in individual cases (and indeed in our response to the Merger Consultation Document we have suggested this).

23. We note from para 4.26 that, in the case of data rooms, the CMA reserves "*the right to review the reports and/or notes prepared by [advisers] to ensure they do not contain any confidential information.*" It would be helpful if the CMA could state explicitly that in that case such notes and reports will only be reviewed upon the advisers leaving the data room (rather than at a later stage, when the notes and reports may contain privileged advice or otherwise confidential information).

24. It would be helpful if the CMA could clarify its statement in para 6.8 that "*the CMA may disclose information to UK public authorities without the consent of the person or persons to whom the information relates in order to facilitate the exercise by the receiving authority of its functions.*" How does this relate to s.241(1) and (3) of the Act?

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We would be happy to clarify or discuss any of the above if it would assist the Transition Team. If so, please contact Ajal Notowicz (t: +44 (0)20 7649 6838, e: ajal.notowicz@dmws.com) or Ruth Osborne (t: +44 (0) 20 7649 6896, e: ruth.osborne@dmws.com).

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