the global voice of
the legal profession

17 September 2013

CMA Transition Teams

By email: cmaconsultation@bis.gov.uk

Dear Madam/Dear Sir

CMA's Consultation on draft jurisdictional and procedural guidance

I have pleasure in enclosing a submission which has been prepared by a Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs of the Working Group and Officers of the Antitrust Committee of the IBA would be delighted to discuss the following submission in more detail, should that be of interest.

Yours faithfully

Jose Regazzini / Cani Fernández Vicién
Co-chairs
Antitrust Committee

cc. Neil Campbell, Partner, McMillan

Dave Poddar, Partner, Clifford Chance

INTERNATIONAL BAR ASSOCIALTION
ANTITRUST COMMITTEE'S
WORKING GROUP IN RELATION TO
THE COMPETITION AND MARKETS AUTHORITY's CONSULTATION ON
DRAFT MERGER JURISDICTIONAL AND PROCEDURAL GUIDANCE

1. INTRODUCTION

1.1. The International Bar Association ("**IBA**") is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession across the world.

1.2. The IBA's 50,000-strong membership of individual lawyers from across the world, including antitrust practitioners and experts with a blend of jurisdictional backgrounds and professional experience, places it in a unique position to provide an international and comparative analysis in the development of commercial laws. Further information on the IBA is available at http://www.ibanet.org/.

1.3. A working group of the IBA antitrust committee ("**IBA-WG**") has been formed to provide comments on the July 2013 consultation document: "Mergers: Guidance on the CMA's jurisdiction and procedure" ("**the Guidance**"). A list of contributors to this Working Group is set out in Appendix A. We apologise that this submission is late, but it is due to the broad nature of the Working Group.

1.4. The IBA-WG commends the CMA for consulting stakeholders on its proposed Guidance. The Guidance is an impressively thorough and comprehensive overview of the UK merger review process, and rather than try to address all of the issues raised in that document, the IBA-WG has limited itself to commenting on those specific points which it feels would be of most relevance to its members.

2. EXECUTIVE SUMMARY

2.1. The IBA-WG's primary concern is that the Guidance sets out a merger review regime which incentivises the notification of non-problematic deals, and which seeks far more from the

merging parties during the initial phase of merger review (in terms of time and information) than many other jurisdictions.

2.2. The introduction of tougher interim measures by the Enterprise and Regulatory Reform Act 2013 ("**ERRA**") was always likely to make the UK merger regime a little "less voluntary" than it is now. However, the intended practice of the CMA appears to go beyond that required by ERRA, or the Government's intentions when it decided to retain the voluntary regime, specifically around the use of phase I interim measures in anticipated transactions. The IBA-WG believes that the increased costs and risks associated with the procedures around interim orders may make many businesses treat the UK regime as if it were mandatory. This could potentially lead to a significant increase in the CMA's caseload, with much of that increase coming from cases that do not raise any particular substantive competition concerns. In other cases, the prospect of a lengthy and expensive merger review process may mean that potential mergers which would otherwise have gone ahead, are simply abandoned.

2.3. Whilst the IBA-WG believes that the regime envisaged by the Guidance will incentivise notification and so bring the UK merger regime closer to the mandatory filing process seen in most other jurisdictions, the proposed timetable and the information requirements in the draft merger notice are far more onerous than in many other jurisdictions.

2.4. In the rest of this submission, the IBA-WG has focussed on the following aspects of the Guidance:

a) The use of interim orders and the impact this may have on determining whether or not to submit a voluntary filing

b) The merger review timetable

c) The amount of information required in the template merger notice

We reiterate, however, the positive intention of the Guidance, our appreciation that consultation is occurring and the opportunity to provide constructive comments. We now consider each of these points in turn.

3. THE USE OF INTERIM ORDERS

The use of interim orders on anticipated mergers at phase I

3.1. In March 2012, following an extensive consultation process, the UK Government decided to retain the voluntary notification regime in order to *"limit the increased costs to business and the CMA"* that would result from introduction of a mandatory regime ("Growth, competition and the competition regime, Government response to consultation", paragraph 5.7).

However, the Government also decided to strengthen the regime by extending the CMA's power to suspend integration steps to anticipated, not just completed, transactions in order to address perceived difficulties faced by the authorities when investigating and remedying problematic completed deals. The legislative reform package of the ERRA therefore introduced a power enabling (for the first time) the imposition of interim orders on anticipated mergers at phase I (i.e. those mergers which have not yet completed).

3.2. Whilst it is quite clear that the transfer of shares or assets following a phase I reference decision is prohibited (except in narrowly defined circumstances), the ERRA contains no explicit provision which would suggest that the transfer of shares or assets prior to a reference decision is prohibited, nor that the CMA could prevent such a transfer through the use of an interim order. As far as the IBA-WG is aware, at no point during the consultation process on the introduction of ERRA did the UK Government suggest it was proposing to alter the merger control regime in this way.

3.3. The introduction of a prohibition on completion prior to phase II would be a significant step as the UK merger regime has historically worked on the premise of caveat emptor and implicitly favoured the Seller in the sense that it does not seek to prevent transactions from completing unless and until the phase I authority has made a reference decision. This allows the Seller to collect the purchase price and leaves it to the buyer to manage the risk of navigating the merger review process. The *"low"* threshold the CMA intends to use in deciding whether to apply interim measures (see paragraph 7.35), combined with the potentially extensive impact on merging parties and deal certainty, risk undermining the fundamental nature of the voluntary regime.

3.4. The IBA-WG notes the statement in paragraph 7.32 that "*the CMA would not expect generally to impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction*". This position is re-stated in paragraph 12 of Annex C (*"the CMA would not normally expect to make an interim order at Phase 1 in an anticipated merger"*). However, there are a number of references in the Guidance that suggest the CMA does consider that it has the power to prevent the completion of transactions in phase I. For example:

a) in paragraph 7.32 of the CMA's guidance – "*the CMA would not expect generally to impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction*" (emphasis added)

b) paragraph 5(b) of the draft interim order states that the buyer shall not "*transfer the ownership or control of [the target] or any of its subsidiaries*"

3.5. Although, the Guidance also contains wording suggesting that interim orders are intended to prevent integration not completion (see for example paragraph 7.38), the IBA-WG would

urge the CMA to make its position absolutely clear on this point and to confirm that it would not seek to prevent a transaction from completing during phase I. If it intends to leave open this possibility, the IBA-WG encourages the CMA to clearly explain the exceptional circumstances in which interim measures could be used to prevent completion.

3.6. It would also be helpful if the CMA could specifically confirm that it would not seek to prevent completion of concentrations with an EU dimension which are referred back to the UK pursuant to Articles 4(4) or 9(1) of the EU Merger Regulation. The ability to complete these transactions is often particularly important as the parties will already have had to allow for a period of pre-notification and review by the European Commission (at least two months, potentially much longer).

3.7. The IBA-WG believes that if Sellers consider that there is a material risk that the CMA will intervene in a transaction during phase I, then this may lead to a significant increase in transactions being notified, not because they raise any particularly difficult substantive competition concerns, but simply because notification is the only way the Seller can achieve certainty of completion. Given the duration of the UK merger review process and the information burden imposed on the merging parties (on which, please see below), this will add needless costs to transactions which have no impact on competition (or which may even be pro-competitive) and will challenge the ability of the CMA to manage its phase I caseload.

Interim orders – procedural issues

3.8. It is not just the Seller which may face additional risk in the changed UK merger regime. Buyers will also have to navigate a more rigorous hold separate regime and will be liable to a fine of up to 5% of global turnover in the event of a breach of an interim order. For international companies, that could amount to a very significant figure.

3.9. The ability to impose a financial penalty for breaching interim measures may well be justified, given the Government's concerns that pre-emptive steps (such as integration) compromise effective merger review. However, the IBA-WG has serious reservations concerning the CMA's proposed approach to the way in which interim orders are put in place. Currently, nearly all interim measures are dealt with consensually, such that any derogations from the standard approach are typically agreed up front. Under the new regime proposed by the CMA, interim orders would be imposed with little or no notice and any derogation requests dealt with subsequently.

3.10. This will mean that any organisation entering into a transaction which may be subject to UK merger control faces the prospect that, without notice, it will be made subject to obligations that it may not be able to meet and which carry very significant financial penalties. This risk is likely to be manageable in relation to anticipated mergers (provided the terms of any

interim orders do not conflict with the deal's conditionality[1]). However, it may cause significant difficulties where the parties to a transaction are looking to complete prior to CMA clearance.

3.11. The IBA-WG believes it is counter-productive to put companies in a position where they may be unavoidably in breach of a legal requirement – even when that breach may be retrospectively "cured" by a subsequent derogation. It will put companies in the position of having to concede they are in breach of the interim order in order to be able to request a derogation from the terms of the interim order.

3.12. Consequently, any company considering whether to complete a transaction prior to CMA clearance will either have to be prepared to disregard the requirements of an interim order (in the event a subsequent derogation is not given) or try to agree the scope of its derogation requests pre-completion. The IBA-WG was therefore disappointed to read at paragraph 7.41 of the Guidance that the parties to a merger should not expect the CMA to agree the scope of the interim order up-front.

3.13. The justification for this approach seems to be that it was open for the parties to seek pre-merger clearance or at least not take any integration steps. In many cases, the option of not taking any steps that might breach the terms of an interim order is simply not possible once completion has occurred. This may be because the employees of the target are transferred to the Buyer under TUPE rules or that the Buyer has financial or other reporting obligations that require it to take account of the acquired target business (which in turn requires access to information which may be prohibited by the interim order).

3.14. If the CMA will not seriously engage on the terms of an interim order prior to its issue, the IBA-WG believes that fewer Buyers will wish to complete prior to CMA clearance than is currently the case. This is partly a result of the risk of fines, but also the difficulty many deal team leaders may have in explaining why they put their company in the position of being subject to and in breach of an interim order without first having agreed a suitable derogation.

3.15. The IBA-WG believes that as the risks and potential costs of not seeking prior CMA approval increase, the numbers of transactions being notified will also rise. Some of these additional cases may well raise competition concerns, but, given the low threshold at which the CMA can seek interim orders, many will not. In either case, the likely increase in case load will have an impact on the merger review process which will be felt across all transactions.

---

[1] For example, some UK transactions are made conditional on the OFT's "suspended duty to refer" decision in which the OFT decides it will not refer the transaction provided the parties give undertakings in lieu of reference. However, interim orders remain in place until such undertakings have been accepted some weeks or months later.

3.16. Under the current system, the OFT generally reviews around 100 mergers per year (20-25% of which are typically found not to qualify). This is low compared to other major European jurisdictions – last year, for example, Germany reviewed over 1100 cases, France nearly 200 and Italy over 450. It is the voluntary nature of the UK regime which is believed to keep the UK numbers relatively low.

3.17. As the UK becomes "less voluntary" due to the increased risks of not seeking pre-merger clearance, the number of UK merger filings is likely to increase. That in turn will require the CMA to adapt its procedures so it can process cases more quickly and efficiently. However, as noted below, the Guidance suggests that the review process will become more demanding in terms of the information required to be submitted (and reviewed) and will still take much longer than most other jurisdictions, with the pre-notification requirements making it longer still.

4. MERGER REVIEW TIMETABLE

4.1. Although one of the primary objectives of the reform to the competition regime was to improve the speed of the decision-making process, the IBA-WG is concerned that the procedures envisaged in the CMA's guidance may lead to the merger review period in the UK being even longer than before. This will be a major challenge for businesses contemplating transactions which require notification across several jurisdictions. As the pressure grows on businesses to treat the UK merger regime as de facto mandatory, increasingly it will be the UK merger review process which will determine the date of completion.

4.2. The UK has one of the longest merger review periods in Europe – or indeed globally. At 40 working days, the UK phase I process is nearly double the first phase review period of 1 month commonly found in many other jurisdictions. The CMA's intended approach to pre-notification is likely to exacerbate this difference, in the following ways:

a) The introduction of a case allocation form and weekly case allocation meetings, similar to the system used by the European Commission, means that the parties to a merger will face up to a week's delay simply to have a case officer appointed.

b) Paragraph 6.40 of the guidance suggests that the parties should allow at least two weeks for the pre-notification process. As paragraph 6.49 of the CMA guidance suggests that it will generally take 5 to 10 working days for the case team to respond to pre-notification submissions, it is likely that in all but the most straightforward cases, pre-notification will last significantly longer than that.

c) Once the parties have been through the pre-notification process and submitted a merger notice, paragraph 6.58 of the guidance allows the CMA a further 5 to 10 working days to confirm the completeness of the submission and it is only upon the date of that confirmation that the 40 working day timetable begins.

d) Even after the CMA has declared a merger notice complete, it may subsequently reject a merger notice if the parties fail to comply with a formal information request within the requested timeframe.

e) As envisaged in ERRA, after the "standard" 40 working day phase I period, a further 10 working days is allowed for conditional clearance decisions.

4.3. The IBA-WG believes that the Guidance could do more to streamline this process and has particular concerns around the way in which the 40 working day period starts and the circumstances in which a merger notice can be rejected.

4.4. If the parties to a merger have gone through the pre-notification process and have submitted drafts of the merger notice upon which the case team has commented, then there is no reason why the 40 working day period cannot start as soon as the parties submit the merger notice. In some situations, such as transactions involving a public bid, there is intense interest in the timing of the merger review process. In these situations, a two week limbo period in which the merger notice has been submitted but the 40 working day period has not yet started will be a very difficult message to communicate. The IBA-WG suggests that the CMA's practice should be to confirm that the merger notice meets the statutory requirements as soon as possible after submission, provided this follows acceptable pre-notification discussions.

4.5. Similarly, the ability of the CMA to reject a merger notice on the basis of a failure to comply with a formal information request within the requested timeframe (where such a failure may in any case result in a suspension of the 40 working day period) adds another needless layer of uncertainty over the timetable. The IBA-WG suggests that CMA use the Guidance to clarify that it would only reject a merger notice in this way during phase I in exceptional circumstances.

5. CONTENT OF PROPOSED MERGER NOTICE

5.1. The IBA-WG also has concerns over the extensive nature of the scope of the information which is required to be provided in the draft merger notice. The requirements go far wider than current practice and include substantially more than is typically required in other regimes. Examples of information requested which many parties may find particularly challenging include:

a) The list of required internal documents is very extensive and includes any documents or emails prepared by or for any person in relation to a wide range of matters including the investment case or pricing. This is very wide in that it goes beyond documents in the possession of senior managers or decision makers (and covers all "personnel"). It also includes documents which are normally considered as extremely sensitive (investment case) and are usually not or only indirectly relevant to the question of the nature of competition between the merging parties.

b) Other internal documents include all documents relevant to the markets under consideration prepared or published over the last three years and all marketing documents created in the past year. This is potentially a large amount of material.

c) There is no materiality threshold in the questions relating to the information requested – there is no equivalent notion of an "affected market" (used in the EU's Form CO) meaning the information has to be provided, regardless of how small the overlap might be.

d) Variable profit margins by product.

e) Contact details of up to 20 competitors and 50 customers.

5.2. The Guidance states that it is "*important that any Merger Notice submitted is complete*" (paragraph 6.57) and in cases which are urgent (for example because they are subject to the rules on public bids), the Guidance states that the parties need "*to be particularly alert to the importance of a full and complete submission*" (paragraph 6.67).

5.3. Given the extent of the information required by the merger notice, the IBA-WG believes it is unrealistic to expect many (or arguably any) cases in which the provision of all of this information would be necessary or proportionate. Although the Guidance indicates that the CMA "may" be willing to grant derogations from the obligation to provide certain pieces of information, the IBA-WG believes this approach is unsatisfactory for a number of reasons.

5.4. Firstly, it will be very difficult for merging parties to prepare a submission which they can be confident will be sufficiently complete to be notified without first engaging with the CMA and agreeing derogations. There will be many transactions in respect of which – for reasons of confidentiality – the parties will not be able to approach the CMA until the transaction becomes public, at which point there is likely to be additional pressure to expedite the filing process.

5.5. Secondly, it is unrealistic to expect that in each case, the CMA case team will grant sufficient derogations to reduce the information requirement to an appropriate level. Over time,

there is likely to be some degree of (upward) recalibration of case teams' expectations in terms of what information is required to enable a filing. In addition, there will likely be (hopefully isolated) cases where case officers are either inexperienced or overstretched and yield to the temptation to use the completeness of submissions to manage their pipeline of cases.

6. CONCLUSION

6.1. As noted above, the IBA-WG requests the CMA to clarify its guidance on the use of interim orders in anticipated mergers during phase I and to expressly rule out using this new power to prevent mergers from completing. The IBA-WG also encourages the CMA to reconsider the proposal to issue interim orders without first seeking to agree their scope with the merging parties.

6.2. In terms of timing, the IBA-WG believes the CMA should give more certainty around the 40 working day phase I timetable and in particular should confirm that where the merging parties agree the content of the merger notice in pre-notification, the CMA would confirm the start of 40 working day timetable immediately upon filing.

6.3. The IBA-WG urges the CMA to revisit the requirements for a complete notification. The present proposal is burdensome and does not give parties a clear idea as to what information they would realistically need to provide in order to notify.

6.4. The IBA-WG hopes this submission proves useful to the CMA in developing its Guidance and would be pleased to assist the CMA with further consideration of these issues going forward.

APPENDIX A — CONTRIBUTORS TO THE WORKING GROUP SUBMISSION

Thomas Janssens, James Godden and Sarah Jensen, Freshfields

John Boyce, Slaughter and May

Dave Poddar and Richard Blewett, Clifford Chance

Simon Pritchard, Linklaters

Antonio Bavasso, Allen & Overy

Neil Campbell, McMillan