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RESPONSE TO THE CMA TRANSITION TEAM'S CONSULTATION ON DRAFT CMA GUIDANCE - DOCUMENT CMA2CON (MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE)

A. Introduction

1. Dickson Minto W.S. welcomes the opportunity to respond to the CMA Transition Team's ("**Transition Team**") consultation on the draft CMA guidance document "CMA2con" (Mergers: Guidance on the CMA's jurisdiction and procedure) (the "**Consultation Document**"). The views expressed in this response are solely ours and should not be attributed to any of our clients.

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

   - the OFT's Mergers jurisdictional and procedural guidance (the "**JurProc Guidance**");
   - the OFT's Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance - OFT1122, December 2010 (the "**UIL Guidance**");
   - the Enterprise Act 2002 (the "**Act**"); and
   - CMA guidance document CMA6con: "Transparency and disclosure: Statement of the CMA's policy and approach" (the "**Transparency and Disclosure Consultation Document**").

   However, all paragraph and footnote references in this response refer to the Consultation Document, unless otherwise stated.

B. Key areas

Statutory time limit for phase 1

3. The introduction of the statutory 40 working day time limit is one of the key changes in the reform of the merger control regime. Timing of the CMA's merger review process will be crucial in practice and it will therefore be important to avoid introducing opportunities for the CMA to extend the statutory timetable "through the backdoor". The following paragraphs contain examples of provisions that we consider should be tightened up.

4. Para 4.42 states that, in cases where parties notify the CMA using a Merger Notice, the statutory timetable starts on the first working day after the CMA confirms to the parties that the Merger Notice is complete. We would expect therefore that, where pre-notification has taken place and the CMA has given the parties the "green light" for notification, the statutory timetable will start the day after notification. We have some concerns over the way that para 4.42 is drafted as it seems to afford the CMA significant discretion as to when it confirms to parties that the Merger Notice is complete. Exercise of such discretion could in some cases result in an unjustified relaxation of the 40 working day time limit for the CMA. This would defeat the purpose of introducing a statutory phase 1 timetable.

5. Para 6.53 states that where the parties submit a notification, the MG will, upon receipt, "*consider whether it meets the requirements of the Act*". Para 6.58 further states that, where information is missing from a submission, the CMA will generally inform merger parties of this fact "*within five to ten working days"* (see also para 14(b) of the draft Merger Notice). However, in cases where pre-notification has taken place, the CMA should already be familiar with the Merger Notice by the time it is formally notified; in these circumstances the CMA should not normally require much time to "consider" the notification. It would therefore not be unreasonable to expect the CMA to confirm that the Merger Notice is complete upon notification (subject to any necessary assurances from the lawyers that no (material) changes have been made to the Merger Notice since the last version submitted, or that any final changes requested by the CMA have indeed been made), meaning that the initial period starts on the next working day. Even in cases which are not pre-notified, we consider that the CMA should endeavour to confirm whether or not the Merger Notice is complete as soon as possible (and in any event, 5-10 working days as a starting point seems very long).

Completion/integration without prior clearance

6. We consider that it would be beneficial if there was an express recognition that completion without prior CMA clearance is entirely lawful in the UK regime and that completion is not held against the parties by the CMA. Parties are free to complete the transaction and integrate their businesses without obtaining prior clearance (providing they are not prevented from doing so by interim measures). However, in a recent press release regarding the *Optimax/Ultralase* reference decision[1], the OFT's decision maker (Jackie Holland) commented that *"[i]t is unfortunate that several Ultralase clinics had been closed down prior to the parties engaging fully with OFT's investigation*." This appeared to suggest that the integration steps taken by Optimax (such as closing some Ultralase clinics) before the OFT became aware of the transaction constituted some form of unethical behaviour. The Act clearly does not attach any sort of "unethical" label to pre-emptive action (see for example para 7.30) and so the CMA should be careful not to let such actions affect its treatment of the parties in a completed case.

7. Despite the fact that the UK regime is non-suspensory in nature, para 7.32 states 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*" (emphasis added). We are concerned about the inclusion of the word "*generally*" as this appears to give the CMA some discretion and could in practice lead to a "backdoor" introduction of a suspensory regime. Indeed, para 7.38 states that the making of interim orders will bite on post-closing integration action rather than steps towards completion, "*leaving parties free to complete mergers if they are prepared to assume the regulatory risk*". It is therefore hard to see in what circumstances the CMA would be able to justify an order preventing completion and we suggest that the words "*expect generally to*" be removed from para 7.32.

8. In the third bullet of para 6.22, the CMA explains that the CMA's initial phase 1 period for a completed merger may be reduced to fewer than 40 working days if the four month statutory deadline for a reference falls before the expiry of the 40-working day period. It is important that, in such a case, the CMA does not hold against the parties the fact that the CMA must conduct its review in a shorter time period. We note that in any event sections 25(1) and (2) of the Act enable the CMA to extend the four month period.

9. We welcome the confirmation in Annex F (template interim order), para 4, that any integration steps taken by the parties prior to the making of an interim order by the CMA at Phase 1 shall not constitute a breach of that interim order (and that the parties shall not be obliged to reverse such steps).

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[1] http://www.oft.gov.uk/news-and-updates/press/2013/56-13

Informal advice ("**IA**")

10. Paragraph 6.38, in particular the second bullet, does not state expressly whether it is possible for two parties to make a joint application for informal advice (in the case of a merger, for example). Further, in the third line of that bullet, the CMA states that the content of IA is confidential to the party seeking IA and their "*legal advisers*" whereas in the last line of the bullet the CMA refers to the wider "*legal/financial advisers*". We assume that this inconsistency is not intentional, and therefore would be grateful if this could be clarified.

11. We presume that a private equity house would be entitled to make an application for informal advice on behalf of one of its portfolio companies (given that the entities are part of the same "group" for control purposes). We consider that a clarification would be helpful here.

12. Whilst it is clear that the IA procedure is confidential vis-à-vis the public, it not unambiguously clear whether IA can in principle be sought on an anonymous (i.e. no-names) basis. In this regard we recognise that para 6.39 requires the parties to inform the relevant case officer in the event the proposed transaction proceeds.

Pre-notification

13. Para 6.45 states that, in order for the CMA to engage in pre-notification discussions, the CMA will generally expect to be satisfied that there is a "*good faith intention to proceed*" evidenced by, for example, adequate financing, heads of agreements or board-level consideration. However, we would be grateful for clarification on the approach that the CMA is likely to take in auction situations. It is possible that, at the stage at which a potential purchaser wishes to commence pre-notification discussions, no bidder has exclusive status yet (as there are a small number of competing bidders who remain in the auction) but this potential purchaser has secured adequate financing and can provide evidence of board level consideration. In such a situation, would the CMA allow this potential purchaser to pre-notify the transaction (in order to avoid a delay if and when exclusivity is obtained or the transaction documents are signed)?

14. We note that in para 6.49 the CMA states that it will nominate a case team including a specific case officer. We consider that it is important to ensure consistency in resourcing as far as possible throughout the CMA's phase 1 review process (including at the early stages), in order to enable the CMA to carry out an effective review. We would suggest therefore that the CMA includes a "best endeavours" provision to this effect in the guidance.

15. Para 6.49 also states that "*the work of individual case officers is co-ordinated and overseen by senior staff in the MG*". Para 7.6 states that "*this process should start with pre-notification discussions and consideration by the MG of a draft merger notice before it is formally submitted for review*". In some cases (e.g. those likely to present competition concerns or those requiring significant economic analysis) we consider that it is beneficial for senior staff to be involved from the early stages of the merger review process. It would be helpful if the CMA's guidance expressly recognised that due consideration will be given as to the involvement of senior staff at each stage, and that there will be flexibility to meet the needs of each individual case in this regard.

Decision-making

16. Para 7.52 provides that the CMA's Phase 1 decision maker will not attend the issues meeting but will be informed of discussions at the issues meeting by those who were present. We suggest that the CMA reconsiders the merits of this system; why not change this so that parties have access to the decision maker in the issues meeting? As it currently stands, parties must rely on the case team or the devil to argue their case in front of the decision maker at the SLC decision meeting,

rather than present their case directly to the decision maker, who would be in a position to ask the parties further questions.

17. However, assuming that it continues to be the case that the decision maker does not attend the issues meeting, we would be grateful if the CMA could explain to what extent the decision maker will have had involvement with the case prior to the SLC decision meeting. It is conceivable that a decision maker could have been consulted on a case in its early stages in another capacity (e.g. as Chief Economist, Senior Director of Policy or Chief Executive), and then later appointed decision maker for that same case. Alternatively, the decision maker may have learnt about the case in an internal CMA meeting or through informal discussions with colleagues. Either way, if the reason why the decision maker does not attend the issues meeting is to ensure that he/she enters the SLC decision meeting with an "open mind", any prior involvement with the case could impact on the decision maker's ability to make a SLC decision from a "blank canvas".

18. In our view, it is not completely clear which individuals are currently on the OFT's roster of decision makers. Para 3.14 of the Transparency and Disclosure Consultation Document helpfully states that "*the CMA will seek to ensure that the parties directly involved are aware of… the identity of the person or persons within the CMA who will be responsible for key decisions during the course of the case*". Taking account of the CMA's stated desire to ensure transparency as regards the decision maker, we consider that the CMA should publish a list of the individuals who are qualified to act as decision makers at Phase 1. For example, this list could be published on the CMA's list of "Who to contact in mergers".

Undertakings in lieu

19. We note that in footnote 152, the CMA states that it "*will typically expect UILs offered by parties to be structural, rather than behavioural*". This wording is slightly different to the corresponding wording in the current UIL guidance, which provides that structural UILs "*will normally be the most appropriate*". Does this change in wording represent a change in position, or is it simply a reflection of the fact that the OFT has accepted structural UILs rather than behavioural UILs in the vast majority (we understand over 90%) of UIL cases?

20. Para 8.12 states that "*given the short window of time before the deadline to offer the UILs, it may not be possible to arrange a meeting between the parties and the case team or to engage in iterative discussions*". We consider this wording to be unduly restrictive and quite unhelpful. Although we understand that it may not always be feasible for the CMA to attend a meeting with the parties in the limited time available, we would expect the CMA to commit on a "best endeavours" basis to engage with the parties regarding the nature of the UILs. UILs will have a lasting impact on the direction of the affected business(es), and we respectfully submit that, in the interests of fairness, the CMA should in principle be open to engage constructively with the parties regarding the UILs.

21. We note also that para 8.18 appears to discourage parties from proposing a range of UIL options as it states that "*submitting a range of alternative remedy options is likely to slow down the process and lead to a risk of the CMA being unable to accept UILs in the time available*". We consider that this is at odds with para 5.16 of the UIL Guidance, which provides that "*parties may wish to offer a range of alternative remedies that they would be prepared to give in order to avoid a reference to the CC*". Para 8.18 also appears to present a departure from the current position, as set out in para 8.16 of the JurProc Guidance, which states: "*it is open to the parties to offer a sequence of different remedy options*". We are of the view that consideration of a range of alternative UIL options will in some cases be an important part of the discussions between the parties and the CMA.

22. In addition, we note that there is no longer a mention of the possibility to provide sequential offers to the CMA in sealed envelopes, as is currently the case at the OFT stage (see footnote 105 of the JurProc Guidance). We believe that, if the parties decide that they would like to take this approach, this should remain possible (and we would welcome an express recognition of this remaining possibility).

23. We note that under section 73A(1) of the Act, parties will have up to five working days after receiving the CMA's reasons for its SLC decision to formally offer UILs (see para 8.13). It would be helpful to have guidance as to whether this 5-working day period applies automatically (i.e. the CMA will not make a reference until this period has expired) or whether parties must effectively "apply" for this period to be triggered by indicating that they are considering offering UILs. If it is indeed automatic, do parties have an option to waive the 5-working day period in cases where they are not intending to offer UILs and would prefer that the CMA refers the case to Phase 2 as soon as possible? If so, what are the practicalities?

24. In para 8.33, the CMA states that it would typically require the appointment of a monitoring trustee to oversee and report on the sale of a divested business to an upfront buyer. Annex C provides some further detail on role of the monitoring trustee and also on the role of the "hold separate manager". We consider that it would be helpful to have further clarity on the differences as well as the possible interactions between these two roles; there are some aspects that are not entirely clear from the current text, e.g. can both a monitoring trustee and an HSM be appointed on the same matter, and if so, in which circumstances is this likely to happen? We would suggest that the CMA provides further explanation of their roles in the guidance document itself, possibly in the form of a table, with appropriate cross references to the further details contained in Annex C.

25. Para 8.42 also refers to the appointment of a "divestment trustee" but there is little information given as to the nature of the divestment trustee's role, e.g. who pays the fees etc. We would suggest that the table referred to in para 24 above also includes details relating to the divestment trustee.

26. It seems to us that the differences between an “internal HSM” and an “external HSM” may be highly relevant in certain circumstances. We would therefore suggest that the CMA's explanation of which factors it will consider when weighing up the choice between an external or internal HSM should be moved from footnote 339 (see the last sentence) to the main body of text.

Interim measures

27. Footnote 109 states that in exceptional circumstances where the CMA considers that there is a risk of pre-emptive action before the transaction becomes public knowledge, the CMA may impose an enforcement order under section 72 of the Act, which must then be published under section 107(1)(e) of the Act. We consider that such a scenario could have major adverse consequences for parties as they would lose control of how and when their planned transaction becomes public knowledge. It is hard to imagine in what "exceptional circumstances" the CMA would consider that such an order is justified. We would urge the CMA to consider this provision further and, at the very least, issue specific guidance on the exceptional circumstances in which such a power might be exercised by the CMA.

28. Annex C contains most of the guidance relating to interim measures. Para C.12 sets out a list of situations in which the CMA might consider an interim order necessary at Phase 1 or Phase 2. Our understanding from informal recent discussions with CC staff had been that the giving of interim undertakings in anticipated transactions may recently have become more common in phase 2 investigations. We welcome, however, the recognition in para C.12 that there will

"normally" be no need for interim measures in anticipated merger cases, and hope that the CMA will stick to this in practice.

29. At para C.18, it is stated that the CMA is unlikely to grant derogations from interim measures unless it can be shown that the request is necessary to safeguard the viability of the acquired business, to ensure the effective operation of the interim measures as a whole or to meet a regulatory/statutory obligation. More generally, we would suggest that the CMA should endeavour to take a common sense approach to each derogation request on a case by case basis, and consider whether the continued burden of interim measures would be disproportionate in cases where there is no realistic risk of pre-emptive action.

Continuity between Phase 1 and Phase 2

30. Although we agree that a degree of case team continuity between Phase 1 and Phase 2 will assist in facilitating an efficient process and avoid unnecessary duplication, the CMA should bear in mind the potential for such continuity to create bias. For example, in the course of the Phase 2 investigation the Phase 1 staff are likely to (naturally) want to "defend" and explain the reasons for the Phase 1 decision. We would therefore suggest that the CMA limits the number of individuals that are retained for Phase 2, ideally to one staff member (who would be responsible for ensuring continuity between the phases).

Reasonableness of CMA decisions to call in cases, issue information requests etc.

31. In our view, one of the CMA's guiding principles should be that it will seek to make reasonable and proportionate decisions when deciding whether to investigate a case, or whether to send an information request to parties. We strongly welcome the CMA's commitment in para 2.6 of the Transparency and Disclosure Consultation Document, in which the CMA aims to be reasonable in its approach to formulating information requests, determining to whom to address information requests and determining the date by which information should be provided. The Transparency and Disclosure Consultation Document also contains specific examples of how the CMA 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, as outlined in the following paragraphs.

32. In para 7.2, the CMA states that it may ask for additional data and that such requests will normally identify short deadlines for provision of this data/information. It is understandable that such deadlines may need to be tight in order for the CMA to be able to carry out its review in line with the 40-working day timetable. However, for any deadline to be "reasonable", the CMA should endeavour to ask for additional data/information at the earliest opportunity; it is unreasonable to impose short deadlines on parties where the CMA could have identified a need for the further information at an earlier stage (e.g. where the CMA has been sitting on information for a number of days/weeks, including in pre-notification). In the event that the parties feel that a deadline is unreasonable, we would suggest that they be entitled to raise this with the Procedural Officer (i.e. our suggestion is to expand his responsibilities in this regard – see further below).

33. Para 20.3 confirms the principle that a fee is payable in all cases in which the CMA reaches a decision whether or not to refer a relevant merger situation. In our view, the size of the merger fee payable should be taken into account by the CMA when weighing up the various factors and considering the proportionality of its decision to "call in" a case. This would be particularly relevant in cases where the parties are just above the SME thresholds (which are relatively low).

Procedural Officer

34. Para 9.3 provides that the Procedural Officer should be contacted in the event that the parties and the CMA case team/MG are unable to agree whether information is confidential and should be redacted from a CMA decision. Footnote 174 sets out further details relating to this aspect of the Procedural Officer's role. However, we note that the guidance contained in the Consultation Document does not include a general section relating to the Procedural Officer. Given that the Procedural Officer is a new position which does not currently exist at the OFT/CC, we consider that it would be helpful if the CMA could provide further guidance on the Procedural Officer's role including a list of his responsibilities (and in this regard note the suggested expansion of the Procedural Officer's role in para 32 above). Such guidance should also clarify whether the Procedural Officer will be the same individual at Phase 1 and Phase 2 of a case.

C. Miscellaneous comments

35. In para 2.14, the CMA encourages companies to keep the CMA informed of a merger notified by the companies to the European Commission where that transaction may give rise to potential competition concerns in the UK. We are concerned that the use of the words "*potential competition concerns*" carries a risk of perception of self-incrimination for companies, and we would therefore suggest replacing this with alternative wording such as "*a significant effect in the UK*".

36. The last sentence of para 4.23 states that "*board representation alone may confer material influence*". This wording appears to be slightly less tentative than the wording used in para 3.23 of the JurProc Guidance. Please could the CMA clarify whether this change is intentional (i.e. does it represent a change in policy position)? Determining whether material influence is obtained through board representation can be a complex area and we would therefore appreciate further guidance if any change is intended.

37. We note the example of *de facto* control described in para 4.28 (i.e. where a minority shareholder has in practice control over more than half the votes actually cast at a shareholder meeting). In our experience, the other situation in which de facto control is most likely to be found is where two or more shareholders have "joint control", for example each having 50% of the voting rights (in other words they both have the separate power to block actions that determine the policy of a company but none of the shareholders has the ability to unilaterally determine such issues). We would suggest that reference is made in para 4.28 to this alternative situation giving rise to *de facto* control, for completeness.

38. In the second bullet under para 4.44, the CMA sets out the test for whether material facts about the transaction have been "made public". However, we consider that it is unclear from the text whether the two elements to this test (i.e. (i) publication in the national/relevant trade press, and (ii) steps taken by the parties to publicise the transaction) are cumulative or alternative. The OFT's decision in *Tesco/Brian Ford's Discount Store* seems to suggest that the two elements are alternative i.e. publication in the national trade press is sufficient for the transaction to have been "made public" (see paras 3-4 of that decision). However, the OFT's decision in *Genus plc/ Local Breeders Ltd* seems to suggest that both elements must be present (see para 10 of that decision). This area is not currently clear from the JurProc Guidance, and we consider that the new CMA guidance represents a good opportunity to improve this wording.

39. Footnote 63 states that: "*in assessing whether a firm is active in the UK, the CMA will have regard to whether its sales or purchases are made directly or indirectly (via agents or traders) to UK customers*". We consider that this wording is unclear and, in particular, that the use of the word "traders" is ambiguous. For example, does this include sales to non-UK distributors for on-sale to the UK? This would not be practical as a business does not normally know what proportion of its products sold to non-UK distributors (i.e. traders) is then sold on to UK customers. The wording

in this footnote appears to represent a new policy as it is not contained in para 3.48 of the JurProc Guidance. Further, there appears to be some discrepancy between footnote 63 and the guidance contained in: (1) footnote 68 (which refers simply to "*customers within the UK*") and (2) para 3 of the Schedule to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (which refers to "*amounts derived from the sale of products and the provision of services … to businesses or consumers in the United Kingdom*").

40. We understand from the context that para 6.23 (pre-notification) applies to parties who are intending to make a voluntary notification to the CMA, although this is not expressly stated. We would suggest adding the following clarificatory wording at the beginning of the paragraph: "*If parties intend to make a voluntary notification to the CMA, the…*".

41. We welcome the CMA's proposal to allow parties to provide a submission in a written format of their choosing, accompanied by a completed Merger Notice indicating where in that submission the required information can be found. We consider that this option will make it easier for parties and their advisers to put together comprehensive and clear submissions.

42. Para 7.3 describes the circumstances where the CMA is likely to issue a section 109 notice. The final sentence of this paragraph reads: "*If the parties have notified the merger to the CMA using a Merger Notice, the CMA may also reject the Merger Notice*". It is not clear on what basis the CMA would reject the Merger Notice, especially if the CMA has exercised its power to "stop the clock" while the information due under the section 109 notice is overdue. It would also be helpful if the CMA could clarify at what point it is likely to reject the Merger Notice, and what effect this would exactly have.

43. The first line of para 7.8 reads: "*In all cases, the CMA commits that, generally, in the period between working days 15 and 20, it will have a 'state of play' discussion with the parties…*" (emphasis added). It is unclear what the word "*generally*" means in this sentence, particularly given that the CMA gives this commitment "*in all cases*". We would suggest replacing this with "*In all cases, the CMA will endeavour to have, between working days 15 and 20, a 'state of play' discussion with the parties*".

44. We note that, in footnote 127, the CMA states that in cases where customers of the merger parties are final consumers and no contact details can be provided for them, the CMA expects parties to make "*best efforts*" to publicise the CMA's invitation to comment and the CMA's contact details e.g. on the parties' websites or through signs in-store. This expectation on the parties to publicise the invitation to comment is new as it was not contained in the JurProc Guidance. We consider that this requirement may well go too far, particularly as it may not always be commercially feasible for parties to put a notice on their websites (and parties should not be required to redesign their website for this purpose).

45. In para 7.34, it is stated that "*the fact that the CMA has made an interim order in a particular case does not rule out its eventual clearance of the merger*". We believe that the words "*does not rule out*" are unduly negative and consider that this should be replaced with "*will have no bearing on*".

46. In para 7.49 the CMA states that it will provide the merging parties with an interval of at least two working days between receipt of the issues letter and the date of the issues meeting. The CMA acknowledges that this is a short time period but points out that "*the state of play discussion should ensure that, when an issues letter arrives, it contains few, if any, surprises*". In our experience, state of play discussions normally tend to be fairly high level as they provide only an outline of the issues that the OFT has identified. Not all members of the case team are always available to attend the state of play discussion and so there may be areas that cannot be discussed in detail. Parties' legal advisers often have a number of questions on the issues discussed once the state of play discussion has ended. For these reasons, we consider that the state of play discussion is not a substitute for an issues letter and parties would be grateful for as much time as possible

following receipt of the issues letter to prepare for the issues meeting. In light of this, we consider that the CMA should endeavour to provide more than two working days of preparation time for the issues meeting (and this should be reflected in the guidance document).

47. It is also important that parties have sufficient time in order to put together a meaningful follow-up response after the issues meeting (if they choose to submit such a response). Para 7.50 states that the CMA will advise the parties of the deadline for the responses; we would strongly encourage the CMA to liaise closely with the parties' legal advisers in order to set a realistic deadline for submission of the response.

48. In the section on Phase 1 Remedies, there are two references to the CC's Merger Remedies guidance document CC8 (see footnote 165 and para 8.38). However, given that these references are made in the context of a UIL situation at Phase 1, should the references to the current guidance not be to the OFT's UIL Guidance (paras 5.25 – 5.38) rather than the CC guidance?

49. In relation to FNTQ decisions, we would ask the CMA to consider publishing more detailed decisions containing a summary of the grounds why the CMA found that the relevant case did not qualify. This would assist the business community and advisers in understanding which types of decision are likely not to qualify and would lead to greater transparency.

50. We consider that the CMA's tables setting out the milestones of a typical Phase 1/Phase 2 inquiry are very helpful. However, in relation to the table containing the key stages of a Phase 2 inquiry (page 94 of the Consultation Document), we suggest that the CMA clarifies that the first row of the table is only applicable to anticipated mergers (i.e. there can be no suspension of reference in the case of a completed merger).

51. In the fourth bullet under para 11.23, the guidance states that, at Phase 2, the parties' initial submission should address the issues set out in the CMA's Phase 1 reference decision, which forms the starting point for the CMA's Phase 2 inquiry. We consider that it would be appropriate to remove the statement that the Phase 1 reference decision is the starting point for the Phase 2 inquiry, in order to minimise the risk of confirmation bias at Phase 2.

52. Para 11.25 states that, when making submissions of technical economic analysis in Phase 2, "*parties should not expect the CMA to agree the approach to analysis in advance or to work jointly with parties on its analysis*". While we understand that the CC is entitled to conduct its own economic analysis, independent from any analysis performed by the parties, we believe that the CMA could be slightly more accommodating in this regard. For example, the CMA could endeavour to provide input on the parties' economic analysis where possible, in order to ensure that the direction of the parties' analysis is appropriate and to avoid the waste of time and resources at the parties and/or the CMA.

53. In para 12.12, the CMA does not give an indication of how far in advance of the Phase 2 hearings it will provide the parties with the hearing agenda and the annotated issues statement. These documents are essential for the parties' hearing preparation and we therefore consider that the CMA should, for example, endeavour to provide them to the parties at least five working days before the hearing.

54. Para 13.6 states that "*hearings with third parties may often be led by the case team*" (emphasis added). We find this wording unclear and, on the basis that it is the case team that will most often run Phase 2 hearings, we suggest that the CMA amends this wording to "*hearings with third parties will often be led by the case team*". Similarly, in para 13.7, it is stated that "*a transcript or a note of such meetings will be taken, depending on the circumstances*". Given the fact that the taking of a transcript or note is not guaranteed (as it will depend on the circumstances), we suggest amending this wording to "*a transcript or a note of such meetings may be taken, depending on the circumstances*".

55. The remedies working paper described in para 13.8 will contain an assessment of the remedies options and will set out a "provisional decision" on remedies. It would be helpful to have clarification as to whether this provisional remedies decision will be a staff document, rather than a document prepared by the group of members?

56. Para 14.11 advises that further guidance on the CMA's approach and procedures relating to the variation/termination of undertakings "*is available on the CMA's website*". It would be helpful to be more precise by including specific references to the names of the documents that contain this further guidance.

57. In footnote 278 (which contains the references to the Implementing Regulation and the EUMR), the CMA notes that the Commission is currently consulting on proposed amendments to the Implementing Regulation. We suggest that the CMA updates this section of its guidance once the European Commission publishes its final decision given that the results of the current consultation could involve some potentially significant changes.

58. We consider that it would be helpful to have clarification as to how long a clearance decision remains valid in anticipated mergers. There may be circumstances in which completion of a transaction may be delayed by a substantial period of time (several months or even years) following the CMA's clearance decision. In such a case, it might be unclear to a notifying party whether the previously-obtained clearance decision remains applicable to the (what may reasonably be considered still the same) relevant merger situation. To provide certainty to businesses, we would like to suggest that the CMA includes either (a) a confirmation that the decision remains valid indefinitely for the same "relevant merger situation", or (b) a minimum period for which the clearance decision remains in any event valid (e.g. three years). Where this time period has expired, parties should consider whether they would like to make a new notification.

Annex A (using a Merger Notice)

59. Para A.4 provides that a Merger Notice may be delivered to the CMA by post, by hand or by email. In our experience, the OFT and CC's IT firewall limits are currently not high enough to enable receipt of some of the larger electronic documents that we have wished to submit via email and so we have had to use CD ROMs (which we note is not listed as an option in para A.4). We consider that the CMA should ensure that such firewall limits are increased, and/or consider setting up an online upload facility for larger electronic documents.

60. In para A.6, it is stated that "*the CMA's decision to reject a merger Notice takes effect from the moment it is sent to the notifier or an authorised representative*". We believe that the effect of this statement is unclear. For example, where the CMA rejects the Merger Notice on the grounds that the parties have failed to provide all the required information, it is not clear whether that rejection will have the effect of "stopping the clock" or whether in fact the Merger Notice will effectively be treated as not having been submitted at all. The wording of para A.6 seems to suggest that rejection of the Merger Notice does not have retrospective effect but we would be grateful if this could be clarified.

Annex D (Status of OFT and CC publications)

61. We presume that the CMA's intention is to replace all the OFT and CC guidance documents in due course, even those which are due to be adopted at this stage. If this is correct, perhaps the CMA could include a statement in Annex D to this effect?

Annex E (Draft Merger Notice)

62. Para 15 of the preamble states that if, after submitting the Notice, there are any changes in the circumstances of the merger or the merger parties which are relevant to the information provided to the CMA, the merger parties must inform the CMA immediately. While this provision is sensible during the CMA's review, the requirement should obviously not extend beyond the CMA's review period. We suggest that para 15 be amended to clarify this.

63. Question 9 (of Part II) asks the parties to indicate the level of UK turnover of the target and the acquirer groups. However, it is not clear whether the CMA wishes to receive only annual figures or also monthly figures for such turnover, particularly given that in the previous sentence it asks for both annual accounts and monthly management accounts (and so some element of confusion arises). We suggest that this point be clarified (presumably annual UK turnover only).

64. Question 12 (of Part II) asks for copies of any documents prepared for assessing or analysing the transaction. Could the CMA please clarify whether the word "any" in this context means all documents meeting that description, or whether the word "any" in fact affords the parties an element of discretion as to which documents they provide, and in particular whether a representative sample will be considered sufficient in the first instance (which we hope will be an acceptable approach in cases not raising serious competition concerns)?

65. In question 15 (of Part II), we consider that the first question should be "please indicate whether or not the parties agree with the CMA's general practice in relation to the counterfactual at Phase I" (as the parties may have no comments on the CMA's practice, in which case the current wording of para 15 is not relevant).

66. We consider that the "Efficiencies" heading at question 32 (Part II) should be amended to "Efficiencies and customer benefits" in order to more accurately describe the content of that section.

67. As regards the declaration at the end of the Notice, we consider that it is unclear which part should be signed and by whom in the case where external advisers are authorised to sign the Notice on the parties' behalf. For example, the text below the date seems to apply only where it is the party who is signing the notice. Furthermore, it is not clear who should sign in each of the two lines beginning "*Signed:*".

68. By way of general comment in relation to the guidance notes to the draft Merger Notice, we note that the title of each guidance note does not necessarily relate to the corresponding question in the form itself. For example, confusingly, guidance note 4 does not relate to question 4 of the form but instead relates to question 5. We consider that it would be much clearer if the titles of the guidance notes were aligned with the relevant question of the form (e.g. by changing the title to "Guidance note to question 4"). Alternatively, the CMA could publish a consolidated copy of the form which includes the guidance notes under the relevant questions.

69. In guidance note 1, the CMA asks parties to confirm that the person to whom correspondence should be addressed is authorised to accept service. We consider that it would be appropriate to mention this in the declaration part of the Notice (e.g. by including this in the same paragraph as that in which the parties authorise a solicitor to act on their behalf).

70. Guidance note 5 provides advice on timing for parties to a merger governed by the Takeover Code. In our view, this guidance is important and would be more appropriately located in the guidance document itself, rather than in a guidance note to the draft Merger Notice.

71. Guidance note 6 states that the CMA will usually need only the most recent annual report and accounts of the main parties. Does the CMA require full copies of these documents or would it be sufficient for the parties to provide a hyperlink to them? On this point we draw the CMA's attention to the European Commission's recent consultation on the reform of the simplified procedure, in which the Commission proposed that parties could provide a website address rather than hard copies of their annual reports and accounts (which can often be bulky documents).

72. Further down in guidance note 6, the CMA states that in cases where no annual accounts are available, the parties should provide separate figures for turnover and profit and assets. For profit, the CMA asks for "*the profit and loss accounts*". We would be grateful if the CMA could clarify whether it is referring here to management accounts (as in this scenario no annual accounts are available).

Annex F (Draft template interim order)

73. Para 6 (l) of Annex F provides that, in the event of prohibition of the merger, any records or copies of confidential/commercially sensitive information should be returned or destroyed. We consider that this paragraph should include an exception where it is necessary to ensure compliance with regulatory/accounting obligations. Furthermore there should be an exception to the general information exchange prohibition where such exchange is necessary for compliance with external regulatory and/or accounting obligations (and we note that these exceptions were for example recently accepted by the OFT and subsequently by the CC in the initial undertakings given in *Optimax/Ultralase*, paragraph 2(j)(i) and (ii)) .

74. Under para 8, the Chief Executive Offer "*shall provide a monthly statement to the CC on behalf of X confirming compliance with this Order*". We would suggest amending this so that the statement can be provided by either the CEO or the General Counsel.

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We would of course 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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