**Mergers: Guidance on the CMA's jurisdiction and procedure**

**Consultation document CMA2con – July 2013**

**Herbert Smith Freehills LLP Submission**

## Introduction

Herbert Smith Freehills LLP welcomes the opportunity to comment on the CMA's draft Guidance on 'Mergers: Guidance on the CMA's jurisdiction and procedure' (the 'Draft Guidance') and on the related merger control documents. Many of the changes made to the UK merger control regime by the Enterprise and Regulatory Reform Act 2013 (ERRA13) are procedural changes and require further guidance as to how they will be implemented in practice by the CMA. The Guidance is comprehensive and deals with all aspects of the new procedures. A number of our comments relate to the potential increase in the burden on businesses of some aspects of the new procedures. This is the case in particular in respect of the new Merger Notice, which is now much more onerous and requires more detail than what is required by many other comparable jurisdictions in Europe. We also have concerns relating to the framework under which the CMA proposes to impose interim measures, which applies a very low threshold for the CMA to impose interim orders, in particular for completed mergers, with limited scope for the parties to negotiate derogations from the standard interim measures order. We would urge the CMA to consider these issues carefully and to ensure that the new regime does not unduly increase the burden on businesses. One of the reasons for the ERRA13 reforms to the UK competition regime was to ensure that the UK operates a competition regime that drives investment and promotes economic growth and an overly burdensome and interventionist merger control regime will deter rather than encourage a number of potentially beneficial transactions.

The comments contained in this response are those of Herbert Smith Freehills LLP and do not represent the views of our individual clients.

1. **QUESTION 1**

***Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?***

1.1 On the whole we agree with the list of guidance documents to be put to the CMA Board for adoption and with those that have become obsolete. We note that the original text of the adopted guidance will be retained unamended and will continue to refer to the 'OFT' and 'CC' and certain departments and teams not replicated in the CMA. We consider that the CMA should endeavour to produce, as soon as possible, an updated version, in particular

for the core guidance documents such as the Merger assessment guidelines, which as a minimum reflects the merged regulator and the new Phase 1 and Phase 2 stages.

2. **QUESTION 2**

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

2.1 We consider that there is sufficient guidance available in relation to the operation of the UK merger regime, covering the key procedural and substantive issues and that no further guidance is required.

3. **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 We consider that, on the whole, the draft Remedies Form is clear and comprehensible, but that a number of points could be clarified in order to minimise uncertainty.

3.2 The first paragraph of the draft Remedies Form states that it is to be used for the purpose of offering structural remedies. It is also possible for parties to offer behavioural remedies (although the fifth paragraph of the Form notes that it is highly unlikely that such remedies will be suitable as UILs), but it is not clear what information the CMA would require from parties who propose behavioural remedies. The fifth paragraph of the Form states only that "*… if the merger parties wish to submit a behavioural remedy as UILs they should provide a detailed description of the behavioural remedy and how it would remedy, mitigate or prevent in a clear cut manner the CMA's competition concerns.*" Although it may be difficult to set out exactly what information would be required in light of the wide range of behavioural remedies that could be offered, it would be helpful if the CMA could provide some guidance on the minimum information it would expect to see or how the parties should go about ascertaining this.

3.3 Point 7 of the draft Remedies Form asks for "any significant customer contracts or supplier contracts". It is not clear how "significant" should be defined, and we would therefore suggest a more specific requirement – e.g. parties should be asked to provide details of the divestment business' 5 largest customers and 5 largest suppliers by value.

3.4 Point 8 states that the parties should also provide a breakdown of financial information by product type/market "*if relevant*". The Form does not specify when such a breakdown would be considered relevant and clarification would be welcome. We would suggest that such information should not be required by default in *every* case that the divested business

offers products and services falling within different markets, as this could result in the Form becoming disproportionately burdensome when such information is not necessarily required.

3.5 Point 11 requires the parties to set out what transitional service arrangements will be included as part of the divestment in the event they are required by the purchaser. This requirement would seem premature and unnecessary at this stage.

3.6 Point 21 requires the parties to summarise the strength of potential purchasers' interest and their capability to complete a transaction within the required timescales. We would suggest making clear that this information only needs to be provided in so far as the parties have been able to ascertain this.

4. **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?***

4.1 As explained in further detail below, we would welcome further clarification on the circumstances in which the CMA may extend the period for acceptance of UILs.

4.2 Paragraph 8.23 of the Draft Guidance states that in considering whether an extension may be appropriate, the CMA will, inter alia, have regard to whether any delay may increase the risks of anti-competitive outcomes in the case of completed mergers. We consider that the CMA should also have regard to this factor in the case of *anticipated* mergers (although we recognise that this is a lower risk): for example, a significant delay may in some instances cause issues with the viability of the target business or staff morale which could in turn lead to a deterioration in competition.

4.3 The Explanatory Notes to the Enterprise and Regulatory Reform Bill[1] set out the expectation that extensions to the period for deciding whether to accept UILs would primarily be used in cases where the CMA requires an upfront buyer.[2] However, paragraph 8.24 of the draft Guidance interprets the phrase "special reasons" expansively, allowing the CMA to extend the period in a range of other circumstances. In our view, it should not be necessary to extend the period in order to undertake further consultation with third parties, as it should be possible to fit this into the initial 50 working day period. In addition, it is not

1 Referring to the Enterprise and Regulatory Reform Bill as brought from the House of Commons on 18th October 2012 [HL Bill 45].

2 Paragraph 226: "…*The CMA must then decide whether to accept the UIL or a modified set of such UIL within 50 days beginning with the date the Phase 1 decision is announced. This period can be extended once by up to 40 working days where there are special reasons. It is expected that such an extension will be primarily used in cases where the CMA requires the identification and conditional commitment of a suitable purchaser before it will agree an undertaking. The CMA will be required to publish reasons for the use of the extension.*"

clear what the CMA has in mind as "some other exceptional circumstance" justifying an extension. We would suggest that the CMA should limit any extension on the grounds set out in the latter two bullet points in paragraph 8.24 to 20 working days, such that the possibility of a full 40 working day extension is reserved for cases involving an upfront buyer: this would be consistent with the Government's intent as set out in its consultation response.[3] We note in any event that the CMA will also have "stop-the-clock" powers for failure to comply with information requests at this stage of the process; the combination of this with the 50 working day period and a possible extension of up to a further 40 working days would mean that the UILs process could potentially become very lengthy.

4.4 We would also suggest that logically speaking, paragraph 8.23 of the draft Guidance should follow paragraph 8.24 rather than precede it.

5. **QUESTION 5**

***Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?*****CMA decision making**

5.1 The new legislation preserves the current two-phase approach to the decision making process for merger control, with the CMA board in charge of Phase 1 decisions (with power to delegate these decisions to executives and senior staff) and Phase 2 decisions adopted by a panel of independent experts who must act independently of the board. Paragraph 10.8 of the Draft Guidance provides that: "*in order to avoid unnecessary duplication and to facilitate an efficient end-to-end merger review process, the CMA would expect to have a degree of case team continuity by retaining at least some of the Phase 1 case team to work alongside newly assigned staff on the in-depth Phase 2 investigation when a matter is referred*". Whereas we agree that it is important to avoid unnecessary duplication of investigatory work and recognise the benefits of doing so both for businesses and for the CMA, it is also important that the Phase 2 investigation preserves the "fresh pair of eyes" approach of the current system. It is therefore important that the decision making process strikes the right balance between on the one hand avoiding unnecessary duplication and on the other ensuring full independence of the detailed Phase 2 investigation. One way of dealing with this would be to ensure that, while some of the junior members of the Phase 1 team may be retained at Phase 2, there should also be a number of new junior members at Phase 2 in order to bring a fresh perspective to the information gathering stage. At more senior level officials should in any case be replaced at Phase 2. It is also important that the parties are told of the level of cross-over between the Phase 1 and Phase 2 teams and

[3] "*Growth, competition and the competition regime: Government response to consultation"*, March 2012, paragraph 5.25.

have the opportunity to object to a particular individual crossing over if they are concerned this is likely to adversely affect the independence of the Phase 2 investigation.

5.2 We would also welcome greater access for the parties to the senior decision makers at Phase 1, in order to assure the parties that the points they make are passed on to those who ultimately take the decision whether or not to refer their transaction.

**Non-problematic mergers**

5.3 We welcome the introduction of a 40 working day statutory timetable, which provides the parties with greater clarity regarding timetable.

5.4 However, we consider it unfortunate that the Draft Guidance does not contain any commitment by the CMA to progress 'non-problematic' mergers within a shorter timeframe. While we would not necessarily expect the CMA to bind itself to such a shorter timeframe, it would be encouraging if the Draft Guidance were to acknowledge that it may be often be appropriate to clear non-problematic mergers in less than 40 working days.

5.5 Our experience in relation to the OFT's current 40 working day administrative timetable is that the OFT is unlikely to publishes a decision before Day 40, even in the case of a non-problematic merger (for example where the overlap between the parties is extremely small) and where the guidance from the case team at the state of play discussions has been that the OFT is not minded to refer.

5.6 In light of the abolition of the shorter 20 working day procedure which currently offers an alternative for merging parties in more straightforward cases, we would particularly welcome a steer in the Draft Guidance that the CMA will endeavour to publish its decision sooner in the case of non-problematic mergers. The 40 working day statutory period introduced by the ERRA13 is in addition to the initial five to ten working day period before the case team will revert to the parties with the name of the case officer responsible for dealing with the case and the minimum two week pre-notification discussions. The timetable for clearance of a non-problematic transaction will therefore on average stretch to 60 working days, which is unduly lengthy for a straightforward merger with minimum overlaps.

5.7 The length of time taken by the OFT to clear non-problematic mergers also means that, where the transaction has been notified in several Member States, the clearance decision from the OFT is often received some weeks after that of other authorities. In light of the significant uncertainty generated by the merger process for businesses, we would encourage the CMA to ensure that resources are available to allow for decisions in non-problematic cases to be published as soon as possible.

**Pre-notification process**

5.8 We have concerns that the significant degree of discretion offered to the CMA to determine whether or not a Merger Notice is complete may be used as a means of extending the already generous 40 working day timetable. The Phase 1 pre-notification process in the UK should not require the same degree of pre-notification discussions as a Phase 1 process before the European Commission, particularly in light of the longer timeframe in which the CMA has to come to a decision, and the more limited geographic scope of the CMA's enquiries.

5.9 In particular, we would encourage the CMA to take a pragmatic approach to the question of whether or not a Merger Notice is complete, and to recognise that it would not be appropriate to require the same degree of detailed information in every case. We see a significant risk that the pre-notification period will become unduly lengthy and burdensome. This timing issue does also have serious implications in respect of mergers that are subject to the City Code on Takeovers and Mergers. The new 40 working day statutory timetable for phase 1, combined with the two weeks pre-notification, leaves very little scope for delay to the statutory timetable or for dealing with undertakings in lieu of a reference and means that such bids are more likely to lapse. Paragraph 6.67 of the Draft Guidance recognises the interaction with other regulatory processes such as the City Code but does not adequately address the timing constraints on the parties. The CMA needs to recognise the importance of speed and flexibility in these cases and should be prepared to work more closely with the parties in order to avoid conflict between the Code timetable and the CMA's statutory timetable.

5.10 In the interest of transparency we would encourage the CMA to publish statistics in relation to the length of time spent by parties in pre-notification, beginning on the day on which the OFT receives the first substantive submissions for the notifying parties and ending on the first day of the formal notification process.

**Undertakings in lieu**

5.11 As a general matter, we welcome the introduction of a more structured process for the offer and acceptance of UILs and the fact that parties are not required to formally offer UILs until after receiving the CMA's reasons for its SLC decision. This will allow the parties to offer more targeted UILs which address the specific competition concerns raised in the SLC decision. It will also reduce the concern that the existence of an offer of UILs could influence the CMA's views on whether or not an SLC arises.

5.12 We note that the Draft Guidance (reflecting the existing guidance) urges the parties to consider whether UILs are appropriate at any stage of the Phase 1 investigation or during pre-notification. The Draft Guidance also notes that in most cases, the case team will be available to discuss UILs by telephone following the SLC decision, but that it may not be

possible to arrange a meeting or to engage in iterative discussions. The Draft Guidance therefore encourages parties to engage with the case team at or before the issues meeting to identify and resolve any potential issues with any proposed UILs.

5.13 We consider that while it will often be appropriate for parties to consider UILs at an early stage in the process where the potential SLC is clear, the position differs where the scope of the potential SLC is not clarified until the state of play discussions. Effectively requiring parties to propose UILs before the scope of the SLC is clear creates a risk that time and costs are wasted on considering UILs which do not appropriately address the concerns raised or which are either wider than necessary or conversely are too limited in scope.

5.14 We therefore consider that it is extremely important that the CMA case team is available to discuss UILs with the parties following the SLC decision. Even where the parties have considered what UILs are appropriate, the case team's guidance as regards what is required to address the SLC will be vital. If the CMA does not devote sufficient resources to this crucial stage in the process, there is a real risk that cases may be pushed into Phase 2 as a result of a lack of communication between the parties and the CMA as to what form of UILs would be acceptable.

5.15 In addition, we consider that there are a number of ways in which the Draft Guidance could be further improved:

5.15.1 Paragraph 5.9 of the OFT's "*Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*"[4] (the "UILs Guidance") states that the fact that there may still be doubt over the precise nature or likelihood of the SLC at the end of the OFT's investigation even though the test for reference is met will not exclude the possibility of UILs being acceptable. The UILs Guidance makes it clear that the question for the OFT is whether the remedy proposed would act in a clear-cut manner to remove all competition concerns meeting the test for reference caused by the merger. Paragraph 8.6 of the Draft Guidance (and indeed the corresponding wording in the OFT's current Jurisdictional and Procedural Guidance) does not sit easily with this, as it provides that acceptance of UILs would not be appropriate where there is doubt over the precise identification of the SLC. Annexe D of the Draft Guidance provides that in case of conflict between the Draft Guidance and adopted guidance (including the UILs Guidance), the Draft Guidance prevails. However, in our view, the approach in the UILs Guidance is not affected by the introduction of the new time limits and processes for UILs and should therefore be maintained. The Draft Guidance would need to be amended accordingly.

[4] OFT1122, December 2010

5.15.2 Paragraph 8.18 of the Draft Guidance is inconsistent with paragraphs 5.14 to 5.16 of the UILs Guidance. The latter 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, and that the OFT will select only the option(s) that are necessary to remedy comprehensively the concerns that have been identified. The Draft Guidance states only 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 would suggest that the wording of the Draft Guidance is amended to make it clearer that the CMA is willing to consider alternative remedy options proposed by the parties in order to ensure that any UILs are proportionate to the concerns identified in its decision but that, depending on the number and complexity of the alternatives submitted, in some cases it may not be possible to accept UILs within the statutory timetable and that the CMA will keep the parties informed of whether this might be the case.

5.15.3 Paragraph 8.20 of the Draft Guidance provides for the CMA to propose modifications of the proposed UILs to the parties. We would suggest that the last sentence of paragraph 8.20 is amended to make clear that any verbal communication about proposed modifications will be followed up in writing in all cases for certainty.

5.15.4 Footnotes 163 and 164 to paragraphs 8.27 and 8.28 provide that the CMA will generally try to give third parties 15 working days in which to respond to the first consultation on the proposed UILs and 7 working days for any second consultation – i.e. longer periods than the statutory provisions require. We consider that the CMA should take into account the need to allow sufficient time for the parties to make any material modifications to the UILs and, in cases involving an upfront buyer, to find a suitable alternative buyer if necessary, when determining the length of consultation periods (as well as the factors set out in footnote 163), to avoid the risk of the process not being completed within the statutory deadlines and mergers being referred to Phase 2 as a result.

5.15.5 Paragraph 8.33 of the Draft Guidance states that when the CMA considers that an upfront buyer is required, the parties will be given a "relatively short, individually-determined period" after the CMA's decision that it is considering whether to accept the offered UILs in which to identify the upfront buyer, obtain provisional confirmation from the CMA that the buyer is likely to be acceptable, and enter into the sale agreement. Although paragraph 8.33 mentions that this period is "likely to be weeks rather than months", it would be helpful to have a more concrete indication of the CMA's starting point (for example, that the period

will generally be no shorter than a specified number of weeks) so that companies have a clearer idea of the timeframes to which they may have to work.

5.15.6 We would also have concerns that if the CMA does not make it clear at an early stage that an upfront buyer is required, the parties would have a very short time to find an upfront buyer and conclude a sale agreement with them and that this may not be workable. The CMA should therefore clarify at which stage of the process it would inform the parties that it considers an upfront buyer to be necessary.

5.15.7 We assume that the penultimate sentence of paragraph 8.34 of the Draft Guidance means that failure by the parties to progress a sale as envisaged would weigh *against* the CMA deciding to extend the 50 working day timetable, but the CMA may wish to clarify this.

5.15.8 Paragraphs 8.33, 8.34 and 8.37 of the Draft Guidance suggest that the CMA is likely to require the appointment of a monitoring trustee by default in an upfront buyer process, and also that the CMA may require the appointment of a monitoring trustee in other cases, in each case at the parties' cost. This does not appear to reflect the current position as set out in the UILs Guidance (which only suggests that a monitoring trustee may be required in cases involving behavioural remedies). We do not consider this to be a necessary development for cases involving structural UILs: in upfront buyer cases the parties will be incentivised to find a suitable buyer, obtain approval from the CMA and enter into a sale agreement in order to avoid a reference to Phase 2, while in other cases the parties will be incentivised to find a suitable purchaser in order to avoid a sale at no minimum price. The costs of having to appoint and remunerate a monitoring trustee may be a significant burden, particularly for small businesses and to require this as a matter of course would be disproportionate.

6. **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?***

**General Comments**

6.1 As an initial comment, the Draft Guidance states at paragraph 3.19 that the Merger Notice needs to be updated to be suitable for all mergers voluntarily notified to the CMA. We question whether the Merger Notice used by the OFT requires significant updating, as in our experience we have used the existing Merger Notice for a wide range of cases and

overall our experience is that it does not have significant gaps which would need to be addressed through wholesale changes to the Merger Notice. The Merger Notice was most recently updated in 2010 and when originally implemented in 2003 appears not to have distinguished between straight-forward and more complex matters. Therefore we believe that it would be possible to continue to use the existing Merger Notice with modest changes and consequently we do not see the need for the significant changes proposed in the Draft Guidance.

6.2 In addition our experience of the OFT's current information requirements for notifications to be deemed complete tend to be more onerous and require more detail than that required by many other comparable jurisdictions in Europe and indeed the information required is frequently comparable to that required by the European Commission for the purposes of the Form CO (i.e for notifications made on a pan-European basis). For this reason we believe the CMA should look very carefully at ensuring that the information requirements it places on business for notifications are set at the minimum level necessary for the CMA to undertake its Phase 1 review and to take decide whether or not the referral test is met.

6.3 A further concern we have about the approach adopted in the Draft Guidance is that it runs the risk of conflating information that is required for both a Phase 1 and a Phase 2 review. An example of this thinking is in paragraph 7 of the Preamble where notifying parties are invited to look at the information requirements both in previous OFT and Competition Commission cases. We note that a Phase 2 investigation will necessarily require substantially more information and that the volume of information required for a Phase 2 investigation should not be the standard for determining what should be required for the purposes of the Merger Notice.

6.4 Large volumes of data will not necessarily be helpful to the CMA and can easily slow down the process. A well-focused and targeted submission would form a more useful starting point. The CMA can in any event stop the clock and request further information should that prove necessary. The draft Merger Notice appears to reverse the current process and it will now be up to the parties to argue that the CMA does not require certain information, rather than as is currently the case, the CMA telling the parties which particular issues it will focus on. There is no short-form notification option and the cost and burden of such onerous notification requirements will in many cases be disproportionate and could act as a disincentive for certain transactions, thereby restricting rather than encouraging economic growth.

6.5 We also note the European Commission's recent consultation on proposals to simplify certain procedures for notifying mergers under the EU Merger Regulation to make the process more business-friendly by cutting red tape and streamlining the procedures. Whilst not agreeing with all aspects of the Commission's proposals, we consider that the

approach of the European Commission in making the European notification process more business friendly should be followed by the CMA in its approach to notifications in the UK. We feel that the current draft Merger Notice falls short of that objective and compares unfavourably with the approach adopted by the European Commission in its consultation.

6.6 If a new merger notice is to be designed by the CMA to replace that currently used by the OFT then the principle that should direct the CMA's approach should be to place the minimum of red tape and administrative burden on businesses for what is already an onerous and indeed one of the most costly (in terms of fees at least) Phase 1 review processes of any major European jurisdiction. This means that the Merger Notice should set out the minimum information necessary for an assessment of the transaction recognising that in individual cases additional information may be required by the CMA from the notifying parties and can be requested either by the CMA in pre-notification or formally required post-notification pursuant to the CMA's section 109 powers.

6.7 We feel that as currently drafted the Merger Notice places significant information provision burdens on a notifying party requiring potentially voluminous provision of information beyond that required for the Phase 1 assessment of a transaction within the statutory timetable. We feel that the issue arises primarily from two areas of the draft Merger Notice:

6.7.1 The removal from the Merger Notice of any recognised "affected market" threshold below which the transaction would be deemed not to have any effect on competition in a particular market. The result is that for any market where there is an overlap between parties (irrespective of the parties combined shares or any increment) all of the detailed market information required by the draft Merger Notice and Guidance Notes would need to be provided. This compares unfavourably with the European Commission's Form CO (and indeed the notification forms in many other European jurisdictions) where detailed market information only has to be provided where there are "affected markets", i.e. a defined material overlap. The CMA is proposing to remove the previous materiality thresholds of 10% and 15% applied in the current Merger Notice and make the application of a materiality threshold discretionary at a time when the European Commission is actually proposing to increase its general materiality thresholds to 20% for horizontal overlaps and 30% for vertical links.

6.7.2 The document requirements specified in paragraphs 7 to 14 of the draft Merger Notice go significantly beyond the current requirements of the Merger Notice and (by comparison) the current Form CO Section 5.4 request and even go beyond the European Commission's much criticised revised proposed Section 5.4 information request. We are not aware of such extensive information obligations being required in other European jurisdictions such as, for example, the

Netherlands, France or Germany as a matter of course and therefore it is not clear to us why they would be required in the UK.

6.8 We recognise that the CMA has indicated that it will consider that the possibility of waivers in respect of individual information requests and will look at applying a materiality threshold. However, whilst this does give flexibility to the CMA it does not satisfactorily address the burden on business. Prior to commencing pre-notification discussions, notifying parties would have no certainty as to what information they will actually have to ultimately provide as this would appear to be at the discretion of individual case teams. In those circumstances a notifying party will be forced to either collect significant information (with the associated management and advisor costs) on a failsafe basis which may be unnecessary for the substantive assessment or enter into extensive pre-notification discussions as to what would be sufficient for the CMA in the particular case. Such discussions are likely to lead to an extended timetable and delay in the overall notification process.

**Specific comments on the Draft Merger Notice**

6.9 Paragraph 2G asks whether the transaction is being notified in other jurisdictions and if so whether the parties are willing to offer a waiver to support coordination between the CMA and those competition authorities. We consider it is inappropriate to request such a general waiver in the Merger Notice. It would be more appropriate for the CMA to seek specific consent with the parties in respect of the jurisdictions concerned so that the terms of any cooperation with other jurisdictions and the extent of any disclosure between the CMA and other competition authorities is clearly understood and agreed to by the notifying parties.

6.10 In Paragraph 4 the notifying party is required to provide information on "any acquisition" by either of the parties in the last two years. This seems to go beyond what is necessary in the context of the notification and contrasts with the approach taken by the European Commission which is only interested in acquisitions in affected markets. We suggest that this should be limited to those markets where there is a material overlap (horizontal or vertical) between the notifying parties.

6.11 In Paragraph 9 the "latest monthly management accounts" are requested. Whilst in most cases this is unlikely to be unduly onerous it is unclear why this is necessary and such information is not generally required by other authorities as a matter of course. We therefore suggest that this is not necessary and just adds another element to the burden of overall information gathering on the notifying party.

6.12 In Paragraph 11 the request is for "<u>any documents</u> setting out the rationale for the merger" (emphasis added). This seems to us an unduly and unnecessarily broad information request as it would appear to encompass any document, including for example emails,

created by any party or advisor to the deal and created at any time during the course of the transaction.

6.13 Similarly in Paragraph 12 the request for any documents relating to the transaction is very wide ranging and subjective. This is an onerous request and is in contrast to the approach taken previously which arguably focussed on the documents seen by the decision-makers responsible for determining whether a deal proceeded. To the extent that such documents are required, then in our view the document request should focus on the parties' decision-makers – i.e. those individuals (usually directors or shareholders) who are responsible for approving the transaction as anything else is likely to impose significant unnecessary obligations on the notifying parties and may not reflect the basis or assumptions on which a transaction proceeded.

6.14 In Paragraph 13 the final limb of this request ("which are readily available and prepared or published") is too vague and could be read as meaning that the notifying parties would be required to purchase commercial market data which they did not already possess or were not familiar with in order to satisfy the requirement. Whilst in some cases we consider it may be appropriate for parties to purchase additional market data from commercial providers in order to assist a competition authority in reviewing a transaction, we do not consider that this should be imposed as a matter of course as it could represent a significant additional burden and cost on the notifying parties. In addition the absence of any materiality threshold has the potential to make this obligation significantly more onerous as such market data might need to be purchased for any market where there was any overlap between the parties.

6.15 In Paragraph 14 the request for "any market and advertising strategy documents" generated in respect of any market where there is an overlap or a vertical relationship appears unnecessary and potentially burdensome. We query whether this level of information and documentation needs to be provided as matter of course as part of a notification but, in any event, if the CMA decide to require such information, then it should be limited to those areas where there is a material overlap between the parties.

6.16 In Paragraph 20 further guidance should be provided on who would be relevant contacts for the customers and competitors. Please also see our comments below on Guidance Note 11.

**Specific comments on the Guidance Notes**

6.17 As noted above, we have significant concerns about the level of information set out as required in the Guidance Notes in the absence of any materiality threshold in respect of the overlap markets. However, we have the following additional comments on specific aspects of the information requirements specified in the Guidance Notes.

6.18 In Guidance Note 9 whilst we understand that the CMA will need to have an understanding of the relevant markets, we are not clear why it would be necessary as standard procedure for a Phase 1 investigation to provide "supporting documentation outlining the merger parties' price setting process and any analysis used to set prices". It seems to us that it should be sufficient for the price setting process to be described, if appropriate, and then for the CMA to request any further clarificatory information if required. We note that the provision of an explanation is generally sufficient for the European Commission for the Form CO and do not see any clear reason why more information and documentation should be required by the CMA.

6.19 In respect of Guidance Note 10, we note that the provision of detailed bid data is required as standard where there is a bid market. We note the contrast in the approach adopted by the CMA on the one hand and that taken by the European Commission in its recent consultation with regards to the provision of bid data. In contrast to the CMA, the European Commission specified that the non-provision of information such as bid data would not be sufficient for a notification to be deemed incomplete[5]. On that basis it is not clear to us why such information would be necessary for a notification to be deemed complete before the CMA.

6.20 Similarly, in Guidance Note 10, we are unclear why product level profit margin data should be required as a matter of course for any overlap market. We understand that in specific cases such data may be helpful to the CMA (even in a Phase 1 investigation), but having undertaken a substantive number of OFT and European Commission reviews it seems to us that such information is only necessary in a small number of cases. Consequently we do not believe that such information should be required as a matter of course or in all cases. We also note that the obligation to provide product level data is likely to be very onerous in any event where the parties have a significant number of different products or SKUs.

6.21 Guidance Note 11 requires the provision of contact details for the "top 10 to 20 competitors" and the "top ten to 50 customers". The Guidance Note states that the number of contact details will vary on a case by case basis and the notifying parties should contact the CMA to discuss what is the appropriate number. This seems to us unnecessarily bureaucratic and we consider that the Guidance Notes should specify a fixed number of contact details which should be provided. In cases where the CMA requires further contact details the CMA can request such additional details in pre-notification or by means of an information request post-filing. We note that the collection of correct and complete contact details is generally a time-consuming exercise and as such the requirements for extensive numbers of contact details should be limited to exceptional cases rather than representing

[5] See the European Commission's consultation draft Form CO at paragraph 1.8.

the norm. Similar comments apply in respect of the contact details specified in Guidance Note 15 and Guidance Note 18.

6.22 We consider that the materials required pursuant to Guidance Note 17 in respect of any vertical links appear unduly onerous and we query whether such information is necessary in all cases. In particular we are not clear why, for a Phase 1 review, detailed margin information would be required in all cases. Similarly we are unclear why it would be necessary to provide a list of all exclusivity agreements and to provide internal documents discussing plans to put in place exclusivity agreements as this again would seem to go beyond the scope of what would be required for most Phase 1 cases.

7. **QUESTION 7**

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

7.1 We agree with the principle that with the creation of a "single track notification" procedure it would be appropriate to have a single point in time at which the merger fee is payable. We agree that the payment of the merger fees on the publication of the decision would seem to be an appropriate point in time.

8. **QUESTION 8**

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

8.1 In addition to our comments set out above we have some further observations in respect of the proposed notification process.

8.2 At various points in the Draft Guidance it is specified that the CMA will endeavour to respond within 5-10 working days (see for example paragraph 6.49 in respect of timing for the pre-notification review of the draft Merger Notice). We consider that the proposed time for response compares unfavourably with the European Commission's specified 5 working days[6]. We believe that there is no reason why the CMA should require more time to review submissions than the European Commission and that consequently the default position for reverting following submission should be 5 working days. We also note as a practical matter that if the CMA commits to only responding within 10 working days this would imply that pre-notification would be likely to last longer than the 2 week pre-notification period proposed in the Draft Guidance.

[6] See paragraph 15 of *DG Competition – Best Practices on the conduct of EC merger control proceedings*.

8.3 It appears to us that the overall effect of the proposals will be to make the process for notification more cumbersome and more bureaucratic: for example the introduction of case allocation requests and the specification that cases will generally only be allocated at weekly meetings. We see the introduction of such a formal step as the unwelcome adoption of more bureaucratic and time consuming processes in circumstances where the UK system previously allowed for a case team to be appointed at short notice without formality. The CMA should consider again whether such a step is necessary and look more generally at how it anticipates the system working from the point of view not merely of the administration of the CMA but also the parties notifying.

8.4 As a final comment we consider that it would be helpful if the Draft Guidance also addressed the appropriate form of submission in the case of submissions made in respect of the Water Industry Act special water merger regime. Does the CMA intend that a Merger Notice is used for such notifications and what information would it require for any notification?

## 9. 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?***

9.1 This section contains our comments on paragraphs 7.28 to 7.42, 11.8 to 11.12 and Annexe C of the Draft Guidance, and the draft template order at Annexe F of the consultation document.

9.2 Overall, we consider that the level of detail on interim measures and the inclusion of a draft template initial enforcement order (the "Draft Template Interim Order") are both necessary and appropriate to provide clarity and predictability to businesses involved in transactions caught by the UK merger regime and legal practitioners advising on those transactions. However, we are of the view that the proposed approach to interim measures risks being unnecessarily burdensome for the parties and that there are a number of respects in which the Draft Guidance and the Draft Template Interim Order could be improved to increase clarity and to maximise certainty for stakeholders.

### The need for interim measures

9.3 As a general point, we welcome the statements in the Draft Guidance that the CMA will consider the need for interim measures on a case-by-case basis.[7] However, one of our main concerns, as explained further below, is that the specific proposals for the use of interim measures powers at Phase 1 for completed mergers will in effect result in the CMA

[7] See, for example, paragraph C.5.

imposing interim measures orders in most if not nearly all cases of completed mergers, which, in our view, would not be appropriate.

9.4 The statutory test for making an interim order is set out in amended s 72(1) of the EA02, namely that the CMA is considering whether to make a reference (s 72(1)(a)) and has reasonable grounds for suspecting that there is or may be the case that two or more enterprises have ceased to be distinct (or will do so in the context of anticipated mergers) (s 72(1)(b)). There is no longer an express statutory requirement of reasonable grounds for suspecting a "relevant merger situation", nor that pre-emptive action is in progress or in contemplation.

9.5 The Draft Guidance states that the threshold the CMA applies to consider whether it is appropriate to make an interim measures order at Phase 1 is a *"low one"* and that, in the context of completed mergers *"the CMA will normally make interim orders in investigations where it has reasonable grounds for suspecting that two or more enterprises have ceased to be distinct"*.[8] The Draft Guidance therefore does not appear to take into account the first limb of the statutory test, namely that the CMA is considering whether to make a reference. According to the Draft Guidance, to make an interim order, the CMA would only need to have reasonable grounds for suspecting that two or more enterprises have cease to be distinct.

9.6 Furthermore, the Draft Guidance states that *"Experience has shown that, for initial measures to be effective, they should be implemented as soon as possible after completion of the merger in question."*[9] Paragraph C.11 states that "*In a Phase 1 completed merger, an interim order will normally be made at the same time as the enquiry letter is sent to the parties. […] Where parties to a completed merger approach the CMA to notify the merger, the CMA will also normally issue an interim order soon after that approach. The interim order will require the parties to cease all integration steps with immediate effect*."[10] This seems to contemplate an interim order being imposed very early in the process, potentially at a time when the CMA does not have sufficient information to be "considering whether to make a reference" i.e. to meet the first limb of the statutory test (s 72(1)(a)).

9.7 Given this, and absent a requirement in the Draft Guidance for a substantive competition test to be applied before an interim order is imposed, it is difficult to see in what circumstances an interim order would not be imposed at an early stage in completed merger cases. Although the Draft Guidance provides that there may be some exceptions to

8 See paragraphs 7.34, and 6.22 and 6.17, respectively.
9 Paragraph 7.34.
10 See also paragraph 7.35 *"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."*

this *"for example if there is a lack of clarity as to which parties have ceased to be distinct,"*[11] this is unlikely to be an issue in most merger cases in practice.

9.8 While we recognise the need for the CMA to act quickly to prevent pre-emptive action in cases where there is a risk of a merger not being cleared, the need is less clear in mergers that are unlikely to raise competition concerns given that the "unscrambling the eggs" problem, which was one of the drivers behind this aspect of the reform,[12] would not be an issue in such cases. We note that as at 2 September 2013 hold separates had been imposed in 120 cases at the OFT stage and that approximately 49% of those cases were unconditionally cleared by the OFT; 65% of those cases were cleared by the end of Phase 2.[13] This shows that in the current regime (in which a higher statutory threshold applies than will apply in the new regime, and in which the OFT Guidance refers to a substantive test) hold separates are already being imposed in a large number of cases which are not ultimately found to give rise to competition concerns. Moreover, we are concerned that preventing integration in transactions which are unlikely to raise any competition concerns would be unduly burdensome on businesses involved (given, in particular, that the businesses may subsequently need to engage in the derogations process, see below). In any case, the new express power for the CMA to reverse pre-emptive steps already taken (see further below) should make an immediate interim order with these potentially harmful effects less necessary.

9.9 Therefore, to ensure a targeted and effective approach to dealing with integration (and also an approach that is consistent with underlying primary legislation), the Draft Guidance will need to take into account the first limb of the statutory test for making an interim order. Furthermore, we consider it is necessary for the CMA to apply a substantive test before imposing an interim order in Phase 1. As such, we suggest the Draft Guidance be amended to provide that the CMA will not use interim orders in Phase 1 "*in cases that do*

11 Paragraph C.11.

12 The Consultation, paras 4.1-4.15 and the Government Response, paras 5.1-5.9.

13 Initial undertakings under section 71 EA02 and unconditional clearances (as at 2 September 2013)

| Year | Initial undertakings under s 71 EA02 | OFT unconditionally cleared | % unconditionally cleared by OFT | CC unconditionally cleared | % unconditionally cleared by OFT or CC |
|---|---|---|---|---|---|
| 2013* | 10 | 6 | 60% | 1 | 73% |
| 2012 | 24 | 12 | 50% | 3 | 63% |
| 2011 | 23 | 12 | 52% | 2 | 61% |
| 2010 | 08 | 4 | 50% | 2 | 75% |
| 2009 | 11 | 7 | 78% | 2 | 82% |
| 2008 | 09 | 5 | 56% | 2 | 78% |
| 2007 | 12 | 6 | 45% | 3 | 75% |
| 2006 | 08 | 4 | 50% | 0 | 50% |
| 2005 | 09 | 1 | 11% | 4 | 56% |
| 2004 | 06 | 2 | 33% | 2 | 67% |
| **Totals** | **120** | **59** | **49%** | **21** | **65%** |

* As at 2 September 2013. Source: OFT Register of Initial Undertakings: http://www.oft.gov.uk/OFTwork/mergers/register/Initial-undertakings/, http://www.oft.gov.uk/OFTwork/mergers/Mergers_Cases/?Order=Date&caseBydateDecision= and http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries?bytype=selectedthemes1&byid=mergers.

*not raise* [competition] *concerns*", as is currently the case for the use of initial undertakings under section 71 of the EA02.[14]

9.10 As regards anticipated mergers, we welcome the express statements in the Draft Guidance that the risk of pre-emptive action in an anticipated merger is generally lower than in a completed merger and, as such, that *"the CMA would not normally expect to make an interim order at Phase 1 in an anticipated merger"*[15] and *"the CMA would not expect generally to impose an interim order in Phase 1 preventing parties to an anticipated merger from completing the transaction (although an order may prevent integration occurring post-completion)".*[16]

9.11 It is clear from these statements that the use of interim orders in anticipated mergers is intended to be more limited than in completed mergers. Overall, we think this approach generally strikes the right balance in ensuring a targeted approach to addressing integration in anticipated mergers at Phase 1, without shifting the balance inappropriately towards a suspensory merger regime, which was not the stated policy intention of the reform. However, consistent with our comments as regards completed mergers, we consider that the use of interim measures at Phase 1 in the context of anticipated mergers should also be limited to transactions which are likely to give rise to competition concerns.

9.12 Further, in the context of anticipated mergers, the Draft Guidance states that an interim order might be required *"if the CMA believed that there was a risk that pre-emptive action might take place."*[17] We agree that interim measures should not be imposed in anticipated merges at Phase 1 unless the CMA believes that there is a risk of integration/pre-emptive action occurring. However, we consider that the non-exhaustive list of circumstances set out in paragraph C.12 in which the CMA might consider an interim order necessary at Phase 1 in relation anticipated mergers is very wide. In respect of commercially sensitive information being exchanged between merging parties, we would argue that the Chapter I prohibition/Article 101 TFEU would in any case apply to such conduct. As for the issue of key staff leaving the target business or being likely to do so, an acquirer may not have control over this. As such, in circumstances where staff are not moving from the target business to the acquiring business, we consider that it would not be appropriate for an interim order to be imposed. In fact, if the target is failing to retain staff, it might be more appropriate to allow the acquirer to put in its management (i.e. integrate) than to prevent integration.

9.13 The final guidance should also provide further clarity as to whether the fact that integration/pre-emptive action may be occurring is a pre-requisite to the use of interim

14 The OFT Guidance, para 6.33.
15 Paragraph C.12.
16 Paragraph 7.32.
17 Paragraph C.12.

measures powers in completed mergers also. In particular, we find the wording in paragraph 7.34 confusing in this respect:

> *"As a matter of practice, the CMA will consider the appropriateness of making an interim order as soon as it has reasonable grounds for suspecting that: (i) two or more enterprises have ceased to be distinct or will cease to be distinct during the CMA's review, or (ii) arrangements are in progress or contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct, and that integration of those enterprises may be occurring prior to completion."* (emphasis added)

9.14 Whilst (i) and (ii) deal with the second limb of the statutory test for the use of interim measures in completed and anticipated mergers, respectively, the underlined section appears only to deal with anticipated mergers. If the intention is for this requirement to apply to anticipated mergers only (i.e. not to completed mergers also), we suggest this be made expressly clear in this paragraph to avoid potential confusion, alternatively this could be moved to a stand-alone section in the Draft Guidance on the use of interim measures in anticipated mergers.

**Power to unwind integration / reverse pre-emptive action**

9.15 We welcome the statements in the Draft Guidance that at Phase 1 *"the CMA would, in general, expect to seek to achieve an unwinding of integration that has already occurred only in limited circumstances […] but will assess each case on its own facts"*.[18] The Draft Guidance also states that the power is more likely to be used at Phase 2 *"where the circumstances of the case require"* and includes examples of measures to unwind integration that have been required in the past. [19] There is however limited guidance on circumstances in which this power might be used.

9.16 Unwinding integration (be it at Phase 1 or Phase 2 of the investigation) could potentially be costly for businesses. It is also highly intrusive and disruptive and therefore not a power to be used lightly. As such, it is important that there is further clarity in the Draft Guidance regarding:

9.16.1 the circumstances in which the CMA would use the power to unwind integration / reverse pre-emptive action in practice (at both Phase 1 and Phase 2). For example, will the power only be used in transactions which are likely to raise competition concerns at Phase 1 – we suggest the power should be limited in this way (see our comments above in relation to prevention of pre-emptive action); and

[18] Paragraph 7.32. See also paragraph C.30.
[19] Paragraphs C.30 and C.31.

9.16.2 the type of integration steps that may be unwound by the CMA. For example, in completed mergers, would the CMA seek to unwind completion at Phase 1 – we suggest that this would not be appropriate in a voluntary/non-suspensory regime. What sort of action does the CMA envisage unwinding in anticipated mergers, in particular at Phase 1?

**Draft Template Interim Order**

9.17 We consider that the scope of the Draft Template Interim Order goes beyond what is necessary to deal with pre-emptive action in all cases and the proposed "one size fits all" approach does not provide for sufficient flexibility to deal with the range of possible situations that may come under the CMA's jurisdiction. The wide scope of the Draft Template Interim Order is particularly concerning given that the proposed intention is for an order to be made early on and quasi automatically in completed mergers. In particular, we emphasise that the purpose of an interim order is to prevent pre-emptive action i.e. something that would impede a reference or impinge on the CMA's remedial powers. While this would clearly cover measures to ensure the ongoing financial viability or proper management of the target business (for example, the preservation of the target's physical assets (paragraph 6(e)), a blanket prohibition on the movement of key employees, for example, (paragraph 6(i)) might in some cases go beyond what is necessary to preserve viable management of a target business. We are therefore in favour of a more pared back and flexible, case-by-case approach to interim orders.

9.18 If the CMA is nonetheless minded to retain a blanket and all-inclusive template interim order, we consider that the Draft Template Interim Order is generally clear and comprehensible but that further clarification could be made to it and the accompanying paragraphs of the Draft Guidance as follows.

9.19 Paragraph 5(a) refers to any action "*leading to the integration of the Y business with the X business"*. It would be helpful if further clarification was provided as to what would constitute steps leading to integration. We also wonder if it is correct to use integration as a proxy for "pre-emptive action". For example, provision of necessary services no longer available from the vendor will preserve the target business, but will be to an extent integration. However, without these steps, the viability of the target business could easily suffer.

9.20 Paragraph 6(b) requires that sufficient resources are made available for the development of the Y business, on the basis of its pre-merger business plans. This is a very general and potentially far reaching requirement and it would be helpful if the Draft Guidance would elaborate in order to clarify what will be expected of X in order to satisfy this 'development' requirement. We also wonder if it is essential for an interim order – a negative obligation

not to cancel arrangements relative to pre-merger business plans without consent - would seem more suitable.

9.21 Paragraph 6(g) of the Draft Template Interim Order provides that *"the [customer] and [supplier] lists of the two businesses shall be operated and updated separately and any negotiations with Y's existing or potential [customers] [suppliers] in relation to the Y business will be carried out by the Y business..."* It is not clear how "existing or potential" is defined in this context, in particular, we are concerned that "potential", if interpreted expansively, could make this requirement unduly onerous on the merging parties and difficult to comply with in practice. We would therefore suggest a more prescriptive/precise definition of "potential", for example, *"customers/suppliers with which Y has commenced negotiations prior to the date of the order."*

9.22 Finally, we would also urge the CMA to limit the scope of the interim measures to the UK operations and to the area of the business giving rise to the overlap. It will therefore be important to take care when defining the acquirer (X) in order to make sure that the measures do not cover the acquirer's entire business but only those parts which are related to the markets under investigation.

9.23 Paragraph C.7[20] of the Draft Guidance provides that the Draft Template Interim Order *"is not intended to deal exclusively with all matters that the CMA may reasonably wish to address in interim measures. In some cases therefore, it will be necessary to put in place further interim measures that go beyond the safeguards contained in the template."* While the CMA will have discretion to include additional safeguards to the interim order from the outset, the indication from the Draft Guidance is that there will be limited opportunity for the parties to negotiate to reduce the scope of the Draft Template Interim Order with the CMA; the discretion therefore rests with the CMA whilst the burden is with the parties subsequently to negotiate derogations. We would therefore recommend that the Draft Guidance be supplemented to include additional examples of when further interim measures may be needed (in addition to the examples already cited at paragraph C.20 and hold separate managers and/or monitoring trustees), to the extent relevant.

**Requests for derogation**

9.24 The Draft Guidance envisages that an interim order will be imposed (with limited opportunity for the parties to negotiate the scope of the order with the CMA upfront[21]) and that the parties will subsequently need to request derogations from the interim order if they wished to take steps that would otherwise be in breach of the interim order.

9.25 Assuming a highly detailed interim order of the type proposed, we consider that the derogations process will be key in the new regime in order to ensure that the approach to

20 See also paragraph 7.40 of the Draft Guidance.
21 Paragraph 7.41.

dealing with pre-emptive action is sufficiently targeted and effective and does not go further than what is necessary.

9.26 We note that in the last five years (August 2008 – August 2013) derogations from the OFT's template initial undertakings were granted in 66% of cases in which initial undertakings under section 71 EA02 had been accepted.[22] The indication is therefore that derogations from the Draft Template Interim Order are likely to be needed in a large number of cases in the new regime. As such, we would favour a more flexible derogations process than that envisaged in the Draft Guidance. To that end we consider that there should be a period of 5 – 10 days before an interim order is made for the parties to discuss with the CMA whether an interim order is needed and, if so, what derogations from the Draft Template Interim Order may be appropriate. This would mean that interim orders would be avoided in those cases where there is clearly not a competition problem and that the CMA's resources would be employed to deal with pre-emptive action in cases in which that may be an issue.

9.27 Further, we consider that the derogations process set out in the Draft Guidance could be further improved in a number of respects.

9.28 The Draft Guidance provides that the CMA will consider derogation requests "promptly".[23] Given the importance of derogation requests (for example, as stated in the Draft Guidance, they may be required to ensure the ongoing financial viability of the acquired company)[24], consents to the requests could in many cases be time critical.[25] As such, for clarity and predictability, it would be helpful if the Draft Guidance could be more precise as to the timeframe within which the CMA will consider derogation requests – we suggest that 5 working days would be sufficient. This would also be in line with the Government policy of streamlining the merger regime by introducing timeframes to the end-to-end merger review process.[26]

9.29 In view of the penalty regime, it should also be clarified that derogations from interim orders will be back-dated so that recipients are not faced with a position where non-compliance with the interim order in the interval between the order being made and the agreement of derogations could expose them to a financial penalty.

9.30 The Draft Guidance lists the type of evidence the parties need to include to support requests for derogation from an interim order and provides that the CMA is unlikely to grant derogation consents 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*

22 Source: OFT Register of Initial Undertakings: http://www.oft.gov.uk/OFTwork/mergers/register/Initial-undertakings/.
23 Paragraph C.16.
24 Paragraph 7.41.
25 As recognised in the Draft Guidance (see paragraph C.16.c.).
26 The Government Response, para 5.24.

*effective operation of the interim measures as a whole, or to meet regulatory, statutory or other obligation."*[27] While the threshold for imposing an interim order is low, the threshold that the parties need to meet in order to obtain a derogation appears to be relatively high. It is not clear to us why the approach to requests for derogations is so restrictive. The parties to a transaction should be able to request such derogations as are necessary in a particular case to suit the nature of their businesses and limit the burden and inflexibility of the Draft Template Interim Order. A restrictive approach to derogations would undermine a targeted approach to interim measures.

9.31 We also note that circumstances and evidence to support a request for derogation may change over time. As such, we are of the view that the CMA should permit repeat requests for derogation (for example, if the CMA turns down a request, the parties should be able to submit a further request for derogations to the CMA if there has been a change in circumstance since the last request) and that this should be made expressly clear in the Draft Guidance. Allowing for repeat requests in this way would promote a targeted approach to interim measures.

9.32 Footnote 337 of the Draft Guidance provides that *"if the parties consider an interim order is unnecessary, they may also make submissions to the CMA setting out reasons why there is no risk of pre-emptive action and the CMA will consider whether it would be appropriate to revoke the interim order."* To assist the parties in making appropriate submissions to the CMA in this regard, it would be helpful if the Draft Guidance would further clarify in what circumstances the CMA considers it might be appropriate to revoke an interim order. We would also suggest in cases that it is clear at an early stage that there is no competition issue or that the merger does not qualify for a reference, the CMA will normally revoke the interim order. This would avoid unwarranted costs and inefficiencies for the businesses concerned and reduce unnecessary red tape.

9.33 We welcome statements in the Draft Guidance that derogation consent notices will be published by the CMA on its website alongside the interim order to which they relate.[28] However, if these are to provide an insight in the long run as to the type of integration that may be permissible, the CMA's reasoning will also need to be published in each case, which the Draft Guidance does not currently contemplate.

**Monitoring trustees and hold separate managers**

9.34 We recognise that in some cases it may be necessary to appoint a hold separate manager ("HSM") and/or a monitoring trustee to ensure effectiveness of interim measures. However, given that such appointments can in practice be intrusive and costly to

27 Paragraphs C.16 – C.18.
28 Paragraphs 7.42 and 7.30.

businesses concerned, [29] we consider that circumstances in which they can be made need to be limited and that the Draft Guidance is too permissive in this regard. The requirement to appoint a monitoring trustee/HSM adds a further burden and costs to the parties and it is therefore important that it is applied in a manner that is proportionate to any potential risks.

9.35 Paragraph C.24 of the Draft Guidance provides that *"the CMA may consider it necessary to appoint a monitoring trustee and/or an HSM at Phase 1 where one or more of the risk factors [listed at paragraph C.25] below apply and/or where it is clear at an early stage that the merger raises prima facie competition concerns."* (emphasis added)

9.36 We have two observations regarding the underlined text:

9.36.1 First, we are of the view that a competition concern should not, in and of itself, be sufficient for the CMA to require the appointment of an HSM and/or a monitoring trustee. Appointment of monitoring trustees and/or HSMs should in our view be limited to cases where a pre-emption risk is present (i.e. one of the risk factors at paragraph C.25 applies) and there are clear competition concerns. We therefore suggest that the "and/or" above be replaced with "and".

9.36.2 Second, we consider that identifying a "prima facie" competition issue at an "an early stage" in Phase 1 is too low a bar for the purpose of deciding whether an HSM and/or a monitoring trustee should be appointed as there is a risk that this requirement would catch transactions which are ultimately found not to give rise to competition concerns. We would therefore favour a formulation that requires more than a "prima facie" competition concern.

9.37 We agree that one of the risk factors listed in paragraph C.25 of the Draft Guidance will need to apply in order for the CMA to be able to appoint a monitoring trustee and/or an HSM. However, we note the statements in footnote 339 regarding the decision whether to appoint an external or an internal HSM. Given that appointments of external HSMs can in practice be intrusive and costly to businesses concerned, we would suggest that the Draft Guidance be amended to make it clear that the starting point should be that the CMA will appoint an internal HSM, unless relevant factors are present which would favour the appointment of an external HSM.

**Financial penalty for breach of interim measures**

9.38 Failure to comply with interim measures may result in administrative penalties of up to 5% of the total value of the turnover of the enterprises owned or controlled by the infringing company (both within and outside the UK). This is a significant sanction, particularly when compared to the 10% maximum for substantive infringement of the Chapter I and Chapter

[29] Paragraph C.23 of the Draft Guidance provides that the appointment of an HSM and/or a monitoring trustee will be at the expense of the acquiring party.

II prohibitions. We therefore suggest that it would be appropriate for the CMA to apply the proposed penalty in a restrictive fashion and that the upper threshold should only be applied in the most egregious of cases. In line with our comments made on the 'Administrative Penalties: Statement of Policy on the CMA's approach' consultation document, we would also welcome further clarification of the steps leading up to the CMA imposing financial penalties for breach of interim measures. In particular, if the present approach is maintained of "order first and derogations later" then conduct covered by the initial interim order should be exempt from fines – this will ensure preservative measures can be taken, while not excluding the ability to punish genuinely pre-emptive conduct after derogations have been agreed.

10. **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?***

10.1 Paragraph E.4 provides that the CMA's powers to make interim orders under section 72 will apply in respect of anticipated mergers that are ongoing at the effective date. The power to impose interim orders in the case of anticipated mergers is a new power and presents an important change from the current regime. On that basis we would argue that ongoing anticipated mergers should benefit from a transitional provision in respect of this power and that the CMA should only be able to impose such measures on new (as at the effective date) anticipated mergers.

10.2 The suggested approach in respect of Phase 2 cases is not consistent. On the one hand it is proposed that the new procedures will apply from the effective date to all ongoing Phase 2 cases, on the basis that the ERRA13 did not make any substantive changes to the Phase 2 process prior to publication of the final report, while on the other hand it is suggested that the old procedures will apply for Phase 2 cases where the final report is published but final remedies have not yet been accepted (so the CMA will not be subject to the statutory time limits for agreeing remedies). The possibility of administrative fines of up to 5% being imposed on the parties for breach of interim orders is a sufficiently important change to warrant a transitional provision and we would therefore recommend that the old procedures continue to apply in all cases where a Phase 2 is ongoing at the effective date.

**Herbert Smith Freehills LLP**

**September 2013**