City of London Law Society

Competition Law Committee

COMMENTS ON DRAFT CMA GUIDANCE DOCUMENTS: TRANCHE 1

1. INTRODUCTION

1.1 These comments are submitted by the Competition Law Committee of the City of London Law Society ("CLLS") in response to the public consultation published by the Competition and Markets Authority on 15th July 2013 in relation to draft CMA Guidance Documents Tranche 1 ("the Consultation")

1.2 The documents contained in the Consultation are as follows:-

1.2.1 Mergers: Guidance on the CMA's jurisdiction and procedure ("Merger Guidance");

1.2.2 Market Studies and Market Investigations :Supplemental Guidance on the CMA's approach ("Market Guidance");

1.2.3 Administrative Penalties: Statement of policy on the CMA's approach ("Administrative Penalties");

1.2.4 Transparency and disclosure: Statement of the CMA's policy and approach ("Transparency");and

1.2.5 Cost Recovery in Telecom Price Control References: Guidance on the CMA's approach ("Telecom Price Control References")

1.3 This paper does not comment on the draft guidance on Telecom Price Control References.

2. THE CLLS

2.1 The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

2.2 The Competition Law Committee members responsible for the preparation of this response were:

2.2.1 Philip Wareham Partner Hill Dickinson LLP,

2.2.2 Antonio Bavasso, Partner Allen & Overy LLP;

2.2.3 Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);

2.2.4 Alex Potter, Partner, Freshfields Bruckhaus Derringer LLP;

2.2.5 Jenine Hulsmann, Partner, Clifford Chance LLP;

2.2.6 Deidre Trapp, Partner, Freshfields Bruckhaus Derringer LLP

2.2.7 Samantha Mobley, Partner, Baker & McKenzie LLP.

2.2.8 Dorothy Livingston, Consultant, Herbert Smith Freehills LLP

3. CLLS RESPONSE

3.1 We are grateful for the opportunity to comment on the draft guidance documents that comprised in the Consultation and our comments are set out below

4. MERGER GUIDANCE

4.1 We are pleased to note that the proposed guidance will be as detailed as is currently the case and essentially amalgamates existing guidance from the OFT ("OFT") and Competition Commission ("CC"), subject only to necessary changes required by the statutory changes and updates to reflect developments in case law and experience. The Consultation states that the Competition and Markets Authority ("CMA") have also tried to reflect "incremental improvements to policies and procedures which have been made by the OFT and CC since those documents were published or which are intended to capture the benefits of the CMA's unitary nature."

4.2 This seems to us the right approach. Nevertheless, we are concerned that, where the CMA have a discretion under the new legislation, they have opted for practices and procedures that are in direct conflict with the stated objectives of the Government's reforms, namely streamlining merger control processes and freeing up business activity.

4.3 We highlight below a number of issues raised by the CMA's proposal which in our view create excessive and unjustified bureaucratic burdens for business and even a risk that M&A activity that is pro-competitive (or at least harmless from a competition point of view) will be jeopardised. There are several procedural reforms in the CMA's proposals that cannot be described as mere incremental improvements. There is in our view a real risk that the CMA are about to introduce a compulsory pre-clearance system by stealth. We submit that the proposals should be reviewed again with a view to achieving greater consistency with the clear political decision to retain a voluntary and more business friendly system of merger control in this country and taking account of a fuller analysis of the resource and cost issues the proposed approach appears to raise for both businesses and the CMA.

4.4 Our three principal areas of concern are as follows:

4.4.1 The timing and inflexible use of interim orders (and an over-reliance on derogations which cannot be granted until the order has been in place for some time);

4.4.2 The lack of flexibility with the prescribed form for notifications (and an over-reliance on formal waivers)

4.4.3 The tightness of the procedural deadlines for UILs and lack of clarity on when upfront buyers may be required.

4.5 We do not propose to go through the various questions in the consultation on this part of the guidance point by point but, rather, discuss the important points of principle raised here by the CMA's current proposals in relation to the above three areas. We begin by making some preliminary observations on the above three proposals and then proceed to examine each of them in more detail.

5. Preliminary observations

5.1 The approach on interim orders and the mandatory form relies heavily on administrative derogations from burdensome, and in many cases impractical and/or unnecessary requirements. Far from speeding matters up or reducing costs, it will instead slow down the process, focus staff attention on process instead of the real issues and add to costs. The UK prides itself on its business friendly environment and we feel that the CMA have missed an opportunity to devise a system that is flexible enough to cope with the range of different cases before them, pragmatic and not unnecessarily bureaucratic or obsessed with the ticking of boxes.

5.2 In particular, the scattergun approach of making an immediate effect order wherever the CMA decide to enquire whether there is a completed merger is a particularly egregious example of this approach. There does not seem to be any intention to change current OFT practice, in which letters are sent not just in cases where there may be a significant competition issues, but also frequently catch cases that are not yet completed, or do not qualify for investigation(see frequent OFT decisions on non-qualifying cases), as well as unproblematic cases. If the order could (having regard to the language of the statute) be framed to catch uncompleted cases that the CMA suspect may have been completed, it may well be addressed to some cases where the EU has jurisdiction and the UK authorities have no power to apply the UK regime at all.

5.3 The Committee appreciates that in some cases the proposed changes are driven by problems that have been experienced in the past, e.g. in relation to completed mergers referred to the CC where integration had reached a stage where it had become impossible to unwind. These are however a very tiny number of all completed merger cases. Similarly while we understand the desire to shorten the pre-notification procedure by avoiding iterative requests for more information ,it has to be remembered that most mergers are non-problematic and even where there are issues, they are often narrow in scope, so that much of the information requested will be irrelevant. So while we have no objection to having more predictability in the procedures, for instance in the timetables and the handling of undertakings in lieu of a reference, the changes should be designed to make merger control easier and cheaper, not more rigid and more expensive. We therefore believe that the present OFT approach strikes the right balance and that parties should not be faced with an automatic one-size-fits-all interim order whenever the CMA decides to investigate a completed merger case and a form, such as that proposed, for a straightforward merger which asks for information that is only needed in difficult cases.

5.4 The impact of the proposals regarding interim orders and the pre-notification process, taken together, risks creating one of the world's slowest and most expensive merger

control regimes and having a dampening effect on merger activity and the wider economy, just at a time when growth is needed.

5.5 We are particularly concerned that non-qualifying and non-problematic mergers will become at risk (even if a lesser risk) of being subjected to the full weight of interim orders, and will be treated no differently from genuinely problematic completed mergers. Many acquisitions involve small, often family run businesses, businesses with limited resources that are in difficulties or business units being sold off that cannot stand on their own. In such cases a purchaser needs quickly to provide firm management control to keep the business alive, which is incompatible with a standard hold-separate order.

5.6 The blunt and indiscriminate use of interim orders in all cases will in our view deter potential acquirers from taking the risk of acquiring companies in that situation as the obligation to keep the acquired business going as a separate concern and the cumbersome procedure for obtaining derogations (often for urgent and necessary commercial decisions) would put an impossible burden on them as purchasers. And where purchasers take that risk, the imposition of the interim order is more likely than not to kill off the very business that could otherwise be saved, to the detriment of competition and in direct contradiction to the purpose of such orders.

5.7 We submit that, given many cases are caught in the net of UK merger control approval where it is apparent that there is no real prospect of an SLC, the CMA should adopt a flexible process, which would ensure that interim orders will not be made in such cases.

5.8 In addition, we note that merger fees are set at the rate appropriate for a system in which most mergers are not notified, and precautionary pre-clearance will be prohibitively expensive for many deals. This, coupled with the proposed approach, carries the risk that it will prevent some useful merger activity, including some rescue deals.

5.9 While we are not able to put an exact figure on it, we believe that mergers referred to the CC for a second phase review generally represent well under 5% of all reported merger activity and only a fraction of those are completed mergers where there has been any attempt at irreversible pre-emptive action. We would submit that it would be disproportionate to impose on the whole business community a set of rigid procedures to deal with such minority cases at the expense of the vast majority of cases, which are non-problematic and are not reviewed at all under the present system.

5.10 We had understood the policy intention of Government to be that the UK should not adopt a pre-clearance approach and that the fee regime (high fees on the basis that attention is directed only to genuinely problematic mergers) and resources of the regulators should be appropriate to deal with a small number of problematic cases, not a high volume of unimportant cases. But the extent of the proposed changes in the CMA's approach from that of the OFT sits oddly with Ministerial Statements on the aim of reforms, for example, Norman Lamb on 15th March 2013 promised that the new structure would bring:

"More flexibility in prioritising cases and using resources to address the most important competition problems of the day, and for sector regulators, better incentives to use antitrust and markets tools to deal with competition problems…… Faster, less burdensome processes for business."

5.11 We expand on all these concerns below . We submit that the CMA should rethink at what stage an interim order should be appropriate – we suggest that it cannot be before it has enough information to form a view that it is likely to have jurisdiction and that there is a real risk that a second stage reference will be necessary.

5.12 We also suggest that the notification form should be radically pruned, with much of the detail given in non-binding form as matters that the CMA may request in particular cases, but not as a barrier to starting the clock. This will mean that the clock is stopped in a few cases, as at present, but in cases where the CMA have the essential information (particularly in non-problematic cases caught in the net) they will be able to proceed genuinely within timetable to the benefit of all concerned. Parties will benefit from the non-binding guidance as to what they should produce where a case raises serious issues, but there is no need to burden non-serious cases with a form which would need little added for a second stage review.

5.13 As experienced practitioners, we know that the need to stop the clock in existing UK processes rarely happens and that pre-submission discussions are generally short and focused, but in other systems where a complex notification form is used (e.g. EU pre-notification) weeks or months may be taken before the regulator agrees to accept a notification as complete and start the formal timetable, even though most of the information given is wholly irrelevant to the issues in the case. Here, the CMA are proposing to adopt a worse practice than the OFT's current practice and follow much criticised practices in other jurisdictions, which mean that fixed time-limits are irrelevant to the true (vastly longer) timetable.

6. Interim Orders for completed mergers

6.1 The deletion of Section 71 of the EA 2002 means that the CMA will no longer have the power to accept undertakings from the parties but retain the power under Section 72(2) to make an initial enforcement order in order to prevent pre-emptive action, subject to two cumulative conditions set out in Section 72(1). The two conditions are that they must be considering a reference and must have reasonable grounds for suspecting that there is or may be a completed merger situation or there is or may be a merger situation in progress or in contemplation. The amended Act no longer requires that the CMA should have reasonable grounds for suspecting that pre-emptive action is being taken or is about to be taken, although is implicit in the wording of the statute that those powers are exercisable only for the purpose of preventing pre-emptive action and not for any other purpose. In addition ,there are new powers to make orders to reverse or ameliorate pre-emptive action that has taken place.

7. The Guidance

7.1 Paragraph 7.35 of the draft Guidance suggests that the threshold that the CMA will apply to consider whether it is appropriate to make an interim order at Phase 1 will be "a low one". In particular, it is clear from the draft Guidance that the CMA have in mind an exceptionally low threshold for completed merger cases, virtually a presumption in all cases that the parties would otherwise take pre-emptive action and an assumption that the CMA will be considering a reference, at a time when they have little information and what they have may well be inaccurate.. The draft Guidance states that no account will even be taken of whether a particular transaction qualifies as a relevant merger situation.

7.2 The draft Guidance appears to indicate that whenever the CMA write to a party in relation to what they suspect is a completed merger they would "typically" make and send with the enquiry letter an order in standard form prohibiting a wide range of interactions between the acquirer and the business which the CMA suspect that it has acquired control of (at any of the 3 levels of control which is subject to the UK merger jurisdiction) together with a number of ancillary requirements. Such an order would be of immediate effect and would expose the acquirer to penalties of up to 5% of worldwide group turnover for breach. There is even a suggestion at paragraph 7.36 that it is necessary for standard form interim orders to be the norm as "lengthy consideration of these issues…could increase the risk of pre-emptive action occurring before any interim order is made."

7.3 The draft Guidance does nevertheless envisage that the CMA would expect to carry out a more rigorous assessment for mergers in anticipation and look at them case by case.

7.4 There is, however, no authority in the statute for such a 'one-size-fits-all' approach to completed mergers, with absolutely no consideration of the circumstances. The underlying rationale for the imposition of interim orders is said to be to preserve the target enterprise as a going concern so that, if necessary, it can be divested if necessary to remedy any adverse competition effects. Imposing the straitjacket of an interim order is in many cases likely to have exactly the opposite effect, as we discuss below. .

7.5 It also risks being unworkable: no opportunity will have been given to tailor the wording of the interim order to the specific circumstances of the transaction and the likely competition concerns (if any). Indeed the Guidance does not appear to envisage any interaction between the parties and the CMA as to the scope of application of the order before the order is issued. Thus the recipient will be in a catch 22 situation in many cases; if it obeys the order, the acquired business may well not be able to operate at all, but if it does not obey the order it is at risk of severe penalties if the CMA refuse to approve any part of what it has done between order and agreement of the derogations. This is a risk, regardless of the situation, even for mergers that do not raise competition issues or do not qualify for investigation.

7.6 The proposals also raise the legal question of how the CMA would be able, in the majority of cases, to satisfy themselves that they would satisfy the conditions laid down by Section 72(1) justifying the exercise of its order-making powers. We believe that the proposed approach essentially ignores the first condition cited above for use of the order-making power and simply relies on a suspicion that a merger is completed or in contemplation. The CMA must have some information indicating that there actually is a situation which would warrant a second stage reference, or the first condition has no independent weight. The first condition is incompatible with a procedure under which interim orders are automatically attached to enquiry letters in respect of completed mergers at a stage when the CMA will generally have insufficient information to satisfy themselves that there would be any case for a second stage reference at all. There may be a few exceptions, but as a general rule, our experience is that these letters are somewhat random.

8. Objections to the proposed approach

8.1 In summary, we consider that there are five main grounds for objecting to the CMA's proposed approach:

8.1.1 There appears to be no weight given to the first condition for the making of an order;

8.1.2 The purpose of the order-making and undertaking-acceptance provisions of the EA2002 (as amended) is to prevent or remedy "pre-emptive action". The power has not generally been understood to prevent the completion of a merger prior to its regulatory review or in the course of it. The UK has firmly set its face against a "pre-clearance" system. The approach taken is calculated to force pre-clearance even in quite unnecessary cases.

8.1.3 The power to make an interim order arises only for the purpose of preventing pre-emptive action, which presupposes that there is a risk that pre-emptive action would otherwise be taken; this should not simply be presumed just because the merger is a completed merger: indeed only in a minority of cases is there likely to be a legitimate concern that what the acquirer is doing would cause any long term damage, should the acquired assets or business have to be sold again. This is particularly so in asset purchases and influence cases (e.g. minority stakes in quoted companies).

8.1.4 Even in appropriate cases, where a real prospect of a reference and a risk of pre-emptive action has been identified (unless, exceptionally, there is evidence that the action is imminent) sufficient time should be allowed for the CMA to engage with the parties to tailor the order to the circumstances of the deal, the degree of risk and the resources available to the parties to comply.

8.2 The consequences of the CMA's proposals will be particularly harmful in three particular instances: (a) cases where the purchaser acquires a series of assets with no (or only limited) supporting functions (such as management, administrative or technical services) attached or where the personnel who performed those relevant functions have already been redeployed elsewhere by the vendor, been made redundant or resigned; (b) small firms with limited resources to dedicate personnel to the target business; and (c) firms in difficulties but capable of being rescued.

9. Key Considerations

9.1 We consider it may be helpful to highlight some key conditions with respect to the statutory position and the meaning of "pre-emptive action". We note as the context for this discussion five specific factors which the CMA should take into account in deciding on its approach to order-making generally and to each specific case.

9.1.1 The context in which the order is used, including in each case whether the conditions in s 72(1) for the making of an order are satisfied,

9.1.2 The fact that the CMA now have additional powers now to reverse or ameliorate any damaging effects that have occurred at an interim stage;

9.1.3 The basic requirement that the enjoyment of private property should only be interfered with to the extent justified by an over-riding public interest and not simply because it would be administratively convenient;

9.1.4 Whether the overall approach and each order will achieve their stated purposes;

9.1.5 Whether the approach of the overall policy and use of an order in a particular case is proportionate.

9.2 The CMA may take the view that their approach is justified given that the Act provides for parties to apply for derogations from any particular interim orders and consequently that any commercial issues can easily be dealt with in this way. We accept that the CMA may consent to conduct that would otherwise be in breach of an order, but it would inevitably take some time for whichever of the following is appropriate to occur:

9.2.1 conduct potentially in breach of the order (which is wide-ranging and not very precise in its terms) to be identified, disclosed and considered by the CMA with a view to their consenting to it continuing, and/or

9.2.2 steps to be taken that would enable the acquired business to operate without such conduct occurring; or

9.2.3 evidence being produced that there is no merger within the CMA's jurisdiction or-, that the merger clearly raises no competition concerns so an order is wholly unnecessary. Occasionally complications such as the fact the merger is not yet complete will arise.,.

9.3 Meantime, the acquirer would be at risk of penalties. In the event that there was no qualifying merger at all, the order might or might not be valid, and if the CMA were wrong in thinking there was a completed merger, the order may ,depending on its terms impinge upon an uncompleted merger (so, for example, preventing the completion of negotiations for the impending transaction).

9.4 The ambit of an order under Section. 72 is set by its purpose – all of its provisions must be aimed at the purpose of preventing "pre-emptive action", which is defined in Section. 72(8) as "action which might prejudice the reference concerned that is the reference which the CMA is considering making under Section 22 or Section 33 or the taking of any action under this Part which may be justified by the CMA's decisions on the reference." Although re-enacted, this language has been in predecessors of the legislation for very many years in relation to measures during and after the reference period and in the original version of Section. 72.

9.5 Action which may prejudice a reference without also affecting the ability of the CMA to impose remedies is difficult to contemplate. Examples such as *The Enterprises of Alan J Lewis and Jarmain & Son Ltd (1991)* where integration was so far advanced by the time undertakings were given to the Secretary of State, that there was little that could be done at the end of the reference, could be said to have frustrated or prejudiced the reference (although they did not prevent it taking place), but they also undoubtedly prejudiced the possibility of action justified by the eventual decision that the merger led to a significant loss of competition. That case was at a time before pre-reference interim measures were available at all: under present law the relevant conduct could readily have been halted well before it became actually pre-emptive and under the new law, steps taken can be required to be reversed or ameliorated.. In rare cases, of which Stericycle stands out, numerous measures were taken by the CC, but these were effective to preserve the core assets which were sold on. The case for the necessity or proportionality of costly and intrusive orders in every case the CMA inquire about, before the CMA have much idea about the context of the order, is not made out by the tiny number of cases like this, which are at the extreme end of the spectrum.

10. Scope of "pre-emptive action"

10.1 The essence of the pre-emptive action is thus something that would prevent the reference being effective or remove the ability of the CMA to use their remedies toolbox (set out in Schedule 8) effectively to remedy SLC in the second stage inquiry it is considering. Clearly this requires the preservation of acquired physical assets (buildings, land, intellectually property, machinery etc.) but it does not require a business frozen in aspic (which is the thrust of the order). To date the ability to negotiate undertakings or derogations with the OFT, has prevented counter-productive effects arising in interim measures situations, but the proposed approach will radically change the situation:

10.1.1 To date the use of undertakings has been sensibly confined to cases of competition concern where the OFT has formed a clear idea that there may be a genuine competition problem. It has not been necessary, for example, to debate whether the supply of essential services for the continuation of the target business is or is not pre-emptive, because this has always been allowed in practice. However, the proposed order would prohibit such provision of services and ancillary information provision, until such time as a derogation was in place. Thus the order itself may be pre-emptive in effect (forcing the recipient either to breach the order, or make the acquired assets inoperable, while the supply of services would not have that effect at all. In consequence an order at this early stage would need to be a lot more limited than the undertakings sought by the OFT currently. There is not a "one size fits all" for the very diverse situations which may be qualifying mergers and the even more diverse situations that might not be. In the case of an acquisition of less than a complete business, the utility of the reference and the ability to order effective remedies will depend upon allowing the acquirer to provide necessary services and/or staff and management so that the acquired asset can continue to operate in the market and preserve value.

10.1.2 The order would positively distort the freedom of employees to change jobs and the general fungibility of the workplace. A blanket requirement that acquirers should be forced into giving unlimited inducements to keep key employees in place seems inappropriate, given government policy on extraordinary remuneration. In practice very few employees are essential to the viability of a business (e.g. inventors in some high-tech businesses may be an exception) and in such cases the acquirer will have obvious commercial incentives to retain those employees, if they came with the acquired business. This proposed order provision is not a suitable or necessary general approach to ensuring viable management for most acquired businesses and is a low-risk in hi-tech businesses.

10.2 Although no recognition is given to this, there is generally a co-incidence of interest between a purchaser (who may have to divest again) and the CMA in having the acquired assets operating productively and maintaining value in case of a forced sale. In cases where that is not so (e.g. where it would be in the interests of the purchaser to close either the acquired business or part of its own), the extent of the problem depends on an understanding of the type of business, whether the underlying assets will continue to exist in any event, what exactly has been acquired and the counter-factual for the business, as well as whether the proposed merger would actually carry a risk of harming competition , so as to justify the consideration of a second stage reference.

10.3 As UK merger law can bite on the acquisition of a supermarket building which has not operated for months (or even years), or the acquisition of a relatively small equity stake in in quoted company (5-15%) or an investment stake in a joint venture, as well as the purchase of a self-standing business and every shade of acquisition in between, interim orders cannot be properly made in a "one size fits all" mode. We have already observed that obeying a standard order would leave acquired assets which came from a large group without services (e.g. accounting, IT, payroll, possibly transport) and potentially without management or even a work-force, until such time as the CMA approved their provision by the acquirer (something calculated to damage the business and its value, rather than assist in the realisation of a useful and pro-competitive outcome). This would, under the proposed approach be the effect, whether or not there actually were any competition concerns and even where the merger was non-qualifying. We submit that adopting an approach which carries the residual risk of damaging businesses is not proportionate or in tune with the purposes of the legislation.

10.4 In the case of minority stakes which carry some competition concern (most do not), simple provisions to ensure that the acquirer does not take part in the business decisions of the target are all that are required. In cases where there is no qualifying merger or no conceivable competition problem, then an order is wholly unnecessary.

11. Recommendations and conclusions

11.1 We submit that it is essential for the CMA to engage with the parties on a case-by-case basis, ascertain the nature of the merger and what steps towards integration have already been taken and tailor the words of the template to the specific transaction and (to the extent possible) to the effects on the UK market over which it has jurisdiction. The CMA already acknowledge at footnote 148 that they generally tailor the standard wording to suit the transaction in question but suggest that interim orders in anticipated merger cases "are likely to be more tailored to the CMA's concerns in each case." There is nothing in the law which requires parties to completed mergers to be punished and an approach which appears to do this does not appear proportionate and is open to criticism as having lost sight of the purpose of the power, to preserve the potential of the merging businesses should they need to be separated, not harm it. Any order needs to be sensitive from its inception to the needs of the acquired business, which may have come to the acquirer without management, staff or services.

11.2 In a regime that has retained the principle of voluntary pre-notification we submit that it is wrong in principle to assume that all completed mergers are by definition designed to allow the parties to take pre-emptive action to prejudice the outcome of a Phase 2 investigation. Parties will have different reasons for deciding not to obtain advance clearance in different cases, often because the merger does not raise competition concerns or is out with UK jurisdiction, or because the terms of the sale mean that it can only be acquired on an immediate completion basis. That is a choice given to them by statute.

11.3 We would be surprised if any significant number of completed mergers examined by the OFT raised a real risk of a second stage reference coupled with a material risk of pre-emptive action by the parties. It is unfortunate that the Consultation does not make any analysis in this regard. There is no reason to assume anything different under the amended regime when the CMA replaces the OFT.

11.4 Interim orders should in our view always be tailored to the particular case and reliance on derogations is a very cumbersome way of dealing with case-specific issues. The CMA may find that while the proposal may remove the initial burden by allowing interim orders to be made and served with minimum use of CMA resources, the burden on the CMA will be just as great or greater once derogation applications come in and that the orders result in businesses being harmed by the operational difficulties an unmodified order imposes.

11.5 Parties who abuse the situation and continue with steps towards integration pending finalisation of the interim order in any event run the risk of the CMA exercising their new power to order a unwinding of pre-emptive action already taken and, if well advised, would not take that risk. Therefore imposing an order in the absence of any attempt to interact with the parties is unnecessary.

11.6 The Government was quite clear when adopting the new legislation that the UK was to retain a voluntary system of merger control. That puts the onus on the parties to satisfy themselves on jurisdiction, and assess the competition issues and the probability of a reference to Phase 2. That ought to mean that where a merger has not been pre-notified there is a good reason, either that there is no jurisdiction or no substantive competition issue. However, the draft Guidance states that no account will even be taken of whether a particular transaction qualifies as a relevant merger situation.

11.7 We regret to say that this does not seem to us to reflect the spirit of the legislation and effectively turns the voluntary regime into a regime that is even more draconian than mandatory regimes, imposing heavy burdens on parties even where a merger does not qualify in the first place. This would be inappropriate and would arguably run counter to the spirit (if not the letter) of the UK merger regime. The ability to request derogations is not a substitute for having a properly tailored interim order in place.

11.8 The procedure should be closer to what is envisaged in paragraph 7.41 where parties would in all cases be given a short window of time in which to indicate the appropriate scope of application and addressees of the order and, where relevant, propose variations to the standard wording (albeit on the understanding that these would be limited) and appropriate derogations where the needs of business make this appropriate.. We would suggest up to 10-15 working days be allowed in normal cases. The very existence of the CMA's new powers to immediately reverse or ameliorate damaging action, makes it less likely that a party will attempt conduct which could cause irreversible damage.

12. Interim orders for prospective mergers

12.1 The "only where needed" approach suggested for these is one which we believe would be more appropriate for all cases. The CMA rightly acknowledge that in most cases of prospective mergers, no order should be needed at all.

12.2 Care needs to be taken:

12.2.1 not to make orders that would frustrate a prospective merger: e.g. by preventing appropriate due diligence.

12.2.2 not to make orders in breach of EU law, where the EU has jurisdiction the UK has no powers.

12.3 We note a suggestion that the CMA may consider that they have power to block a merger from being completed: however, it is difficult to see how this in itself can be characterised as pre-emptive action in a non-preclearance regime where there are the extensive powers in Schedule 8 as well as the powers through orders or undertaking to limit exercise of any powers obtained by the acquirer which could be pre-emptive. We are therefore not convinced that such a power exists.

12.4 It also does not sit well with the absence of statutory prohibition before a second stage reference: after a reference Sections 78 and 79 of the EA2002 (which has not been altered) apply as regards share transactions. Section 79(4) provides that:

"The circumstances in which a person acquires an interest in shares for the purposes of section 78 do not include those where he acquires an interest in pursuance of an obligation assumed before the publication by the OFT of the reference concerned."

12.5 There is no prohibition on completion as regards other types of merger. Orders and undertakings are directed to avoiding pre-emption, but not to questions of property ownership, so that the terms of the limited statutory prohibition should be respected. There are a number of recent examples of completion after the OFT has begun their investigation which respect this position.

12.6 Nevertheless, if, contrary to our submissions, the CMA were to consider they had the relevant power to make an order prohibiting completion, they have in our view failed to take sufficient account in the Guidance of the implications of such a policy given the UK's position as a major financial and business centre. As it stands, the Guidance fails to deal adequately with the impact which the exercise of such a power would have on:

12.6.1 City Code transactions (in particular the effect on timetables and on the obligation to complete imposed by the Code);

12.6.2 Equivalent international regimes to the City Code which will not adhere to or accommodate UK interim measures;

12.6.3 International transactions being inappropriately derailed by UK interim measures.

12.7 The CMA would at the very least have to hold discussions with the Takeover Panel before making such orders. It would in any event be worth considering an amendment to the rules on the lapsing of offers in the City Code and to provide for the making of such an order to be treated as an additional exception to those rules.

12.8 As indicated above, the CMA do not seem to have considered the implications of using its powers to prohibit completion (if such exist) in an international context where the UK is but one of the jurisdictions affected and the UK element is only a small part of the whole transaction.

13. Orders or Undertakings to Prevent Pre-emptive Conduct at the Second Stage Phase

13.1 Generally undertakings have been considered more appropriate than orders in a civilised review system with orders in merger cases very rare to date and reserved for cases where compliance with undertakings has been in doubt. The CMA should be clear whether it

intends to observe that convention, or generally to adopt orders made at the interim stage. We would recommend the release of interim orders in favour of undertakings in the same terms, or taking account of further specific business needs at second stage.

13.2 As the remedies available for breach are the same, there should be a clear policy on which approach will be followed.

14. Pre-Notification Process

14.1 We broadly agree that there could be potential benefits afforded by the pre-notification process set out at paragraph 6.41 of the draft Guidance. However, we believe the extent of pre-notification envisaged by the draft Guidance is counter-productive and likely to result in the diversion of the staff's and the parties' effort from substance to process. This is because:

14.1.1 the unduly wide nature of the information required by the forms significantly increases the burden on the notifying parties without commensurate benefits to the CMA; and

14.1.2 the extent of pre-notification introduces an unnecessary degree of uncertainty to the timetable of notified transactions by affording a checklist blocking of notifications which address all key issues because some minor piece of information is missing.

14.2 The CMA appear to be aligning their pre-notification procedures to those of the EUMR process, which demonstrates these risks. Therefore, it is appropriate that the CMA should match the level of responsiveness promised by European Commission's best practices. We believe that the draft Guidance should explicitly commit case teams to engage actively with the notifying parties throughout pre-notification and to provide responses to their requests or queries (e.g. derogation requests) within three working days. We also believe that the CMA should go further and pare down the form, so that parties can focus on the substantive competition issues rather than process. For example, it seems unnecessary to ask at Phase 1 for the contact details of up to 100 competitors and business customers.

15. Pre-notification needs to be fully tailored where necessary

15.1 We welcome the CMA's invitation to notifying parties to engage in more detailed pre-notification discussions for potentially problematic merger cases: there are clear benefits for both sides in maximising engagement prior to the statutory Phase 1 review period.

15.2 However, this opportunity should not compromise the notifying parties' intention (and/or need) to notify a merger formally (for example, where a transaction timetable requires this)- if the Merger Notice information requirements have been adequately met, the parties should not be delayed in their formal submission. The CMA have adequate opportunity in their new statutory 40 working day review period to conduct their analysis and ask further questions if necessary, as well as to stop the statutory clock in cases of real need. Given the inquiry process regularly catches non-problematic or evidently non-qualifying cases, consideration should be given to decreasing the burden in these cases.

15.3 We therefore suggest that the draft Guidance reduces its expectations of pre-notification engagement for merger cases where there are no substantive competition issues. Given

the CMA's significantly increased interim powers (discussed above at paragraphs 6 et seq.), we think that notifying parties will notify "no issues" mergers more frequently because the risks and costs of CMA intervention will outweigh the costs of a "no issues" notification. We have found being unable to start the formal clock running in similar EUMR cases is a major frustration and it would be unfortunate were this to be repeated by the CMA. Therefore, we would suggest that the draft Guidance explicitly provides for additional flexibility in the pre-notification process and permits a shorter pre-notification period of one week.

15.4 Notifications made by parties involved in transactions governed by the City Code also merit modified treatment by the CMA. The increase of the statutory review period to 40 working days, coupled with two weeks' pre-notification, means that starting the CMA's statutory timetable is now more critical to parties' abilities to execute a City Code transaction: typically, parties will aim to receive all applicable regulatory clearances by Day 60 of the City Code. The statutory review period for a Merger Notice (the normal notification route for a City Code transaction) has increased from 30 working days (i.e. Day 42 in a City Code timetable) to 40 working days (i.e. Day 56) based on notification to the CMA occurring simultaneously with posting of the 'Offer'. This means there is very limited scope for either delay to the statutory timetable and/or dealing with a subsequent UIL process.

15.5 We recognise that the Panel on Takeovers and Mergers has the ability to stop the Code timetable. However, given (i) the potential for conflict between the Code timetable and its rules, and the CMA's statutory timetable, and (ii) stopping the Code timetable remains wholly at the Panel's discretion, we think that the Guidance needs to go further than paragraph 6.67 in explicitly accommodating City Code transactions; in particular:

15.5.1 explicitly recognise that speed and flexibility is crucial as well as a willingness to engage with the parties;

15.5.2 apply pre-notification procedures to ensure that parties can start the statutory timetable by a date no later than posting the offer document; and

15.5.3 state that the CMA will declare the merger notification "complete in principle" in advance of formal submission so that the parties can be certain when the statutory timetable will begin (i.e. the working day after they choose to submit formally).

16. Confirmation of a 'complete' Merger Notice will take too long

16.1 The draft Guidance envisages that the CMA will have a five to ten working day time period in which to confirm whether a Merger Notice or merger notification is complete and, under the statutory timetable, will then start on the day after it gives this confirmation. We consider this to be too long for notifying parties as:

16.1.1 it does not commit the CMA to a time limit: the draft Guidance states this will only be a guide for the CMA's response time ("generally expected to be some five to ten working days" / "generally within five to ten working days");

16.1.2 notifying parties are expected to engage actively with the CMA during pre-notification, during which time the CMA will likely discuss the information

requirements. This should obviate the need for such a long period for the CMA to confirm a merger notification is complete;

16.1.3 it should be made clear that there is only one such review period for the CMA rather than a series of successive review periods following the submission of updated drafts of a merger notification seeking the case team's sign-off for formal submission. While a five working day period to review the first draft notification is understandable, there is no justification for such a long review period for subsequent drafts – the process outlined in the Guidance could readily lead to a delay of at least 20 working days (i.e. a month) before the statutory clock can start for just two draft submissions (in addition to the period of pre-notification discussions) and

16.1.4 we consider that parties should always be allowed to submit the notification formally to the CMA after the initial period. This is to prevent what is supposed to be a shortening of the overall review period stretching indefinitely contrary to clear expectations of Government and business. As most mergers are currently submitted with relatively short pre-clearance discussions (and in simple cases, no such discussions) and the statutory clock is rarely stopped, this proposed process will likely lead to a material bottle-neck at the beginning of the merger review process.

16.2 Therefore, we urge the CMA to revise this time period to be no more than five working days, in line with EUMR best practices and always to allow submission thereafter. The CMA already has 15 working days longer than the European Commission under the Phase 1 EUMR process - and therefore ample opportunity to ask further questions that arise.

17. Merger Notice/Merger Notifications

17.1 We welcome the CMA's flexibility, set out in the draft Guidance, as to the precise form of a merger submission.

17.2 However, we have concerns that the revised Merger Notice will run counter to BIS' intention for a faster and less burdensome process for businesses in the new CMA regime. In particular, we have serious reservations about the CMA's new approach overall and its intention to move away from the OFT's approach in the current Merger Notice of using general questions designed to focus a submission on relevant substantive competition issues, to a detailed check list of 'prescribed information', for the purposes of the EA 2002, set out in the proposed Merger Notice.

18. Burdensome new information requirements

18.1 We are concerned about the increased volume of information required by the draft Merger Notice and its accompanying guidance notes. We recognise that the CMA's intention is to detail its information requirements fully to ensure that notifying parties and practitioners are well placed to prepare 'complete' submissions. However, we consider few merger cases would warrant all of the information prescribed by the draft Merger Notice given that it covers every possible theory or harm, requiring both in depth analysis and accompanying documentation. In this regard, we have set out below, our concerns that the derogations process will not adequately address this increased information requirement.

18.2 Therefore, the draft Merger Notice now has the potential to require a disproportionate level of information from the parties in most cases, thereby greatly increasing the regulatory burden – this is clearly at odds with the fundamental aims of the draft Merger Notice set out in the Consultation.

19. Derogations are unlikely to reduce the new information burden adequately

19.1 The draft Guidance anticipates that this concern will be addressed using derogations. Under the revised draft Guidance notifying parties must choose between complying with the burdensome information requirements or, in the event that they do not wish to or cannot provide this level of detail, engaging in a further procedural step to obtain a derogation from the case team during pre-notification.

19.2 We fear that the default position will therefore be the provision of this information and departures from this must then be justified. The revised Merger Notice guidance notes indicate that certain information requirements may be dispensed if a derogation is obtained, with a general statement that all derogations will be considered. Therefore, discretion to agree derogations lies with the case team and different case teams will take different approaches to the grant of such waivers. The impact of this is to increase the uncertainty for notifying parties as to what information will be required.

19.3 In such circumstances, and particularly where (as is common) confidentiality concerns and timing pressures mean that much of the preparatory work must be done ahead of an approach to the CMA, parties may find that they must conduct much of the information gathering necessary to meet a given information requirement before they can obtain certainty on whether such efforts will in fact be required by the specific case team. We believe this issue may be compounded by a lack of clarity over the new procedure for applying for derogations, including how long parties should expect to wait for a response from the case team.

19.4 We also think that prescribing this new level of disclosure and information in the Merger Notice now establishes a higher than necessary baseline for the CMA to analyse most cases from which departures must be justified and derogations sought. This is at a huge cost to notifying parties, especially in cases of "no issues" notifications. Unlike regulation in specialist sectors or at EU level, it should be borne in mind that the wide UK merger jurisdiction will catch small transactions involving small businesses, some of which will be very short of resources. It may also appear to the CMA that raising the information requirements, while stipulating the availability of derogations, will result in roughly the same level of discussion between case teams and notifying parties as currently occurs. However, we consider that an inevitable result of moving this discussion to the footing that a derogation is required in order to omit information is that:

19.4.1 the pendulum will shift to an expectation on the part of case teams that the information will be required in most cases, and

19.4.2 particularly when dealing with less experienced case team members, it will become more difficult and more time consuming to scale back (through waivers) the information required in simple cases to a more appropriate level.

19.5 Should the CMA adopt the derogation process, we consider it imperative that a senior case team member should be available for all such discussions and the draft Guidance

should commit the case team to reach a decision about any derogation requests within two or three working days of being asked. We are concerned that the proposals have not been properly costed in the context of the overall effect of an expanded pre-notification and merger notification, as well as the interim order and that the resources needed to operate these proposals effectively have not been considered and may not be available. We consider, however, it would be a far better solution for the CMA to pare back its form, as proposed below, concentrating on an expectation of reasoned argument properly evidenced, rather than proscriptive requirements.

20. A significant burden on the CMA too

20.1 We are also concerned that the extended pre-notification process, coupled with the significantly increased information requirements, will unnecessarily burden the CMA at the Phase 1 merger review stage when such detailed scrutiny is not merited.

20.2 We query the impact on CMA resources and its ability to carry out an efficient and timely Phase 1 review even allowing for its materially extended 40 working day timetable: it is possible that the CMA will need to engage with multiple work-streams on a given merger review (e.g. dealing with interim orders, derogations and draft merger submission discussions as well as an extensive document review). Addressing this through an extended pre-notification process would not be a satisfactory solution for business and would run contrary to the intention of the legislation to speed up the merger review process. It may also exceed the available resources of the CMA to manage the workload generated. Therefore, we believe this should be considered further.

21. Overly wide discretion on required information will lead to uncertainty for notifying parties

21.1 The draft Merger Notice (and, in particular, its accompanying guidance notes) have afforded the CMA with overly wide discretion as to the level of information required for a complete Merger Notice, for example:

21.1.1 the CMA require all supporting documents prepared by or for the notifying parties assessing the merger whomever their intended audience; and

21.1.2 the CMA can now readily request in excess of 100 customer and competitor contact details.

21.2 This discretion will leave the notifying parties with little certainty over the actual information necessary for a complete merger submission when starting the pre-notification process. Additionally, the draft Guidance details no checks and balances as to what is reasonable for the CMA to request for different circumstances. Therefore, we suggest that the draft Guidance:

21.2.1 provides further guidance as to the circumstances when less detail is required; and

21.2.2 explicitly sets out reduced information requirements for "no issues" merger notifications (i.e. for mergers without substantive competition issues).

22. Volume of information now required for a 'complete' merger notification is unwarranted

22.1 We consider the prescribed information exceeds what is required in the majority of cases to allow the CMA to carry out a proper Phase 1 merger review.

22.2 As we have discussed at paragraphs 19 and 20 above, we are concerned that case teams will routinely require all, or nearly all, of the prescribed information to confirm that a merger submission is complete. Therefore, we believe that the volume of prescribed information in the Merger Notice should be materially reduced in order to set a more reasonable base line for information necessary to conduct a Phase 1 merger review. As is the current practice with the OFT, this can subsequently be supplemented by specific questions during pre-notification discussions and/or the Phase 1 merger review and, where necessary, the CMA can stop the statutory clock.

22.3 We are happy to discuss with the CMA in detail those prescribed information requirements in the draft Merger Notice which we consider should be amended. In the meantime, however, we list below examples of those information requirements which we consider should only be required on a case-by-case basis, where the substantive competition issues clearly merit their inclusion, rather than being routinely required to review any merger:

22.3.1 Paragraph 12: supporting documents "should include but not necessarily be limited to:" "documents prepared by or for personnel working on the transaction" – too widely construed, this will place a disproportionate burden on parties to collate;

22.3.2 Paragraph 13: competition analyses for the last three years – older reports are likely to be of limited use and/or application to current market dynamics, while sophisticated competition analyses are the province of large and relatively rich businesses: we are concerned that adverse inferences will be drawn from the absence of this type of work;

22.3.3 Paragraph 14: parties' marketing and advertising strategies;

22.3.4 Paragraph 18ff and 30ff: the level of information mandated by the guidance notes to the Merger Notice to analyse horizontal and vertical effects, which is imprecisely required "where relevant", is likely to be overly burdensome on parties (for example, providing variable profit margins, see Guidance Notes 10, 17) - not all parties have the sophisticated resources to provide this work and it is plainly not needed for non-problematic cases;

22.3.5 Paragraph 22: any internal documents relating to the parties' expansion plans - too widely construed and will place a disproportionate burden on parties to collate - in any event it should be limited to affected markets;

22.3.6 Paragraph 32: any documents analysing potential merger efficiencies – as with other document requests at this stage it should be limited to documents prepared by those dealing with the transaction and/or considered by the board or other body deciding on the merger, as otherwise it will place a disproportionate burden on parties to collate; and

22.3.7 the potential breadth of contact details as described at paragraph 21.1.2 above.

23. Recommendation for a change in overall approach to notifications

23.1 Therefore, we urge the CMA to revert to the previous approach of the OFT whereby guidance on the contents of merger submissions was given but the OFT did not set out an exhaustive checklist of information in the Merger Notice required for a 'complete' merger submission. We think that the existing practice of requesting further information during the Phase 1 review period, along with the benefits of more extensive pre-notification discussions, will adequately meet the CMA's need to obtain sufficient information to carry out its Phase 1 merger assessments.

23.2 If nonetheless the CMA is minded to retain the extent of information detailed in the draft Merger Notice, we suggest that all information newly included in the draft Merger Notice, which exceeds the information detailed in the existing Merger Notice (December 2010), should either be placed:

23.2.1 in the guidance notes to the draft Merger Notice and these guidance notes should no longer be considered prescribed information and therefore part of the formal Merger Notice; or

23.2.2 in an annex to the draft Guidance.

23.3 In either case, this information should then be considered "neither prescriptive nor exhaustive" by the CMA, so that it remains in line with current OFT practice, rather than "prescribed information" for the purposes of the EA 2002. This would serve the CMA's purposes by still providing "clear guidance as to the type of information that the CMA may require for the purposes of a Merger Notice". It would also serve as a point of reference for the case team in its discussions with the notifying parties as to the completeness of the Merger Notice but would not disproportionately burden, and cause uncertainty to, merging parties in all cases.

24. Merger review burden on third parties

24.1 We are also concerned about the CMA's intention to use its significantly expanded powers of investigation, pursuant to Section 109 EA 2002 (as amended by ERRA), to require third parties now to give evidence and/or produce documents during pre-notification and the Phase 1 review.

24.2 Most non-notifying parties recognise the importance of responding to third party information requests from the OFT and/or CC under the current regime, but this is often a costly and time-consuming exercise for management. Therefore, we consider that it would place a disproportionate and costly burden on business to use Section 109 powers against third parties, which have not sought to intervene in a merger review, unless otherwise absolutely necessary.

24.3 Therefore, we suggest that the draft Guidance explicitly recognises that the CMA:

24.3.1 will contact third parties informally in the first instance rather than using its Section 109 powers, for example through the existing use of merger questionnaires; and

24.3.2 will be proportionate in its use of Section 109 EA 02 against third parties and only where third parties have failed to provide adequate information within a reasonable timeframe.

25. Undertakings in Lieu of a Reference (UILS)

Background

25.1 In this section we comment on the CMA's proposals regarding undertakings in lieu of a reference (UILs). UILs raise a number of underlying public policy considerations that in our view are not properly reflected in these proposals. Key considerations include:

25.1.1 the need for remedy offers to be proportionate to what is required to remedy any SLC identified and do no more;

25.1.2 the need to use UILs to avoid mergers being referred for a second stage review and so mitigate the cost and burden of merger control that will have to be borne by business and by the public purse.

25.2 In light of these clear public policy imperatives we submit that every effort should be made to avoid inflexible CMA procedures leading to disproportionate outcomes and unnecessary references. We consider that the previous practice of the OFT was sufficiently flexible and was capable of meeting the public policy objectives. Several of the proposed changes in our view do not for the reasons set our below. This is somewhat surprising as the introduction of a unitary authority should have made it possible to offer parties more rather than less flexibility when it comes to UILs as the opportunity to give UILs is not cut-off by the change in review body.

26. Issues

26.1 We particularly highlight the following issues that we believe represent a backward step:

26.2 The proposal to cut out the practice of parties making sequential offers and the emphasis on parties putting forward a single "best" / "clear cut" remedy offer carries it with it the real risk that parties may have to "overshoot" (i.e. give away much more than they need to) and/or offer disproportionate remedies in their desire to put forward an acceptable remedy within the tight statutory 5 working day timeframe. Admittedly, the Act sets a deadline of five working days after receipt of a reasoned SLC decision within which parties are required to submit proposals for UILs but that does not specify that such offers must be complete and final and cannot subsequently be discussed, refined and negotiated with the CMA.

26.3 We regret the apparent lack of engagement by the case team during the five working day period within which parties are allowed to offer a remedy – parties need to have access to the decision maker at this point and an active engagement from the whole case team.

26.4 We note the CMA's suggestion that near miss offers are expected to be "rare" (paragraph. 8.20) but our experience is that this is not the case to date. The new process lacks flexibility and is unlikely to avoid the risk without engagement on the CMA's part.

26.5 The procedure also requires more thought to be given to ensuring its compatibility with City Code procedures in order to ensure Phase 2 is avoided wherever possible and to avoid public bids lapsing unnecessarily or as a result of mere technicalities.

26.6 The one-working day timetable also gives insufficient time for parties to negotiate as at that stage there will generally be a requirement for senior management to become involved and to give the relevant final sign-off.

26.7 Overall, we feel that the CMA's proposals lack sufficient engagement on the part of the regulators and provide insufficient scope for negotiation in clear contrast to other leading merger regimes (e.g. EUMR, FTC).

26.8 We also feel that overall the more inflexible approach proposed risks more referrals to Phase 2 which goes counter to the overall Government policy objectives set out at the beginning of our commentary. The fact that parties would be deprived of an opportunity to agree UILs because of over strict timetables is not in the public interest; it undermines sensible administrative procedures and public policy outcomes.

27. Recommendations

27.1 Our recommendation would be to give parties the ability to:

27.1.1 offer up to three remedies for consideration

27.1.2 commit to enhanced engagement to mitigate the risk of overshooting remedy requirements

27.1.3 have more than one working day to rectify remedies in "near miss" cases

27.2 The Act sets a deadline of five working days after receipt of a reasoned SLC decision within which parties are required to submit proposals for UILs. We agree that the CMA may therefore be prevented by statute from considering UILs offered after this time, although welcome the indication at paragraph 8.20 that it will be slow to reject UILs offered by the parties for "purely technical" reasons. It might be helpful to add the words "or any subsequent modifications".

28. Upfront buyer cases

28.1 We should also mention some difficulties we had in understanding the procedure that the CMA intend to follow in upfront buyer cases, set out at paragraphs 8.30 ff. In particular, we would like more clarity on three points:

28.1.1 at what stage will parties be told that a case is an upfront buyer case and so have time to identify potential buyers

28.1.2 How precise do the CMA expect a party to be when offering UILs involving an upfront buyer? At the stage of making the offer it is unlikely that potential buyers will have been approached. All that parties can give at the first stage is the names of specified buyers or a specified range of possible buyers.

28.1.3 Are there circumstances whereby the CMA would envisage that notwithstanding a decision in principle requiring an upfront buyer, it may decide (following a detailed consideration of the proposed UILs) that all or part of a divestment package may be sold to a non-upfront buyer?

29. MARKET GUIDANCE

29.1 The CLLS welcomes the CMA supplemental guidance on Market studies and market investigations. When read together with the existing OFT and CC guidance (see OFT 519, OFT 511 and CC3 (revised)) the supplemental guidance gives a helpful summary of how the ERRA 13 has impacted the current market study and market investigation procedures.

29.2 However there are a number of concerns which we have set out below in response to the questions set out in the Market Guidance.

Q1 Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?

A: We think the Draft Guidance covers the main changes introduced by ERRA 13 . However we think that the following aspects needed to be more fully addressed

30. Information Requests

30.1 Market Studies now have to be completed within 12 months (or 6 months if a Market Investigation Reference is contemplated) and Market Investigation References within 18 months instead of the present 24. In this context we have concerns about the level of information that is going to be required from parties at both Phase 1 and 2 and whether this is going to lead to an information overload. The Guidance skates over this issue and fails to inform the reader how market studies or investigations are going to be run given the new statutory timetables. In the case of Market Investigations they have seldom finished before the 24 month deadline so how will the tighter statutory timetable affect the timeline for the acquisition of information or the investigation timetable. Further guidance and/or reassurance on these points are needed

31. Confirmation Bias

31.1 Paragraph 1.22 of the draft Guidance reads as follows:-

31.2 "At operational (staff) level, in order to avoid unnecessary duplication and to facilitate an efficient end to end markets process *the CMA would normally expect to have a degree of case team continuity by retaining at least some of the market study case team to work on the larger market investigation case team* when a matter is referred." (emphasis added)

31.3 In light of the above statement we are concerned that there is a high possibility of confirmation bias being built in to the system if there are not the proper checks and balances to ensure independence of thought between Phase I and Phase II case teams.

31.4 The CMA will be aware of the concern expressed by many respondents in the Competition landscape reform consultation (including the CLLS) that in amalgamating the OFT and the CC there was a fundamental need to keep Phase I and Phase II case teams separate to avoid a perception of confirmation bias.

31.5 Whilst we recognise that the efficiency savings of the amalgamation are unlikely to be realised if there is complete separation between Phase I and II case teams there does

have to be sensitive and appropriate handling of which Phase I members of staff continue to be involved at Phase II. Paragraph 1.2 raises the issue of confirmation bias by talking about "continuity" without addressing how the concerns of confirmation bias are going to be addressed. There is no attempt in the document to give any guidance or indeed reassurance that this issue is going to be foremost in the CMA thinking when pulling together its Phase II team members.

31.6 We accept it is, to a certain extent, a trade-off between efficiency and a reassurance of independence but there does need to be guidance as to how the CMA propose to address this. We would have thought that senior staff level positions such as the Chief Economist to the Market Study at Phase I should be different at Phase II The same stance should be taken with the Inquiry Director and that this would invariably be the case in each Market Investigation. In the case of other staff positions their sensitivity or lack of it would need to be judged on a case by case basis.

32. Access to Decision makers

32.1 There is concern that the Guidance does not make as clear as it should that parties will have access to key decision makers at all stages. This debate has echoes of the concerns parties have expressed in relation to CA98 proceedings.

32.2 Parties need to be assured that they will be able to make representations at both a market study and market reference stage to decision makers and this is not spelt out in the Guidance. In relation to Market Studies it is silent and in relation to Phase II Paragraph 1.27 stipulates that the CMA Board must lay down rules of procedure but nothing is expressly mentioned about access .

33. Cross Market references

33.1 Paragraph 2.33 states that the same procedures apply to cross market studies and thereafter cross market references. However no guidance is given about how such potentially wide ranging investigations (and in particular the process for hearings in cross market cases) are going to be dealt with procedurally in the shorter time limits imposed by the ERRA 13. To comply there are going to have to be specific procedural differences in the way the inquiries are conducted or how the informational requirements are demanded of the parties unless considerably more resources are going to be allocated by the CMA for the conduct of the investigation.

33.2 We are worried that purely asserting the same rules apply does appear to lack creditability in the absence of further detail or assurances on this point.

34. Action Following a Market Study

34.1 In Paragraph 2.9 it states that if the CMA want to make a Market Investigation Reference they must publish a notice after 6 months of the Market Study being initiated It then goes on to state that in default of this the CMA must publish a report within 12 months of publication of the Market Study notice setting out its conclusions and what if any action it proposes to take. No mention is made about the timing of any CMA announcement about whether they intend to use their competition enforcement powers under the Competition Act 1998. Would such action be at the end of the 12 month period? Given the recent mobility aid scooter case which resulted in CA98 action following a Market Study it is worth making this clear in the guidance.

Q2. Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?

A: Yes the Draft Guidance is helpful in understanding the workings of the markets regime

Q3. Do you agree with the list in Annexe B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?

A: Yes we agree with this list

Q4. Do you consider that the Draft Guidance is user friendly in terms of its content and language?

A: Yes. The Draft Guidance is well written

Q5. Do you have any other comments on the Draft Guidance

A: We have no further comments

35. ADMINISTRATIVE PENALTIES

Q1: Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties?

A: We do not consider there are any other roles or objectives that should be taken into account considering the CMA's approach to administrative penalties.

Q2: Do you agree that the level of detail in the Statement is appropriate?

A: Subject to the points below, in general we agree that the level of detail in the Statement is appropriate.

We believe there should be a new section above paragraph 4.1 of the Statement providing guidance on what the CMA consider a 'failure to comply' with an Investigatory Requirement to be. The CMA provide some examples in Annexe A of their statement. For example, the second scenario included in Annexe A suggests that, in relation to a questionnaire, sending in a response where '…many questions are ignored or receive one word answers…' would be a failure to comply. Yet one word answers to a binary question (yes or no) may be perfectly appropriate. Setting out in greater detail what the CMA believes to be a 'failure to comply' in the main body of the Statement would be a more principled approach when it comes to the giving of guidance rather than leaving business to guess by reference to the examples in Annexe A what the CMA mean by a 'failure to comply'. In addition, guidance is needed on what the various categories of failure to comply are. The CMA refer in its various documents which form this particular part of their consultation to failures to comply being 'serious', 'aggravated', 'egregious', 'minor', 'mitigated', 'significant' and 'flagrant'. More organisation and order is needed here.

In paragraph 4.2 of its Statement the CMA mention that '…where P intentionally fails to comply with an Investigatory Requirement in order to derive an advantage, this indicates

a particular disregard for its compliance obligations and the CMA's functions. Wilful non-compliance is likely to require more stringent measures…and as such intentional failures will be treated more severely'. We believe that the CMA should add a section (after paragraph 4.4 of its Statement) in order to explain what 'intentional' failure to comply with an Investigatory Requirement (IR) means (in the same way that the CMA has produced guidance on what it considers a reasonable excuse might be).

In paragraph 4.10 of its Statement the CMA explain which are the factors affecting the penalty imposed for a failure to comply with an IR. The CMA also need to explain what the broad levels of the penalty might be (for example, maximum penalty; significant penalty close to the maximum etc.) and how each of the factors mentioned in paragraph 4.10 and in preceding sections of the guidance (including the new section we have suggested in 2.2 above) might affect the broad level into which the failure to comply with an IR falls.

In paragraph 4.10 (last bullet) of its Statement the CMA note that, in determining the level of the penalty for failure to comply with an IR, it will take into account whether '… P has ever failed to comply with an Investigatory Requirement or CMA decision, either in the current investigation or previously (that is, whether there is an element of 'recidivism'). The seriousness of any past failure(s), the time that has elapsed since the failure(s) occurred, and any other relevant factors may be taken into account'. We think the CMA should explain what these other factors may be.

Q3: Do you agree with the approach in the Statement to determining whether to impose a penalty, the level at which penalties should be set and the various factors to be taken into account?

A: In fn 35 of the Statement the CMA note that '…persistent and repeated unreasonable behaviour that delays the OFT's enforcement action is an aggravating factor under the [OFT/CMA] Guidance as to the appropriate amount of penalty for substantive infringements of competition law' and then states that ' the CMA will consider on a case-by-case basis whether any non-compliance with information gathering powers merits both an administrative penalty and the application of the aggravating factor'.

We understand that the CMA want to send a strong signal to parties that they should not cause unreasonable delays to investigations. We believe that the CMA's powers to impose fines for procedural infringements are sufficient in order to deter companies and the CMA should therefore not use non-compliance with procedural requirements in order to increase the amount of the penalty for substantive infringements of the competition rules. However if the CMA persist with the current approach, we strongly believe that they should either impose an administrative penalty or increase the amount of the fine for a substantive infringement, since under the current proposed approach the CMA is effectively punishing the company twice for the same behaviour.

In paragraph 4.10 of its Statement the CMA should state that 'any steps taken by P to ensure that failures do not occur in the future' will be a factor affecting the level of the penalty. The CMA acknowledge this in a different part of its statement (see paragraph 4.13) however we believe that it should also be included in the section of 'factors affecting the level of penalty imposed' for the avoidance of doubt as to whether it will be taken into account when determining the final penalty.

Additionally we believe that 'Whether the IRs were correctly addressed to an appropriate individual within P' should be added as a factor affecting the level of the penalty imposed, since failure to do so by the CMA will obviously have an impact on the ability of P to comply with the relevant IRs in a timely manner.

Finally we believe that the penultimate factor in 4.10 should be amended to read: 'The nature of the IRs, in terms of the burden they impose on P, bearing in mind the size and administrative resources available to P and the internal sign off/approval processes in larger organisations'.

Q4: Do you agree with the approach in the Statement to use the material influence test when determining turnover only in cases where the business structure is such that only the material influence test would meaningfully capture P's turnover?

A: Our experience shows that assessing whether P exercises material influence over certain corporate entities can be a time-consuming/resource-intensive exercise. As noted in the current Statement, in engaging in this assessment, the CMA will have to detract significant resources from its substantive merger assessment which will hold up the progress of its investigation. Also we cannot see why the approach for determining the level of the penalty for failure to comply with Merger Interim Measures should be any different from the one adopted when calculating penalties for substantive infringements of the CA 98, where the material influence test is not applied. Given these considerations we strongly believe that the turnover of the undertakings over which P has material influence should never be taken into account in calculating the financial penalty for failure to comply with IMs. We have made our views known to BIS.

The CMA in their current proposed approach suggest, as possible alternative, to use the material influence test when determining turnover only in cases where the business structure is such that only the material influence test would meaningfully capture P's turnover. We do not agree with this approach. Obviously the same considerations already mentioned above will be present in these cases that the CMA decides to apply the material influence test. However and at a more fundamental level, such an approach would mean that different criteria will be applied to undertakings in determining their fines for the same procedural infringements, which runs counter to the basic principle that the law should apply equally to all.

Q5: Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements?

A: Subject to our comments in Question 2 we found the Statement sufficiently clear.

36. TRANSPARENCY

36.1 We have set out below our comments on the CMA consultation document, Transparency and disclosure: Statement of the CMA's policy and approach (the "Draft Statement").

Q1 Do you consider that the Draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important?

A: The CMA's "aims" are clearly stated, but they appear less firm than the OFT's "commitments" in Transparency: A Statement on the OFT's approach (OFT1234) ("OFT1234") which is to be superseded by the Draft Statement. For example, where the CMA aims to "achieve transparency in its work by engaging with the parties directly involved at an early stage", the OFT committed to "consistently provide parties with information at the start of an enforcement action". See further the response to Question 4 below.

There are many other CMA documents (listed on page 6 of the Draft Statement) which also contain information on transparency and disclosure, however, these are not clearly cross-referenced. It would be helpful to have all information on this topic either consolidated into one document or clearly referenced.

The Chairman's guidance on disclosure of information in merger and market inquiries (CC7) remains in force despite continuing to contain references to the Competition Commission. It would be better to incorporate these provisions into a single Draft Statement on transparency and disclosure.

Q2 Do you consider that the Draft Statement contains the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information (including in particular confidential information)?

A: As noted in response to Question 1, we believe that the Draft Statement generally provides less procedural detail than previous guidance in relation to the specific steps the CMA will take to ensure procedural transparency. See also response to Question 4.

Q3 Do you consider that the Draft Statement contains the right level of detail in explaining the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities?

The CMA approach to disclosure of "specified information" closely mirrors the procedures in relation to such information set out by the CC in their Disclosure of information by the CC to other public authorities (CC 12) ("CC 12"). However, the Draft Statement provides significantly less detail than current guidance in relation to the specific steps the CMA will take to avoid inappropriate disclosures.

The Draft Statement provides that when the CMA disclose information for the purpose of exercising their functions, they will not generally give notice to the persons to whom the information relates. In cases where disclosure is made to facilitate the exercise of another authority's functions, the CMA state that they may give notice. In relation to overseas disclosures, the issue of notice is not dealt with (although the Draft Statement notes that consent may be sought). However, CC 12 states that the Competition Commission will generally give the owner of the information notice of any impending disclosure in sufficient time to allow them to make comments, raise an objection or indicate consent. There is no clear reason for this departure.

We consider that the CMA should commit to giving notice of an impending disclosure, unless inappropriate in the circumstances described in the Draft Statement. In our view, an important objective of transparency is to allow verification that the CMA and other public authorities respect their obligations under the EA 2002, including the prohibitions

on the use of disclosed information that are contained in Sections 241(2A) and 241(4) (or in the case of overseas authorities in Sections 243(10). If information is disclosed without notice, it will be almost impossible for parties to identify breaches of their rights in this respect.

In addition, the Draft Statement of the balancing tests/criteria the CMA will apply in determining whether to make a disclosure to public authorities, with a stated default position of non-disclosure if the tests are not met. By contrast, CC12 contains a clear statement that "the CC will balance the potential harm to legitimate (business) interests against the extent to which disclosure of the information is 'necessary for the purpose' for which the CC is permitted to make the disclosure".

The CC also notes that they "will consider whether the requesting authority would be able to obtain the information from another source, such as the 'owner' of the information, by using its own investigatory powers". In the interests of legal certainty and transparency, there would appear to be no reason for the CMA to disclose information unless there is a good reason why a requesting authority is unable or unwilling to obtain the information from a more direct source.

Q4 Do you consider that there are any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure?

Transparency during the course of a case

A: The Draft Statement provides that, at the opening of a case, it will provide an indicative timetable showing the anticipated dates of key milestones, however, there are no clear provisions for revision of this timescale. Provisions similar to those at paragraphs 3.24 to 3.26 of OFT1234 should be included to address this.

The Draft Statement provides that "the CMA will place a case opening announcement on its website announcing its decision to formally begin a case except if to do so would prejudice the case or would otherwise be inappropriate". There is no indication of when this might be inappropriate, therefore it may be appropriate to indicate clearly that such circumstances may include damage to reputation, goodwill, share price and commercial relationships. Further, it may be appropriate for the CMA to only publish details of the parties or sector under investigation once a Statement of Objections has been issued.

The Draft Statement states that at the opening of an investigation, the CMA "may be able to provide the parties with other information about the case, such as...the identity of the person or persons within the CMA who will be responsible for key decisions" (emphasis added). Similarly paragraph 3.14 of the Draft Statement states that the CMA "will seek to ensure" that parties are aware of the identity of persons within the CMA who are responsible for key decisions. In order to enable proper accountability and rights of redress for parties, as well as administrative efficiency, the CMA should be under an obligation to inform parties of who will be making the key decisions in relation to the relevant case.

The section on notice of announcements in the Draft Statement states that "the points below are a general guide" and that "it may be the case that the particular complexities of the issue the CMA is dealing with mean that it departs from standard practice". This is a very low threshold for departure from the guidelines and it would give more certainty if

departure from the practices set out in the Draft Statement was only allowed in exceptional circumstances.

We also note that, while the CMA's "flexible approach" to sharing their developing thinking/evidence with parties is similar to that currently adopted by the OFT , the Draft Statement omits to include any statement of intent similar to the OFT's currently-stated plan to continue its practice of sharing research and preliminary findings when conducting market studies.

Obtaining and using information

It is welcome that the CMA have reflected the current OFT commitment to discuss drafts of information requests with intended recipients in advance of their issuance. We note that the CMA have not restated the OFT's further commitment to explain the reasons for any failure to hold such advance discussions.

In relation to identifying confidential information, there is a high threshold for applicability of these provisions. The Draft Statements states that "confidentiality claims will be rigorously assessed and claims should be kept to the minimum extent necessary to protect confidentiality". There is no indication of who will be responsible for decisions in relation to confidentiality or how these decisions will be reached.

Complaints and accountability

In OFT1234, the OFT committed to include details in its annual report on project/case timescales (including an outline of reasons for any extensions of initial indicative timescales) has not been included amongst the items that the CMA "will aim" to include in their Performance Report.

Q5 Do you consider that the Draft Statement is user friendly in terms of its content and language?

A: We have no specific concerns regarding the language of the Draft Statement.

Q6 Do you have any other comments on the Draft Statement?

A: We have no other comments.

Q7 Do you agree with the list in Annexe B of the Draft Statement of existing OFT and CC guidance documents related to transparency and disclosure proposed to be put to the CMA Board for adoption by the CMA?

A: It is unclear to us why the CC7 disclosure guidance will continue in effect following the creation of the CMA or how this will be applied in practice. Footnote 27 of the Draft Statement suggests that it will be applied in Phase 2 merger and market inquiries (as it presently is). However, footnote 43 appears to suggest that the disclosure guidelines will have wider application. This should be clarified.

While CC7 is focused on disclosure, there is a significant degree of overlap and, as such, we believe that its key messages could be more efficiently incorporated into the section of the Draft Statement dealing with disclosure (paragraphs 4.17-4.28).

We confirm that we have no objection to this submission being made available on the CMA's website.

City of London Law Society
9 September 2013