BAKER & McKENZIE

RESPONSE TO CMA CONSULTATION: MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: Transparency and Disclosure: Statement of the CMA's Policy and Approach ("the Draft Statement"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on competition law.

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 Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?

1.1 We agree with the list in Annexe D of the Draft Guidance.

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

2.1 We believe that the CMA needs to keep the current changes under review, identify what has or has not worked well and subject to the outcomes of this review, produce revised guidance on its jurisdiction and procedure on mergers within a reasonable time frame (18 months to 2 years).

3. Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?

3.1 We have no comments.

4. Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?

4.1 We agree that the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs is clear and understandable.

5. Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?

4.1 We note that according to the Draft Guidance the parties make their representations in relation to suitable UILs to the case team. However, we believe that the ultimate decision makers should always be present when these submissions are made since this will make the process quicker. It will also improve the quality of the decision as the decision-makers will be able to engage in a direct dialogue with the parties in order to craft the best suitable remedies.

6. Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?

<u>General comments</u>

6.1 As a general comment we are very concerned with the sheer amount of information requested in the Draft Merger Notice (see below paras 6.3 onwards for our specific comments). We understand that it may not be the CMA's intention that all information will be included and

that this may be a way of making the parties to engage earlier in pre-notification discussions. However, as a general proposition, it is our strongly held view that the Merger Notice should only contain the information necessary in order to allow the CMA to engage in a Phase I investigation. We are aware of the need for the CMA to adhere to strict timetables. However there is a balance to be struck and pre-notification discussions should not be used in order to manage case load. We note that there is a tendency for the pre-notification phase to be prolonged for too long so as to cover all potential concerns. The process lacks in transparency, can be very unpredictable and can cause significant delays to the clearance of the transaction rendering the statutory deadlines meaningless.

6.2 We believe therefore that the Merger notification Notice should be shorter (please see below for our specific comments). Additionally and in relation to the pre-notification discussions the process needs to become more transparent and the parties should always have the option to notify if the information requested in the Merger Notice is complete.

Specific comments

6.3 In para 9 of the Draft Merger Notice the CMA stipulates that the merging enterprises need to supply their '*…latest monthly management accounts*'. We would like to know what the rationale for this request is?

6.4 In para 10 of the Draft Merger Notice the CMA notes that ' *Where any horizontal overlap or vertical relationship involves, for example, a specific division or brand of one or both of the merger parties, a business plan for the relevant division or brand should be provided*'. We believe that this should be revised to read '*… a business plan for the relevant division or brand should be provided <u>if it exists</u>*'.

6.5 According to para 11 of the Draft Merger Notice the parties need to '*provide any documents setting out the rationale for the merger*'. This should be revised to read '*provide any <u>final</u> documents…*'. The request as is currently drafted is too burdensome and may cause unnecessary delays and there are no obvious advantages in the CMA having these documents.

6.6 Para 13 of the Draft Merger Notice requires the merging parties to ' *Provide copies of documents (including but not necessarily limited to reports, presentations, studies, analysis, industry/market reports or analysis – including customer research and pricing studies) in the acquirer's and/or target's possession or which are readily available and prepared or published in the last three years setting out the competitive conditions, market conditions, market shares, or competitors in the industry or business areas where the merger parties have a horizontal overlap or vertical relationship*'. It is our strong belief that this will prove to be very burdensome and potentially very expensive to the parties and may cause unnecessary delays in relation to the investigation. An alternative would be for the CMA to limit this request to relevant documents that are presented to the boards of the parties to the transaction.

6.7 Para 20 of the Draft Merger Notice-in conjunction with Guidance Note 11-notes that the parties are required to provide the names and the contact details of their customers (top 10 to 50) and competitors (top 10 to 20). We cannot see the rationale for such burdensome request. In our view, the parties should provide the names and contact details of (maximum) their top 5 competitors and top 10 customers.

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

7.1 We agree with the proposed harmonisation.

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

8.1 For our comments in relation to the pre-notification process, please see above under question 5.

9. Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?

9.1 In para 7.35 of the Draft Guidance it is stated that ' *In a completed merger, the CMA will normally make an interim order at the same time as an enquiry letter is sent out or after being informed of the merger by the parties*'. We disagree with this approach. The CMA, at that stage, will not have sufficient information about the transaction and therefore interim orders might be imposed in relation to mergers that are clearly unproblematic or might not even be qualifying mergers.

9.2 Before the imposition of an interim order the parties need to be able to have a meeting with the case team so as to better understand the CMA's concerns. Also a deadline after that meeting in order to alleviate the CMA's concerns should be introduces (this could be two weeks).

9.3 In para 7.32 of the Draft Guidance the CMA notes that in certain circumstances it might impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction. We believe that this section of the guidance should be removed. The CMA should not be able to impose interim orders prior to completion since this would contradict the voluntary character of the UK regime.

10. Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?

10.1 We agree with the proposed arrangements.