Response to BIS CMA Transition Team

CMA2con: Mergers: Guidance on the CMA's jurisdiction and procedure

6 September 2013

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This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (**CMA**) guidance document *CMA2con: Mergers: Guidance on the CMA's jurisdiction and procedure* (the **Draft Guidance**). We have also responded separately to the following consultations:

- Competition Regime: Consultation on CMA priorities and draft secondary legislation
- CMA3con: Market Studies and Market Investigations: Supplemental guidance on the CMA's approach
- CMA4con: Administrative Penalties: Statement of Policy on the CMA's approach
- CMA6con: Transparency and disclosure: Statement of the CMA's policy and approach

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

By way of introductory comment, the Draft Guidance is well structured and clear. We welcome the CMA's approach to retain much of the existing OFT and CC procedural guidance and only to propose revisions to reflect: (i) amendments introduced by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**); or (ii) recent merger cases. The addition of tables/flowcharts setting out the steps and timings of the merger process (in particular the table of "Key stages of a typical Phase 1 inquiry") are very helpful.

However we do have some areas of concern, including:

- the scope of the information requested in the revised Merger Notice;
- the CMA's approach to pre-notification, the completeness of merger notifications and the start of the statutory timetable; and
- the process for making interim orders, particularly in completed merger cases, and the automatic use of (untailored) template interim orders.

We address these in response to the specific questions raised in the consultation.

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 Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger-control-related guidance documents and publications proposed to be put to the CMA Board for adoption?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 Yes. In particular we agree with the CMA's approach of replacing (rather than supplementing) the OFT and CC guidance on procedural issues, but retaining the joint OFT and CC guidance on substance. Given that the key changes to the merger regime introduced by the ERRA13 relate to procedure, and are in many cases significant reforms, we consider it is extremely important to have a single comprehensive guidance document to take parties through the process.

1.2 It would be helpful for the CMA to publish a document similar to Annexe D but listing *all* OFT and CC guidance, setting out clearly whether it is proposed that each guidance document will be put to the CMA Board for adoption, revoked or replaced. It will be vital, in order to mitigate any confusion once the CMA becomes operational and finalises its new guidance, to display a prominent link to this summary document on the CMA's website.

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 In due course, the CMA should seek to update the OFT and CC guidance that is adopted by the CMA Board to reflect the changes introduced by the ERRA13 (in particular the establishment of the CMA), and to incorporate practical experience gained during the early operation of the new agency. This will be particularly important in relation to the new procedural elements such as the enhanced investigatory powers at Phase 1, the new powers on interim measures, and the time limits for accepting UILs.

2.2 Also see 1.2 above.

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 The draft Remedies Form is generally clear. However, we have a concern about question 20, which relates to upfront buyers: "*Provide reasons why the CMA should not require divestment to an upfront buyer in this case*". We understand that the parties' submissions will be important to the CMA's consideration of whether to require an upfront buyer. But we consider that it should be made clear in the Draft Guidance that it is for the CMA to justify why an upfront buyer is (exceptionally) needed in a given case, rather than the default position being to require an upfront buyer unless the parties can provide sufficient justification that it is not necessary.

3.2 The CMA recognises that the information required will vary according to the remedy proposed and that not all material listed in the Remedies Form may be necessary. It states that the case team will be available to discuss the information required before they submit the offer. While in many cases the parties will have begun discussions with the case team on possible UILs during the Phase 1 investigation, as noted at paragraph 8.12 the parties may wish to see the SLC decision before raising the matter of UILs. If so, given the very short window for the parties formally to offer UILs, the CMA should commit in the Draft Guidance to engaging promptly with the parties to discuss the scope of information needed to assess UILs in their case.

3.3 The Remedies Form notes that template UILs will be available on the CMA's website. The CMA should publicly consult on this template before it is finalised.

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 The circumstances, as set out at paragraph 8.24 of the Draft Guidance, are clear. In particular, we agree that in upfront buyer cases it is very likely that the 50 working day deadline will need to be extended. However, what is not clear from the Draft Guidance is the stage at which the CMA is likely to inform the parties that an upfront buyer will be required. In addition, how much information does the CMA expect parties to submit when offering UILs involving an upfront buyer (it may be that all they can give is a list of possible buyers – will this be sufficient?). Finally, are there circumstances in which the CMA may decide to accept divestment to a non-upfront buyer even though it has made a decision in principle that an upfront buyer was required? Some additional guidance on these issues would be helpful.

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

5.1 Paragraph 10.8 of the Draft Guidance states that "*in order to avoid unnecessary duplication and facilitate an efficient end-to-end merger review process, the CMA would normally expect to have a degree of case team continuity by retaining at least some of the Phase 1 case team to work alongside newly assigned staff on the Phase 2 investigation*". This is very different from the current regime, where the Competition Commission starts each Phase 2 investigation with a blank canvas and there is no continuity between the Phase 1 and Phase 2 case teams. We are concerned that the Draft

Guidance does not indicate how the CMA will seek to prevent confirmation bias in the decision-making process arising as a result of the new process.

5.2 The new statutory deadlines for implementation of Phase 2 remedies are set out at paragraph 14.3. Unlike the guidance on UILs, the CMA does not set out the circumstances in which it may extend the 12-week time limit by up to six weeks. The CMA should give at least some examples of when it may consider such an extension.

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?

6.1 As an initial comment, we welcome the statement at paragraph 6.56 of the Draft Guidance, which allows parties to make a submission in a written format of their choosing. This provides useful flexibility for parties to present information in a way that best suits the case in question.

6.2 However, we are very concerned about the scope of information requested in the Merger Notice. The information required by the Merger Notice has been expanded greatly when compared either to the current merger notice or the information expected by the OFT in an informal submission (as listed in *OFT527: Jurisdictional and procedural guidance*). The Merger Notice questions in and of themselves are extensive, but when combined with the guidance notes become extremely onerous. They will impose a huge administrative burden on notifying parties and the CMA. Rather than simply complementing the Merger Notice questions, the guidance notes contain full lists of the information the CMA will expect in response to each question. This reduces clarity, as the information required effectively is set out in two different places. It is also disproportionate and unnecessary to require the provision of such detailed information for every case that is subject to a Phase 1 review.

6.3 We set out some of our key areas of concern:

(a) The scope of **supporting internal documents** is no longer limited to those prepared by or on behalf of the board of directors, supervisory board or shareholders' meeting. It includes documents prepared by/for any personnel working on the transaction and by/for senior management. It also encompasses documents produced in the ordinary course of business rather than specifically relating to the transaction, such as marketing and advertising strategy documents, notes of meetings and substantive emails. The potential burden in collecting and producing these materials is significant and, in our view, unwarranted for most Phase 1 reviews. It is also significantly more onerous than the information requirements under the EU Merger Regulation. Moreover, in requesting copies of documents created or published in the last three years that more generally analyse competitive conditions in overlap areas we are concerned that the CMA is requesting information that will not be relevant to its assessment of the notified merger. In fast moving (e.g. technology) markets, for example, data which is three years old is unlikely to be representative of current market conditions.

(b) The number of **contact details** required has increased hugely. The current merger notice requests details for the parties' top five customers and top five competitors. The new Merger Notice requires 10 to 20 competitors and 10 to 50 customers. This is wholly disproportionate, particularly when compared to the approach of the European Commission, which only requests contact details for the top five customers (a requirement that it has not extended in its draft revised Form CO). We cannot see the justification for the CMA needing this information for every Phase 1 review. In particular, in cases where the CMA considers that more contact details are required this can be discussed with the notifying parties during pre-notification or addressed in an information request during Phase 1.

(c) The Merger Notice no longer applies a market share filter for the provision of information on **vertical links** between the parties (which is set at 10% in the *OFT527: Jurisdictional and procedural guidance* and 15% in the current merger notice). This would mean that information (including unnecessarily detailed data e.g. on variable profit margins and average price ratios) must be provided in relation to any vertical relationship between the parties, however minor.

(d) A number of **new categories** of very detailed information are requested: loss of potential competition, coordination and conglomerate effects.

6.4 Overall, this expansion in scope is unjustified, unreasonable and disproportionate. It carries a considerable risk of increased costs to business. It also risks extending the pre-notification period, thereby defeating one of the main (claimed) purposes of the introduction of a fixed statutory period for Phase 1 review, as set out further below.

6.5 The CMA's willingness to accept derogations (paragraph 6.59) seeks to address cases where certain categories of information requested in the Merger Notice are irrelevant or inappropriate for the given merger. However, we would urge caution at an approach that asks for detailed information upfront that can only subsequently be carved out following the grant of a waiver. This could result in unwelcome delays in pre-notification while parties try to negotiate with the case team as to what is actually needed for their particular transaction. Moreover, our experience at EU level is that in practice derogations from the provision of information required by the Form CO are very difficult to obtain, even where warranted.

6.6 In our view, a far better approach would be to start with a "lighter touch" Merger Notice, reflecting the information requirements listed in *OFT527: Jurisdictional and procedural guidance* and the current merger notice. If it considers it necessary for its analysis, the CMA can request additional information either after discussion with the parties during pre-notification, or during the 40 working day investigation period.

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

7.1 Yes. The introduction of a statutory Merger Notice for all notified mergers necessitates a revision of the rules on merger fees. We are pleased that the CMA is proposing to drop the current approach of requiring payment at the time the Merger Notice is submitted in favour of a rule where payment must be made once the CMA has made a decision following a Phase 1 investigation. This has two advantages: first, to reduce complexity and create a single rule for payment of fees for all mergers, and second, to avoid the need for repayment of the fee in the event that the CMA subsequently decides that the notified transaction would not result in a relevant merger situation.

7.2 In general chapter 20 clearly sets out the new arrangements for the payment of fees. However, paragraph 20.1 could mislead parties – it states that the main exception to the payment of a fee is where the interest acquired or being acquired is less than a controlling interest, without conditioning the exception to own-initiative investigations (unlike at paragraph 20.3). As this is a change from the current position it should be clarified.

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

<u>Enquiry Letters</u>

8.1 Currently *OFT527: Jurisdictional and procedural guidance* states that "*in all cases in which the OFT sends an enquiry letter on its own initiative, it will proceed to complete its investigation and*

ultimately publish its decision" (paragraph 4.18). In our experience, this requirement has meant that the OFT has had to carry out a full Phase 1 investigation, and publish a full decision, for transactions which plainly on their face raise no possible competition issues (e.g. where the market share increment is so small that it is clear that there are no substantive competition concerns). In our view, this requirement can deplete scarce OFT resources on obviously non-problematic cases. We note the statement at paragraph 6.19 of the Draft Guidance that the CMA would "normally expect" to proceed to a decision on whether or not the duty to refer applies. It is unclear whether this represents a shift in policy (to an approach where, in appropriate cases, the CMA will not follow the route of a full Phase 1 investigation following the issuance of an enquiry letter). If it does, then we welcome this step, and the Draft Guidance on this point should set this out explicitly.

Pre-notification

8.2 We have some particular comments on the process for pre-notification under the Draft Guidance (paragraphs 6.40 to 6.49). Overall, we agree with the CMA that pre-notification discussions are particularly important following the introduction of the 40 working day statutory time limit for Phase 1. We welcome the CMA's commitment to be flexible as to the extent and format of pre-notification discussions depending on the complexity of the case in question.

8.3 In many cases we expect that pre-notification discussions will be longer under the revised regime (due to the loss of flexibility during the investigation process following the introduction of a statutory Phase 1 deadline). This will impose an additional burden on merging parties, and result in a greater degree of uncertainty for the deal timetable than is necessary. In particular, a commitment to review submissions and revert to parties within five to ten working days of receipt is too long and is not in line with the OFT's current practice. The European Commission, in its *Best Practices*, notes that briefings and draft Form COs should be sent to the Commission for review at least three working days in advance of a pre-notification meeting.[1] This appears to us to be a more reasonable time frame for the CMA to review submissions. More generally the CMA should commit to engage with parties quickly and efficiently throughout the pre-notification process, and must ensure it has sufficient resources to do this. The fact that it will be charging substantial merger filing fees implies an obligation on the part of the CMA to provide an efficient service to end users.

Completeness of submissions

8.4 The Draft Guidance states that the CMA will generally inform the parties whether or not a Merger Notice is complete in writing within five to ten working days of receipt (paragraph 6.58). In our opinion this period is too long, particularly where the parties have engaged in pre-notification discussions with the CMA and the CMA is familiar already with the notification and has commented on it. Preamble 14(b) of the Draft Merger Notice (at Annexe E) only states that it *may* be possible for the CMA to confirm that a Merger Notice is a satisfactory notification more quickly where pre-notification discussions have taken place. In our view this is not a strong enough commitment to confirming completeness of a Merger Notice at the earliest opportunity. The CMA should commit to carrying out a review in a maximum of five working days, save for exceptional circumstances (e.g. where the parties to a potentially problematic or complex merger have not engaged in pre-notification discussions). This would be more in line with the approach of the European Commission, which commits to reviewing final draft Form COs for adequacy within five working days.[2] Any commitment should be reflected in both the preamble to the final Merger Notice and the final Guidance.

8.5 In any event, we consider the CMA's approach to be an unwarranted departure from the OFT's current approach, as well as that of the European Commission. At present, a merger notice (and a

[1] DG Competition: Best Practices on the conduct of EC merger control proceedings, paragraph 14.
[2] DG Competition: Best Practices on the conduct of EC merger control proceedings, paragraph 15.

Form CO) effectively is deemed complete on receipt, allowing statutory deadlines to start to run immediately. The commencement of the statutory timetable will only be deferred if the OFT (or European Commission) subsequently finds the notification incomplete. Under the new regime, the timetable will only start to run once the CMA has confirmed completeness. We consider the former approach to be fairer, especially, again, where parties have engaged in extensive pre-notification discussions and time is of the essence for clearance of the transaction. The issue is compounded by the fact that under the new regime the parties will lose the opportunity to obtain approval within 20-30 working days.

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 We welcome the intention behind the statement at paragraph 7.32 of the Draft Guidance that an interim order will not in general prevent parties to an anticipated merger from completing. This is an issue that was debated during the ERRA13 consultation process and the CMA's clarification on this point is helpful. However, as drafted the paragraph implies that the CMA has the underlying power to prevent completion in all cases. This is clearly not the position in relation to share acquisitions where section 78 EA02 in conjunction with section 79(4) clearly allows the completion of acquisitions pursuant to a pre-existing legal obligation. We encourage the CMA to reconsider this issue and to amend paragraph 7.32.

9.2 We also have some comments about the CMA's proposed use of interim orders in the Draft Guidance, in particular in completed merger cases.

9.3 First, we are concerned that in completed mergers, there will be in effect a presumption that an interim order will be made. At paragraph 7.35 (reiterated in Annexe C at C.11) the Draft Guidance states that in completed mergers, "*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*" (emphasis added). This contradicts the CMA's position at paragraph C.5 that it will "*consider the need for interim measures on a case-by-case basis*", which reflects the statutory requirement that an order should be imposed only to prevent pre-emptive action. We acknowledge the CMA's point that "lengthy" consideration of the risks of pre-emptive action would be a wasteful diversion of resources away from substantive assessment of the merger (paragraph 7.35). However it is disproportionate to impose an interim order without at least *some* consideration of whether it is appropriate. In particular, where the OFT is sending out an enquiry letter and has little information at that stage, it should be prepared to wait until it has received some further details about the merger before deciding whether to impose an order. Giving the parties the ability subsequently to make submissions that the order should be revoked (as referred to in paragraph C.11 and footnote 337) is inefficient (see further below) and is not an appropriate way to address this issue.

9.4 Second, we do not agree with the CMA's proposed approach in completed merger cases to impose the template interim order and only tailor the provisions of the order to the transaction in question through later derogation requests by the parties. This does not amount to the "required flexibility" which the CMA commits to provide (paragraph 7.41) and risks the imposition of orders that are disproportionate or have irrelevant or unnecessary provisions. In anticipated merger cases the CMA acknowledges (footnote 148) that it will tailor interim orders to its particular concerns. We consider that this is the correct approach and one that should be taken in *all* interim order cases, whether the merger is anticipated or completed. Dealing with amendments by way of formal derogation request is inefficient and in our view will take significantly longer (resulting in a waste of resources) than upfront interaction between the CMA and the parties.

9.5 Third, while we welcome the CMA's commitment that it will deal with derogation requests "promptly" (paragraph C.16), we do not consider that this goes far enough. The CMA should give a time limit (e.g. three working days) within which it generally expects to respond to such requests.

9.6 To address these concerns, we suggest that the CMA adopts a different process for making interim orders:

(a) In both anticipated and completed cases, parties should be sent the template interim order and given a short period to submit: (i) arguments as to why no interim order is needed or (ii) proposed amendments to the template order to reflect the transaction in question.

(b) To minimise the risk of any pre-emptive action taking place in the consultation period before the interim order is imposed, the CMA could warn parties of its power to unwind integration that has already occurred.

(c) For any subsequent requests for derogation from an interim order, the CMA should commit to respond to the parties promptly within a short specified period (say, 48 hours in typical cases).

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 Yes – the proposed transitional arrangements are sensible and practical.