Linklaters

Comments of Linklaters LLP

on the public consultation on

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

1 Introduction and executive summary

We welcome the opportunity to comment on the proposed guidance on the CMA's jurisdiction and procedure in merger cases. We support the BIS CMA Transition Team's publication of draft guidance in advance of the creation of the CMA to explain the CMA's forthcoming mergers procedures.

In broad terms, we welcome the level of detail and advice given by the CMA in the draft guidance. However, we consider that a few aspects of the guidance give rise to concern because, if adopted in the final guidance, they may:

- create a very significant burden on both the CMA and merger parties, which may be potentially disproportionate to the case at hand;
- result in uncertainty for merger parties at crucial times in their transactions;
- depending on how the legislation is interpreted, potentially call into question the voluntary nature of the UK merger regime; and
- fail to realise some of the benefits that, from a merger control perspective, formed the basis for the creation of the CMA.

In this respect, we would highlight in particular the suggestion that the CMA may seek through an initial enforcement order to prohibit completion of a merger at phase 1. This appears to us to be a major change to the structure of the UK merger control regime, not intended at the legislative stage, that, if the CMA considers that it has this power and may use it, should be flagged very prominently in the revised guidance.

Other key issues contained in the draft guidance are:

- the indication that initial enforcement orders will normally be used in completed cases, with insufficient 'filter' as to when such orders might be appropriate;
- the very significant increase in the information required of the parties to fulfil the requirements of a Merger Notice irrespective of the complexity of the case at hand;
- the apparent lack of access to the CMA phase 1 decision maker at either the competitive assessment stage or when considering remedies proposed by the parties; and
- the risk that duplicative information is required to be provided to the CMA at the start of phase 2 such that efficiencies and synergies that have the potential to result from the merger of the OFT and CC are not realised.

This response does not contain confidential information and Linklaters is happy for its response to this consultation to be made available on the CMA's website.

Our response relates to a number of areas covered by the consultation; for ease of convenience, the comments below are structured by reference to the chapters of the draft guidance to which they relate. The table at Annex 1 identifies where feedback on the specific question posed in the consultation document can be found in the response.

Finally, this response is submitted by Linklaters, rather than on behalf of its clients. The views expressed in this document may or may not be shared by Linklaters' clients.

2 What is a Relevant Merger Situation? (Chapter 4)

We recognise that the draft guidance in this area is based on the OFT and CC's previous guidance and that the definition of a relevant merger situation is not intended to be changed by the creation of the CMA.

With this proviso, we would nevertheless highlight the following instances where we believe the CMA may wish to update the guidance or reconsider the position provisionally taken in the consultation document.

- **Footnote 17 – multiple relevant merger situations –** the CMA's determination of whether a single transaction gives rise to a single or multiple relevant merger situations can impact on whether the jurisdictional tests are satisfied or not. As such, we would urge the CMA to provide a clearer statement of principle as to when it would treat a joint venture described in paragraph 4.49 as giving rise to multiple relevant merger situations.
- **Paragraph 4.44 – definition of 'made public'** – the OFT's Jurisdictional and Procedural Guidance (OFT527), from which this text is taken, is now some four years old. In this respect, we would urge the CMA to consider carefully whether the current wording – '*publicised in the national or relevant trade press*' – is meaningful in the digital age in which many trade publications are, in reality, only available online. We would suggest that if this wording is to be retained, it should be made clear that publication in an online trade journal suffices for a transaction to be 'made known'.

3 Notifying Mergers to the CMA (Chapter 6)

We note that the statement included in paragraph 4.5 of the OFT's Jurisdictional and Procedural Guidance has not been carried across into the draft CMA guidance:

> "*These considerations are discussed in turn below. The OFT's obligation under section 107(1)(a) of the Act to publish any decision it makes about whether or not to refer means that, where the parties voluntarily provide information to the OFT about whether a merger in the public domain qualifies for investigation and/or would create competition concerns, the OFT will consider itself under an obligation formally to investigate and publish a decision.*"

Whilst we welcome the possibility to discuss a case informally with the CMA, simply removing the statement above from the new guidance, but without any clear indication as to what the CMA's policy is in this regard, will inevitably create uncertainty. We would therefore welcome a positive statement from the CMA that the fact that the parties voluntarily provide information to the CMA about whether a merger in the public domain qualifies for investigation and/or would create competition concerns does *not necessarily mean* that the CMA will necessarily open an investigation. We encourage the CMA to provide clear guidance as to the criteria it will use to determine when and whether to open a case file.

3.1 Enquiry letters

Flexibility of treatment of enquiry letters?

We note that the statement included in paragraph 4.18 of the OFT's Jurisdictional and procedural guidance has not been carried across into the draft CMA guidance:

> "*Under section 107(1)(a) of the Act, the OFT is required to publish any decision it makes to refer or not to refer. For this reason, 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.*"

Whilst we welcome the potential for parties who receive an enquiry letter to be able to contact the CMA informally to discuss the transaction and its competitive profile, simply removing the statement above from the new guidance, but without any clear indication as to what the CMA's policy is in this regard, will inevitably create uncertainty. We would therefore welcome a positive statement from the CMA that parties may discuss an enquiry letter with the CMA and that the CMA may, in appropriate cases, decide that it does not need to open an investigation and proceed formally to issue a decision.

Initial enforcement orders in conjunction with enquiry letters

Paragraphs 6.17 and 6.22 refer to the circumstances in which an initial enforcement order may be used in conjunction with an enquiry letter. For ease of reference, our comments on these paragraphs are dealt with together with the general discussion of initial enforcement orders in Chapter 7 of the draft guidance.

3.2 Pre-notification discussions

Requirement for pre-notification discussions, and expected timeline

Based on the draft Guidance, we understand that the CMA's position is that pre-notification is effectively mandatory in all cases.[1]

We recognise that pre-notification discussions may be beneficial to both the parties and the CMA. In particular, given the wide scope of the information requested by the draft Merger Notice as currently drafted (discussed at section 10 below), it will be important for the CMA to engage with parties to understand the extent to which information is relevant to the case at hand. However, as mandatory pre-notification is not legislated for in the statute itself, legal certainty requires that further explanation be provided in the final Guidance as to the conduct and likely timing of pre-notification discussions. We consider it particularly important, in light of experiences of pre-notification under the EUMR, that a balance is struck between the ability of CMA to undertake its review within the statutory timetable and the legitimate expectations of parties that pre-notification be proportionate to the nature and complexity of the case at hand.

Experience from pre-notification processes under the EUMR is that the timeline indicated in the European Commission's guidance is rarely met.[2] On the occasions where it is met, this is due, for the most part, to engagement and focus by the case team from the outset; lack of such engagement can severely jeopardise the deal timetable.

We consider, therefore, if pre-notification is to be effectively mandatory, that the Guidance should express the CMA's commitment to engagement from the outset and should be

[1] See paragraphs 6.23, 6.40, 6.51 and 6.57.

[2] DG Competition, Best practices on the conduct of EC merger control proceedings, paragraph 10.

honest as to the likely range of timeframes involved. Paragraph 6.40 of the draft Guidance recommends that the parties commence pre-notification at least two weeks prior to notification. Whilst merging parties would certainly welcome a two-week target for pre-notification discussions, our experience based on recent transactions with the OFT is that a two week period for pre-notification is somewhat optimistic. Citing this figure without any other form of indication or benchmark may give rise to uncertainty and potentially to false expectations, in particular amongst businesses less familiar with the UK merger regime.

Balance between requiring information 'upfront' and during the process (if required)

In our experience, there is a fine balance to be struck between front-loading the information gathering process (including information which later transpires is irrelevant) and risking stop-the-clocks during the review with requests for information.

Whilst the CMA will rightly wish to keep clock stopping to a minimum, at the same time there may be circumstances in which merging parties may have a legitimate interest in starting the 40 working day statutory clock in the expectation that the feedback from the CMA's market investigation will vindicate the parties' position that a particular type or level of data provision is not required and to request it would be disproportionate. We welcome the CMA's acknowledgment that waivers from information required by the Merger Notice will be available but, as a supplement to this, we urge the CMA to acknowledge that such circumstances may well exist and that the CMA will therefore take due account of its ability to require the provision of information under section 109 Enterprise Act 2002 ("**EA 02**") subsequently in determining whether to grant a waiver in respect of information nominally required by the Merger Notice form.

Time for CMA to respond confirming completeness of Merger Notice

We recognise that, pursuant to section 34ZA(3)(a) that the 40 working day 'initial period' starts only on the first working day after the CMA has given notice under section 96(2A) that the Merger Notice is complete. However, we suggest that the CMA revisits the wording of paragraphs 6.49 and 6.52 of the draft guidance. We would have serious concerns if the non-binding 'five to ten working day' time frame referred to in paragraph 6.49 applied also in the context of submission of a final (non-draft) Merger Notice intended by the parties to start the statutory clock.[3] In this respect:

- The key driver for the Government's introduction of the statutory timetable was to provide commercial certainty and predictability for business. The benefit of this change would be severely undermined by the CMA taking a material (and unspecified) period of time to serve notice on the parties under section 96(2A).
- There appears no justification for the CMA to take a significant period of time (and certainly not up to 10 working days) to confirm that a finalised Merger Notice is complete if the parties have previously engaged in pre-notification discussions.

We therefore urge the CMA to provide greater clarity and comfort in paragraph 6.53 over the time that it would take to confirm that the 40 working day statutory clock had started in cases where the parties had engaged already in pre-notification discussions with the CMA.

[3] Paragraph 14(b) of the draft Merger Notice states that '*[t]he CMA will seek to inform the notifying parties as to whether or not the Notice is a satisfactory notification in writing within five to ten working days of its submission to the CMA.4 Where merger parties have engaged in pre-notification discussions, it may be possible for the CMA to confirm that a Notice is a satisfactory notification more quickly.*'

3.3 Fast track reference cases

We note that the draft guidance retains the notion of a fast track reference to phase 2 investigation. We welcome the flexibility that retention of the fast track reference procedure can bring in appropriate cases. We would urge the CMA, to the extent it is able to do so, to provide any additional guidance or clarity on how the fast track procedure will operate in the context of a merged authority and the type of cases in which the CMA considers it will be useful and the timing for this process (as in the couple of cases to date notifying parties may have thought a swifter reference process would occur than proved to be the case in the event).

4 The Phase 1 Assessment Process (Chapter 7)

4.1 Interim orders

Introduction

We recognise that one of the Government's aims behind the reforms to the merger regime was to strengthen the voluntary regime by granting the CMA strong and effective tools to ensure that anti-competitive mergers are properly remedied through interim powers. The comments we make below take account of the Government's clearly stated aims in this area, and are not designed to undermine these reforms.

Nevertheless, we consider that the draft guidance is troubling in three key respects in terms of its discussion on initial enforcement orders, namely:

- the lack of a 'concerns' filter as to when initial enforcement orders are imposed, including in the context of enquiry letters;
- the indications that the CMA may be particularly restrictive in giving derogations from its initial enforcement order template or indeed revoking the interim order; and
- the indication in the guidance that the CMA considers that it might use initial enforcement orders in anticipated cases to prohibit completion of the merger in phase 1.

These concerns are addressed below.

Circumstances in which an initial enforcement order will be imposed

We note that, in the context of sending enquiry letters in completed mergers, the draft guidance states that:

> '*For completed mergers, the CMA will also **normally** notify the parties that it has made an initial enforcement order under section 72 of the Act that prevents them from starting integration (or undertaking further integration) at the same time as it sends the enquiry letter*' (paragraph 6.17, emphasis added).
>
> '*First, the CMA will **normally** make interim orders in investigations where it has reasonable grounds for suspecting that two or more enterprises have ceased to be distinct*' (paragraph 6.22, emphasis added).
>
> '*In a Phase 1 completed merger, an interim order will **normally** be made at the same time as the enquiry letter is sent to the parties. There may be some exceptions to this, for example if there is a lack of clarity as to which parties have ceased to be distinct. Where parties to a completed merger approach the CMA to*

*notify the merger, the CMA will also **normally** issue an interim order soon after that approach*' (paragraph C.11, emphasis added).

On the basis of the draft guidance cited above, we are concerned that the CMA will issue an initial enforcement order as a matter of course when it sends an enquiry letter in a completed case or indeed when it investigate a completed case. Of particular concern is the fact that the draft guidance does not suggest that the CMA will seek to identify any level of concerns – even on the most indicative or prima facie basis – of either the existence of competition concerns caused by the merger or of the risk of pre-emptive action taking place, particularly bearing in mind that this power will be exercised in some cases before UK jurisdiction has even been established.

Under the current system, while it is the norm for the OFT to send a request for initial undertakings at the same time as an enquiry letter, it is not uncommon for undertakings not to be required in cases which turn out to raise low or no competition risk. Our understanding is that the OFT does not currently insist on initial undertakings in all completed mergers because it recognises in a significant proportion of cases (potentially as many as half of completed mergers investigated) that the risk to competition presented by the merger does not warrant imposing such restrictions on the parties or that there is little to be gained from such a restriction. The current system therefore allows a measure of flexibility which does not typically place undue burden on parties to non-problematic transactions, while ensuring that appropriate measures are put in place for transactions which raise prima facie concerns. Such flexibility would be lost under the current guidance.

Whilst the new legislation clearly envisages giving the CMA wide powers in this respect, it does not follow, in our view, that the CMA should adopt a blanket approach to the imposition of initial enforcement orders when (given the immediate 'freezing' restriction of such orders) this potentially has a serious and harmful impact on business activity. Indeed, the result of the near-automatic language in this respect is to undermine to some extent part of the benefits of the voluntary regime, which the Government clearly intended to retain under the CMA.

We therefore strongly urge the CMA to revisit the guidance and to recognise that there will be circumstances involving completed mergers in which it is not appropriate *as a matter of policy* for the CMA to impose an initial enforcement order (notwithstanding that it has the legal power to do so).

We would also urge the CMA to consider an alternative process for the imposition of initial enforcement orders; for example, one by which the CMA notifies merger parties of its *intention* to impose an initial enforcement order in a completed merger, with the actual order being made only after giving the parties a short opportunity (say 48 hours) to make submissions on the appropriateness of such an order.

We also note that stating in the guidance that '*[w]here parties to a completed merger approach the CMA to notify the merger, the CMA will also normally issue an interim order soon after that approach*' may in fact incentivise parties to delay approaching the CMA in the context of completed transactions, thereby having the reverse effect (in terms of preventing pre-emptive action) to that intended by the reforms.

CMA willingness to grant derogations to, or revocations of, interim orders

We recognise that the CMA's intention is to issue interim orders and then consider, and (if necessary) grant derogations or revocations afterwards. However, there are various

references in the draft guidance that appear to suggest that the CMA is minded to take a particularly restrictive approach to granting such permissions; specifically, that the draft guidance states that:

> '*… The interim order will require the parties to cease all integration steps with immediate effect. Parties will subsequently be able to make submissions to the CMA to consider derogation requests or to revoke the interim order if they can make the case that there is no risk that pre-emptive action could take place. However, the CMA would expect* ***such evidence to be compelling*** *in order to revoke an interim order*' (paragraph C.11, emphasis added); and
>
> '*[t]he CMA is unlikely to grant derogation requests unless it can be shown that the request is necessary to safeguard the viability of the acquired business which would otherwise be at significant risk, to ensure the effective operation of the interim measures as a whole, or to meet a regulatory, statutory or other obligation. Requests that relate solely to bringing forward merger synergies are unlikely to be granted.* ***Arguments that integration can subsequently be unwound are not on their own sufficient reasons to allow such integration****; the CMA will instead focus in the first instance on the factors above and whether the integration increases the risk of pre-emptive action*' (paragraph C.18, emphasis added).

These two paragraphs appear to be unduly restrictive, particularly in light of the concerns expressed earlier as to the circumstances in which an interim order will be imposed. The CMA should consider the parties' arguments as to whether an interim order is appropriate, and what derogations may be necessary for the order to operate effectively given the circumstances in question, but should not do so with any form of presumption that such arguments are not well founded. Further, in paragraph C.18, it is not clear why the CMA should consider it appropriate to state that '*[a]rguments that integration can subsequently be unwound are not on their own sufficient reasons to allow such integration*'. The statutory purpose behind the CMA's section 72 EA 02 power is to prevent pre-emptive action. To the extent that integration can be unwound, provided of course that (once unwound) the position (in terms of remedial action) would be equivalent to that before the unwinding, it appears to us to be wholly relevant in whether or not the CMA should grant derogations from the interim order and in light with the purpose of the statutory provision.

We therefore urge the CMA to revisit the drafting of paragraphs C.11 and C.18 to remove the wording highlighted in the extracts above. Whilst we fully accept the CMA's entitlement to take steps to prevent pre-emptive action, as a manner of administrative law, the CMA should do this in the least burdensome manner possible, and if the parties are able to provide evidence as to why pre-emptive action will not occur, we would suggest that the CMA is bound, as a matter of law, to take that evidence into account.

Use of initial enforcement orders to prevent completion of anticipated mergers at phase 1

Paragraphs 6.1 to 6.4 of the Guidance confirms the voluntary nature of the regime, with paragraph 6.4 stating clearly that:

> '*… parties should consider carefully whether to notify the merger to the CMA. In making this choice, they should be aware that: … a decision not to notify the CMA carries particular risks* ***once the merger has been completed***" (emphasis added).

Paragraph 7.28 is categorical about the voluntary nature of the regime, stating:[4]

> '*As there is no requirement to notify mergers in the UK to the CMA, there is similarly no bar to companies completing transactions without clearance from the CMA, or even during the CMA's Phase 1 review.*'

Finally, paragraph 7.38 reiterates the distinction between completion (which is intended to be permitted) and post-completion integration (which may be restricted):

> '*In this respect, a distinction should be drawn between parties' rights to make unconditional bids to acquire share capital or assets, especially common in auction settings, on the one hand, with, for example, actual integration after closing, on the other. The making of interim orders will bite on the latter, whilst* ***leaving parties free to complete mergers*** *if they are prepared to assume regulatory risk*' (emphasis added).

These statements are very much in line with the philosophy behind the Government's reforms to the regime, which were to ensure that the CMA had robust powers to prevent pre-emptive action, but to retain the voluntary nature of the regime (namely that the parties are able to complete without first obtaining CMA approval).

We fully acknowledge that the CMA does have the power to seek to prevent pre-emptive action in anticipated mergers and we welcome the information given in paragraph C.12 about when the CMA might consider imposing an initial enforcement order before the merger has completed.

However, we have very serious concerns about the statement in the draft guidance at paragraph 7.32 that:

> '*Similarly, the CMA would not expect* ***generally*** *to impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction (although an order may prevent integration from occurring post-completion)*' (emphasis added).

Although this statement is drafted restrictively, it in fact implies that the CMA does have the power (contrary to the statement in paragraph 7.28) to prevent completion and that the CMA might, albeit not generally, consider exercising such a power.

Our concerns in this respect are as follows.

- First, we consider that it is very doubtful as a matter of law that the CMA has the power to prohibit completion.
    - The definition of pre-emptive action under the EA 02 has not changed. It is not clear to us that merely completing (and thereby transferring title to a business or assets) can in itself constitute pre-emptive action.
    - The amendments introduced by the Enterprise and Regulatory Reform Act 2013 do not expressly state that the CMA will now have the power to prevent completion from occurring, which is surprising given that this would be a fundamental change to the regime. To the extent that Parliament had intended to enable the CMA to prohibit completion at phase 1, it would have been expected to have made that abundantly clear.

[4] Footnote 141 of the draft guidance refers to the statutory prohibition in section 78 EA 02 upon a referral being made, but does not refer to initial enforcement orders.

- The Explanatory Notes to section 30 of the Enterprise and Regulatory Reform Act 2013 (regarding interim measures) do not make any reference to the fact that the Government intended the CMA to be able to prohibit completion at phase 1.
- The CMA has the power to impose initial enforcement orders in both anticipated and completed mergers precisely because the EA 02 (post amendment) is intended to continue to allow parties to complete mergers without obtaining CMA approval.

- Second, even if the CMA believed that there were an argument to be made that the wording of the EA 02 (post amendment) did permit the CMA under section 72 EA 02 to impose an initial enforcement order prohibiting completion, it would be wrong as a matter of policy for the CMA to seek to make this argument given the clear legislative intention behind the amendment in the Enterprise and Regulatory Reform Act 2013 to section 72 EA 02.
- Third, as a commercial matter, the consequences in terms of deal planning, legal certainty and allocation of contractual risk are very severe if the CMA were to open up the possibility of an initial enforcement order being used to prevent completion during the course of a phase 1 review, or even before a phase 1 review has even started. We would also note that the threat of prohibition of completion may influence parties not to notify anticipated transactions (which may produce an effect not intended by the regime and which is not obviously desirable).
- Fourth, if, notwithstanding the points set out above, the CMA does consider that it was intended by Government that the CMA should have the power to prohibit completion, then – given the commercial significance of this as discussed above – the CMA should be very clear and upfront about this possibility given the magnitude of this change. This possibility should not be mentioned simply inferentially in the middle of one paragraph of the guidance.

For the reasons set out above, we consider that the statement in paragraph 7.32 of the draft guidance is very troubling and needs to be revisited by the CMA when finalising the guidance. We regard it as, in effect, introducing a partial suspensory obligation by the back door, but without providing for any of the legal certainty that a mandatory regime brings. This is not what we understood the Government intended to achieve by the reforms.

4.2 The phase 1 decision making process

Attendance of personnel at issues meeting

We recognise that, as a formal matter, the CMA is able to require business personnel from the merging parties to attend the issues meeting pursuant to section 109 EA 02.

As a matter of practicality and proportionality, we welcome the reassurance provided in footnote 150 of the draft guidance and would urge that it is retained in the final guidance and incorporated into the main text of the guidance to reassure senior management of the CMA's commitment to proportionality in this regard.

Access to the decision maker

Under the current OFT process, merging parties have no access to the decision maker in cases that go to issues meeting and case review meeting, either to discuss the existence

of substantive competition concerns or to discuss potential remedies for any such concerns. We understand that this stems from the OFT's principled concern that it should decide on the existence or otherwise of competition concerns without reference to whether or not the parties are willing to give undertakings in lieu, as explained in the OFT's current Jurisdictional and procedural guidance:

> '*The OFT places great importance on making the assessment of its statutory duty independent of the question of available remedies because there is no legal basis to consider issues relating to undertakings as relevant when deciding whether the OFT is under a duty to refer*' (paragraph 8.13).

The amended structure and timing relating to the way in which undertakings in lieu of reference will be offered by the parties to the CMA means that this concern should no longer prevent the merging parties from being able to present their arguments directly to the decision maker during the 40 working day assessment stage of the process.

Paragraphs 7.52 and 7.55 of the draft guidance implicitly indicate that the merging parties will, notwithstanding the architectural change to the provision of remedies, nevertheless still not have access to the decision maker, which appears both curious and somewhat unsatisfactory to merging parties. It is also out of step with the principles of open decision making that the OFT and CC have sought independently to promote, and which the CMA will also seek to champion in other areas of its work.

The OFT's current position of not allowing access to the mergers decision maker at phase 1 has for a long time been perceived as unsatisfactory given that it does not meet what might be considered best-practice standards in relation to transparency, openness and good decision making. However, there was at least some form of justification for it. With the removal of any risk of reverse-engineering as a result of undertakings in lieu being offered only after the substantial lessening of competition decision, we urge the CMA to revisit its provisional decision not to allow access to the mergers decision maker at phase 1, as there no longer appears any justification for this.

In terms of the practical and logistical issues around access to the decision maker, we recognise that consideration must be given as to exactly which third parties would be given access to a decision maker, and the form and timing that such access would take. However, the need to resolve these issues should not be used as a justification for not providing access to the merging parties, particularly in a situation in which the CMA will have the benefit (as we understand is the case) of a permanent Senior Director of Mergers. We would see a key part of this individual's role as being, indeed, to engage with merging parties (and, where appropriate, third parties) in challenging cases.

5 Phase 1 Remedies (Chapter 8)

5.1 Procedure for submission of UILs

Paragraph 8.12 of the draft guidance states as follows:

> '… *In most cases, the* ***case team*** *will be available to discuss UILs following the SLC decision by telephone. However given the short window of time before the deadline to offer the UILs, it may not be possible to arrange a meeting between the parties and the* ***case team*** *or to engage in iterative discussions. For these reasons, parties may find that engagement with the* ***case team*** *at or before the issues*

meeting provides a helpful opportunity to identify and resolve any potential issues with any proposed UILs' (emphasis added).

The multiple references to the 'case team' suggest that the CMA does not intend to offer meetings between the merging parties and the CMA phase 1 decision maker responsible for determining whether the CMA considers whether there are reasonable grounds for believing that the undertaking or a modified version of it offered by the parties might be accepted by the CMA.

We have commented already on the apparent lack of access to the CMA phase 1 decision maker in relation to the competition assessment stage of the process (see our earlier comments relating to Chapter 7 at section 4.2 of this paper).

The apparent decision not to provide access to the decision maker to discuss potential undertakings in lieu of reference appears an odd one.

- As a matter of principle, the decision maker will already have decided on the existence and scope of any competition concerns, and so there can be no concerns of 'reverse engineering'.
- As a matter of practicalities, there are only a limited number of cases each year in which first phase merger remedies are currently accepted by the OFT, and so any arguments based on the decision maker not being available appear irrelevant.[5]

As is clear from our comments in relation to the phase 1 decision making process, we consider that there is a strong argument that the CMA should provide access to the phase 1 decision maker in relation to the competitive assessment. We consider that this argument applies even more strongly and clearly in the context of a discussion on the potential suitability of phase 1 remedies.

By way of related point, we note that the wording of paragraph 8.12 of the draft guidance is somewhat unfortunate, and sits rather uneasily with the expressed sentiment in paragraph 8.20 that '*… the CMA is mindful of the significant public policy benefits (to consumers, the parties and the public purse) that are achieved through the UILs process*'. Given these benefits from undertakings in lieu, whilst it is understood that a period of five working days does not allow a lot of time for iterative discussions, it is nevertheless regrettable that the CMA considers it necessary and appropriate to state in paragraph 8.12 that '*it may not be possible to arrange a meeting between the parties and the case team*'. This is particular surprising given that the existence of this (very commercially significant) window will be known about some time in advance by the CMA.

We would invite the CMA to reconsider the drafting of paragraph 8.12 and – more importantly – to make it clear that the phase 1 decision maker will seek to make himself or herself available for a remedies meeting with the parties.

5.2 CMA discretion to propose modifications to proposed UILs

Paragraph 8.20 of the draft guidance refers to the potential for the CMA to revert to the parties to inform them that their undertakings in lieu may be suitable to address the competition concerns identified subject to specified modifications.

We presume that the CMA is referring to its ability to revert during the 5 working days that it has pursuant to section 73A(2) EA 02 to consider the undertakings in lieu offered by the

[5] The OFT accepted undertakings in lieu in a total of seven cases in 2012.

parties rather than the 5 working days that the parties have to make the original undertakings in lieu offer pursuant to section 73A(1) EA 02. This is a minor point of precision, but we would welcome clarification of this by the CMA in the finalised guidance.

6 The Phase 2 Process: Overview (Chapter 10)

6.1 The Phase 2 Inquiry Group and case team

The draft guidance states at paragraph 10.8 that:

> '*At operational (case team) level, 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 in-depth Phase 2 investigation when a matter is referred*' (emphasis added).

We welcome the guidance's intention to allow the CMA the flexibility to provide case team continuity from phase 1 into phase 2. We consider that the guidance strikes an appropriate balance between seeking to ensure a degree of continuity and ensuring that additional staff members (of suitable seniority) are brought into the case team in phase 2 to help ensure that the risk of confirmation bias is avoided (at staff level, as well as at Member level).

We note the provision of an indicative timetable for phase 2 inquiries in Chapter 10 of the draft guidance. Whilst we consider that it is critical that the parties' procedural rights continue to be protected during a phase 2 process in the CMA, we note that the 24 week period is a statutory maximum, and that there may be circumstances in particular cases in which a clearance report can be given significantly ahead of the 24 week deadline (as indeed the CC has been able to do in a number of cases).

7 Phase 2 Information Gathering (Chapter 11)

7.1 Contact with the main parties at the outset of the Phase 2 process

We note that paragraph 11.7 of the draft guidance envisages the sending of a 'Phase 2 opening letter' from the CMA to the parties, which '*marks the formal start of the Phase 2 inquiry*'.

The discussion about the contents of the 'phase 2 opening letter' does make reference to the fact that the scope of any data request will be '*individually tailored to each case and its scope will be determined primarily by the extent (and continued relevance) of information gathered by the CMA at Phase 1, on which it seeks to build*', which we welcome (although the reference to it as an 'initial data request' appears somewhat misplaced in the context of a merged CMA).

Whilst it is clearly appropriate for the CMA to do a 'stock-take' of its investigation, processes, interim measures and so forth at the start of phase 2, we would underline the importance of ensuring that the 'phase 2 opening letter' does not request information that is either (a) irrelevant, given the case team's knowledge of the parties and industry developed during the phase 1 review process or (b) already in the possession of the CMA from its phase 1 review.

This is important for ensuring that time and expense is not wasted (on either side) at the start of the phase 2 investigation, thereby freeing up time for the CMA's phase 2

investigative processes. It is also important to ensure that the CMA's processes (between phase 1 and phase 2) appear seamless, efficient and joined-up, thereby promoting confidence in the operation of the new regime.

7.2 Phase 2 information gathering

We note that paragraph 11.14 of the draft guidance refers to '*an **initial** data request focusing on the quantitative information at the parties' disposal*' (emphasis added). We would reiterate here that it is important that the CMA does not simply send out a blanket data request at the start of phase 2, but builds on its existing knowledge of the case from phase 1 to ensure that the request is properly targeted, only asks for data that the CMA does not already have and is, of course, proportionate in its scope. In this context, referring to an 'initial' data request appears somewhat odd.

In paragraph 10.20 of the draft guidance, it is noted that requests for information during phase 2 are often made without formally exercising the CMA's section 109 powers. We consider that it would be helpful also at this point to note the content of footnote 208 – namely that there may be special circumstances in which the parties would welcome the regulatory clarity that a formal information request brings.

7.3 The initial phase 2 submission

We note that the draft guidance invites the merging parties at paragraph 11.23 to provide an initial phase 2 submission. Whilst paragraph 11.23 does invite the parties, in the fourth bullet, to address the issues set out in the CMA's phase 1 reference decision, it appears somewhat odd that the CMA invites the parties at the start of phase 2 to set out, for example, '*background information on the businesses involved in the transaction …, the main parties' views on the economic markets affected by the merger …, [and] the main parties' views on what would have happened to the businesses involved in the merger, and in the market in general, in the absence of the merger situation.'*

It may be that the merging parties do wish to provide additional comments on these matters, but it is likely that they will do so against the backdrop of the CMA's phase 1 reference decision. We invite the CMA to reconsider the drafting of paragraph 11.23 to make it clear that parties are not required or expected to re-submit material that they have already submitted to the CMA, but that the focus of an initial submission at the start of phase 2 should be more clearly on addressing the reasons why the CMA was not able to conclude that there was no realistic prospect of a substantial of competition at phase 1.

By way of connected point, we would also suggest that the language around the use of the CMA's phase 2 issues statement, referred to in paragraph 11.41 of the draft guidance, is amended to show a more joined up approach between phase 1 and phase 2; otherwise, the risk is that the issues statement fails to achieve any real practical benefit because it simply repeats (with less accompanying detail) the theories of harm that have been outlined by the CMA in its phase 1 referral decision. For the issues letter to add particular value to the process, it should be made clear in 11.41 that the issues letter will outline why particular theories of harm considered by the CMA at phase 1 are being pursued and others are not.

7.4 Submissions of technical economic analysis

The draft guidance states that '*[w]hilst parties are free to submit their own economic analysis, parties should not expect the CMA to agree the approach to analysis in advance*

or to work jointly with parties on its analysis' (paragraph 11.25). Whilst we understand the sentiment being expressed in this paragraph, we would invite the CMA to reconsider the drafting of this paragraph, which appears particularly restrictive in terms of developing a constructive working relationship between the case team and the merging parties. We would suggest that in some circumstances the CMA should, in fact, be willing to express views on economic analysis proposed to be undertaken by the parties.

7.5 Submissions of evidence based on surveys

Paragraphs 11.35 to 11.39 discuss the use of surveys in phase 2 proceedings. We would invite the CMA to state clearly how it will use survey evidence employed in phase 1 during the course of phase 2.

8 Developing the Assessment (Chapter 12)

8.1 Annotated issues statement

We welcome the statement in the draft guidance in paragraph 12.3 that the CMA will provide the parties with an annotated issues statement as well as a hearing agenda. As a practical matter, it would be particularly valuable if the CMA were to commit to providing (or to commit to *seeking to provide*) those documents a specified period before the main party hearing to allow merging parties proper time for planning.

8.2 Put-back

We understand that the CMA is seeking, in paragraph 12.5 and 12.6 of the draft guidance, to differentiate between its intended use for 'put-back' and the parties' substantive response to the CMA's developing thinking. However, we note that the draft guidance does state at paragraph 12.6 that ' *…if parties wish to comment on substantive issues arising from the materials disclosed to them, this should be done separately'*. Given that many parties *will* wish, in fact, to comment on substantive issues at this stage, it would be helpful for the draft guidance to provide greater clarity on how best, and within what timescale, this is done.

We also note that there appears to be some tension between the wording of paragraphs 12.5 and 12.6 of the draft guidance and footnote 218, which states that: '*[p]arties have the opportunity to comment more fully in writing on the approach and views of the CMA disclosed to them in working papers disclosed to them for comment (see paragraphs 12.5 and 12.6) and in its provisional findings*'. To the extent that the CMA does wish to rely on the fact that parties can substantively respond to the content of the working papers, as we suggest above, it should be clear about how this is best done.

9 The EU Merger Regulation (Chapter 18)

Paragraph 18.53, in line with the OFT's current jurisdictional and procedural guidance, states as follows:

'*As the UK has a voluntary system of notification, the CMA therefore equates 'made known' for the purposes of the 15 working day time period with the date on which the CMA accepts that the cumulative information supplied by the parties constitutes a* ***satisfactory submission under the Act****, which will typically include in this context the provision of market shares at an EEA level where this is appropriate*' (emphasis added).

It would be useful for the CMA in its final guidance to explain two specific points in this context.

- First, it would be useful for the CMA to acknowledge clearly that the 15 working day period under Article 22 starts from the working day after *receipt by the CMA* of the necessary information, rather than from the working day after confirmation by the CMA that it has the necessary information; in other words, the Article 22 clock will begin *before* the CMA's own 40 working day statutory clock.
- Second, it would be helpful for the CMA to confirm what is meant by a 'satisfactory submission under the Act' in this context. It appears clear that the 15 working day period under Article 22 should start upon receipt of a Merger Notice that is subsequently confirmed to be sufficient to start the CMA's statutory clock pursuant to section 34ZA(3)(a). However, would the 15 working day period under Article 22 also start on receipt of information that the CMA subsequently confirms to be sufficient to start its 40 working day clock pursuant to section 34ZA(3)(b)? Whilst one might naturally consider that such latter information might not be regarded as a 'satisfactory submission', the alternative is that the 15 working day period under Article 22 never commences and that the parties remain permanently at risk of the CMA making an Article 22 request (which cannot be correct).

We appreciate that these timing points can be considered ones of detail; however, the commercial significance of an Article 22 referral is such that it is particularly important for merging parties to have clarity on these points.

10 Draft Merger Notice (Annex E)

10.1 Other transactions (paragraph 4)

Paragraph 4 of the draft Merger Notice requires that the parties provide '*brief details of any other transactions (merger, acquisition, disposal, joint venture) undertaken by either of the merger parties in the last two years*'.

We strongly urge the CMA to reconsider whether this information should be a requirement for the submission of a complete Merger Notice. It is not clear to us why information about previous transactions is necessary for the appraisal of the transaction under consideration. We therefore urge that this paragraph be removed in its entirety from the Merger Notice.

If the CMA is minded to retain this requirement, then we would urge that it is at least made more proportionate as its scope is currently extremely broad. Specifically, we would suggest that it should relate to transactions that:

- have some nexus to the UK; and
- concern the same markets that overlap between the parties in the case being notified (in line with the equivalent requirement in the current Form CO[6]).

If paragraph 4, as currently drafted, is retained, then this imposes a huge burden on for parties with significant international operations, without clear, corresponding benefits for the CMA in terms of its own merger investigation. We note that in the proposed new Form CO (currently under consideration as part of the EC's proposal to simplify certain

[6] Section 4.2.3

procedures for notifying mergers under the EUMR) the European Commission has expressly identified this requirement as one for which waivers may be appropriate.[7]

10.2 Information Memoranda (paragraph 12)

Paragraph 12(d) requires the parties to provide '*all Information Memoranda that specifically relate to the sale of the target*'. We would note that this should be qualified so as only to capture documents that are in the parties' possession given that, in a completed transaction, the acquiring party may not have Information Memoranda produced for, for example, rival bidders, and would not be in a position to provide them to fulfil the requirements of a complete Merger Notice.

10.3 Market analysis documentation (paragraph 13)

Paragraph 13 of the draft Merger Notice requires the 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*' (emphasis added).

We note that the requirement to provide supporting documents is significantly expanded and is no longer limited to analyses associated with the merger. We would make a number of specific comments in this respect.

- We would suggest that the geographic reach of this requirement is made clear, given that (at least as a starting point for the completeness of the initial notification) any such requirement should presumably apply only to documents relating to competitive conditions and markets in the UK, rather than globally.
- The proposed requirement to provide documents produced in the last three years for the purpose of assessing any of the overlapping markets goes far beyond what is necessary for the CMA to analyse most transactions. For example, the current drafting would appear to catch monthly marketing reports (requiring the submission of 36 such reports per product area even in a case that does not raise significant competition issues). In the majority of cases, the CMA will neither require such information, nor indeed will it have the time or resources to review the large volume of documents such a request is likely to produce. We strongly believe that requiring such documentation as a condition for completeness of the Merger Notice is disproportionate. We believe that it would be better for the CMA to request these documents in appropriate cases (potentially during the course of the review, if this is considered appropriate), without making it a pre-notification requirement in all cases.[8] We believe that this change will have the effect of unnecessarily increasing the burden and costs placed on the parties.
- We note that the requirement extends to information that is in the parties' possession '*or which are readily available*'. We strongly urge that these words be

[7] See footnote 22 of the draft revised Form CO available at http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html.

[8] We note that parties are able to request a waiver in relation to the provision of such documents. However, our experience under the EUMR is that case teams may be reluctant to provide waivers, in particular during pre-notification, when they are still familiarising themselves with the case.

deleted. We do not consider that it is reasonable for the CMA to expect parties to incur costs in purchasing a potentially very significant number of market reports (which they have not purchased in their ordinary course of business) simply for the purposes of submitting a complete Merger Notice. In some industries there is a proliferation of market data and commentary, much of which may not be relevant to the merger. If this requirement is retained, then it is, at the very least, incumbent on the CMA to provide clarity as to what '*readily available*' means in this context, which should preferably be 'within the possession of the relevant merger party'.

10.4 Inquiries by competition authorities (paragraph 24)

Paragraph 24 of the draft Merger Notice requires that the parties provide '*[i]n relation to the product(s) or service(s) identified at question 16, … details of any inquiries by competition authorities in the UK or other countries where the merger parties are active in supplying these product(s) or service(s)*'.

We consider that it is not reasonable or necessary for the CMA to require information about any competition investigations, on a potential global basis, simply on the basis that these involve products that are supplied by both the merging parties in the UK. Our objections are that:

- in the absence of a global product market, it is very difficult to understand why a competition investigation conducted by a competition agency in the US or Asia, for example, should be relevant to the OFT's analysis of the competition impact of a merger in the UK;
- the existence of competition investigations, even if in the same relevant product and geographic market, is of dubious evidential relevance to the CMA's analysis of the impact of a merger on competition as a result of co-ordinated effects; the key question for the CMA is whether the conditions for co-ordination are present and/or may be strengthened, not whether a competition authority has started an investigation;
- the question as drafted requires information to be provided on ongoing investigations, which appears both inappropriate and disproportionate. It also raises difficult questions about what constitutes an 'inquiry': for example, what an informal information request from a competition authority constitute an inquiry? Finally, information about concluded investigations should be available in the public domain or via the CMA's participation in the ECN and ICN; and
- to the extent that the CMA did consider that an inquiry of a competition authority in another jurisdiction were relevant to its investigation, it is able to request details of the investigation from that authority.

We strongly urge the CMA to revisit this requirement and, if it is not removed, to limit its scope in line with the principle of proportionality and to provide greater clarity on its scope.

10.5 SIC codes (Guidance Note 3)

We do not understand why the CMA is requiring the submission of SIC codes when this does not appear to be information that has been practically used for the purpose of any OFT or CC inquiry.

Annex 1 – Table of Responses to Consultation Questions

Question	Response
Q1. 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?	Yes
Q2. 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?	We have not identified further guidance at this point
Q3. 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?	Yes. No comments, other than to emphasise that, as the draft guidance recognises, not all information may be required in every case
Q4. 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?	Yes
Q5. Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?	See comments in the response, in particular at section 5
Q6. Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?	See comments in the response, in particular at section 10
Q7. Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?	No comment
Q8. Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?	See comments in the response, in particular at section 3
Q9 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?	See comments in the response, in particular at section 4.1
Q10. 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?	No comment