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maclay murray & spens LLP

The BIS CMA Transition Team on behalf of the CMA
(c/o Xinru Li and Easha Lam)
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
1Victoria Street
London
SW1H 0ET

12 September 2013

Dear Sirs,

Consultation – Mergers: Guidance on the CMA's jurisdiction and procedure

Maclay Murray & Spens LLP welcomes the opportunity to respond to the consultation on the CMA's jurisdiction and procedure issued in July 2013 (the **"Consultation Paper"**)[1]. Our comments are based on our experience of acting for companies who have notified transactions to the Office of Fair Trading or had transactions investigated by the Office of Fair Trading ("OFT") and Competition Commission ("CC") pursuant to the relevant provisions of UK merger control legislation. We begin by answering the specific questions posed in the consultation, before going on to make some specific comments about aspects of the procedural guidance.

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 **Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?**

   The table appears to indicate that OFT1254/CC2 Quick Guide to UK merger assessment will be adopted. This document is not one which is typically referred to by legal advisers, but presumably is used by businesses. It will be obsolete when merger control functions transfer to the CMA on 1 April 2014. Given its intended purpose, it also has the potential to result in confusion. It would seem beneficial to update the short guide and replace it with a new document, something which would not seem to be particularly onerous.

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?**

   In the first instance we would suggest a review of all existing documentation which has been adopted with a view to updating them and correcting / updating any anomalies arising from the CMA reforms.

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?**

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1 Review of the OFT's investigation procedures in competition cases – A Consultation Document – March 2012 <http://www.oft.gov.uk/shared_oft/policy/OFT1263con2>

The proposal that offers of UILs be sought after, rather than before, the CMA has given its reasoned decision as to whether its duty to refer applies is to be welcomed. If this leads to an increased resolution of merger concerns through UILs that also will be welcomed because it is quicker, more certain and cheaper for business than going through the Phase 2 process.

The Remedies Form is clearly drafted in anticipation of the offer of structural undertakings in lieu, but if behavioural undertakings were being offered (which the guidance does not preclude) it may be helpful to indicate that the parties would be expected to provide the information requested in the following sections: 1) Description of the UIL; 2) How the UILs will remedy, mitigate or prevent competition concerns and 3) Implementation Process[2].

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?**

The guidance is understandable and gives a reasonable indication of the circumstances in which the period for acceptance of UILs may be extended. It is not definitive or comprehensive and it is appreciated that it cannot be so in that the full range of circumstances which may constitute special reasons cannot necessarily be anticipated.

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

No.

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?**

None.

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

We have no material comments on this point.

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

No, the process described for notifying mergers appears satisfactory.

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?**

We have a number of comments regarding the use of interim measures.

Paragraph 3.27 of the guidance appears confused. The OFT already has the power under Section 72 of the Enterprise Act 2002 to issue initial enforcement orders in respect of completed mergers so it is unclear why the word "now" is used (implying that the OFT does not currently have the power). Many advisers will also be surprised by the statement that the powers relating to pre-emptive action are clarificatory rather than being considerably enhanced.

There is a tension between the statement at paragraph C.5 that the CMA will consider the need for interim measures on a case-by-case basis and the expectation outlined at paragraph C.10 that in a Phase 1 completed merger an interim order will "*normally be made*" at the same time as an enquiry

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2 Information to be provided regarding implementation would have to be bespoke to the particular remedy proposed.

letter is sent to the parties. This will be at the point where the CMA has reasonable grounds to suspect that two enterprises have ceased to be distinct, but will not be aware of whether there is a relevant merger situation far less any substantive competition issue. The statement regarding the timing of an interim order is strongly indicative that there will be very limited opportunity for the CMA to consider on a case-by-case basis whether an interim order is appropriate or necessary. The interim order will presumably be made simply on the basis of the template interim order which will often result in more onerous obligations being placed upon the merging parties than would be the case under the present regime where there is opportunity to engage on the scope and content of interim undertakings. This is regrettable and in our view unnecessary. It loads regulatory cost on parties to unobjectionable mergers.

This would be of less concern if there were to be an opportunity to engage quickly with the CMA to revisit the terms of the interim order once it is informed of the basic facts of the transaction and whether there is a relevant merger situation or a substantive competition issue. However, it appears doubtful as to whether this will be possible given the approach to be taken to derogation requests (see further below). Another possible approach would be for parties to approach the CMA for revocation of the interim order and its replacement with a second interim order made on a tailored basis. We have been involved in several mergers where "light" versions of interim undertakings were agreed with the OFT where it was clear at an early stage that the particular transactions either raised no, or limited, competition concerns.

It is also unclear whether, where the parties to a completed merger approach the CMA to notify the merger, there will be any opportunity to engage with the CMA on the terms of any order or whether an interim order will be made on the basis of the template.

In this regard, the approach the CMA adopts to derogation requests will be significant. We note the reference to parties requiring to provide evidence to the CMA as to why a request is necessary, but would suggest that the relevant consideration is whether the proposed derogation allows the parties to proceed with a pre-emptive action.[3] Action which is not pre-emptive action should be approved, regardless of any view of the necessity of the action. The concepts of integration and pre-emptive action appear to be used interchangeably in the guidance.

At a policy level, avoiding regulatory cost for benign or pro-competitive mergers will be particularly important, particularly if parties perceive that a benign or pro-competitive, but non-notified merger is at risk of being subject to an interim order. If this balance is incorrect, the CMA may find that it is forced to consider and approve notified mergers which parties would be happy to take a view on not notifying under the current regime. This would not appear to be a sensible use of finite resources, and impose otherwise avoidable regulatory cost.

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?**

The proposed transitional arrangements appear clear.

Yours sincerely

Michael J Dean
Partner
For Maclay Murray & Spens LLP

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[3] Given the potentially severe consequences of breaching an interim order, merging parties will err on the side of caution in considering whether a particular action is caught by the terms of an interim order. In this regard, use of the template, the reasons for which are appreciated, can give parties genuine doubt as to whether particular actions are caught.