RESPONSE TO COMPETITION AND MARKETS AUTHORITY CONSULTATION

BY BIRD & BIRD LLP

MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE

Introduction

This response is submitted by and on behalf of Bird & Bird LLP, an international law firm with substantial experience of representing and assisting businesses before competition authorities in a number of jurisdictions. The views now expressed are those of Bird & Bird LLP and not necessarily those of the firm's clients.

We welcome the opportunity to respond to the detailed draft guidance of the CMA on its jurisdiction and procedure for merger control. We confirm that we are happy for this response to be published on the CMA's website.

Question 1: Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?

We agree with the list in Annexe D.

Question 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?

We note that the draft guidance states at paragraph 6.70 that the CMA considers that it is not in a position to determine whether contractual arrangements are ancillary to a merger and therefore fall outside Chapters I and II of the Competition Act 1998. Accordingly, it is stated that the CMA will not normally give a view in its published decisions on whether or not a restriction is ancillary.

We are surprised that the CMA is not considered to be in a position to take a view on whether restrictions are ancillary, given that it will obtain a detailed understanding of the structure and operation of a merger and the merged entity from the merger notification. We believe that there will be benefits not only for the parties but in terms of legal certainty more generally if the CMA's specific conclusions on contractual restrictions, and whether or not they are ancillary, were published. The CMA will gain considerable experience of reviewing such restrictions across a wide range of mergers and will develop a clear view of the scope of restrictions that will normally be directly related and necessary for the merger and therefore ancillary.

We believe that, as a minimum, the CMA should be expected to state in its published decisions an explanation of any restrictions which it accesses in the context of its merger control functions which it does not regard as being ancillary. Preferably also, the CMA should be expected to state in the form of guidelines, the scope of typical restrictions which are or will be considered to be ancillary to a merger. This would serve a similar purpose to the European Commission's statements concerning ancillary restraints in the consolidated jurisdiction notice of the European Commission pursuant to the EU Merger Control Regulation.

Question 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?

We think that the draft Remedies Form is clear and comprehensible. However, we have certain suggestions with regard to possible improvement of the form, in particular the following. First, in the preamble or introductory section, fifth paragraph, the statements concerning behavioural remedies appear unduly negative. Whilst we appreciate that the CMA will not usually wish to accept behavioural as opposed to structural remedies, we believe that the pro-forma Remedies Form and the explanatory statements in it should not contain statements with are tantamount to ruling out such possibilities. Accordingly, we recommend deletion of the first sentence and the words "However" and "highly" in the second sentence, of the fifth paragraph.

Second, in item 4 of the draft Remedies Form, a new first sub-point should, we suggest, be inserted with reference to the form of divestment, for example by disposal of shares or specific assets. Whilst the preamble in the Remedies Form indicates that a "business" will preferably comprise an existing business as opposed to a collection of assets, the form will be improved if the questions in the Form distinguish clearly between the types of transactions, for example, shares or assets sales that may be envisaged.

Third, we think that the wording of item 12 of the draft Form could usefully be improved by requiring a statement of the specific terms and duration of any of the asset or facility-sharing arrangements referred to, and the duration and terms of any supply, production, distribution, service of other contracts, as between the retained and divested businesses.

Question 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?

We consider this section of the draft guidance to be reasonably clear (in particular, paragraphs 8.22 – 8.24).

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

We note that the draft guidance states repeatedly that any discussions between the parties and the CMA concerning possible structural remedies or any possible undertakings in lieu (UILs) discussed with the case team or other CMA officials will not be disclosed to the decision-maker (see paragraphs 6.41 (final bullet point), 7.56 and 8.16). We welcome this statement of this important principle. However, we also consider that it would be appropriate for a stronger and clearer indication to be given of the ring-fencing measures that in our view should be implemented by the CMA in order to restrict the flow of such information between different groups of CMA personnel.

Question 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?

We note that the amount of information generally required in the merger notice is increased considerably in the present draft as compared with the version currently in use. We consider that some of the information requirements are speculative or even seem to request the parties to conduct the analysis which the CMA as the competition authority should be expected to carry out.

For example, item 27 concerning increases in the parties' buying power is speculative and moreover in many cases may not be capable of a precise answer at the time of notification, on a forward-looking basis. We note that the relevant guidance note, note 14, states that much of the specified information may be waived to the extent that the horizontal overlaps are not considered material by the CMA. We consider that it would be preferable to follow the approach taken in the current merger notice, of only requiring such information where the parties appear to exceed a specified market share threshold, such as the 10 per cent level given in the current merger notice. We also recommend that the required information should be limited to the factual points detailed in guidance note 14 rather than the subjective assessment issue raised in question 27 of the notice.

We also consider that question 30, concerning vertical and other effects, is a speculative question which may not be capable of precise answers on a forward-looking basis at the time of notification. The information required in the relevant guidance note, note 17, is extensive. We recommend that the information requested specifically in item 30 of the notice should focus rather on the specific issues raised in the guidance note. We also recommend that this extensive information should only be required in cases where a market share threshold is passed, for example the 15 per cent threshold referred to for vertical links in the current merger notice.

We note that the notice itself is imprecise as to the number of competitors and customers for whom contact details should be provided. (See items 20, 31 and 34.) The guidance notes indicate references to large numbers of contact details required, for example in the case of vertical mergers, between five and 20 of the top competitors and between five and 30 of the top customers; and in the case of horizontal mergers, between 10 and 20 competitors and between 10 and 50 customers. We do not think that such large numbers of contact details are normally necessary and would suggest that these should be limited to ten contacts for each category. This would already be an increase on the requirement for details of five competitors and five customers as required in the current merger notice. It would also provide some certainty to the parties as to the volume of data required from them.

Question 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 agree with the harmonisation of the requirements for payment of merger fees so that they will always be payable only when a decision is announced following a phase 1 investigation which confirms that the merger qualifies for investigation. This will achieve administrative efficiency in avoiding enterprises making payment on the submission of a merger notice in respect of a merger which is subsequently found not to qualify for investigation, and also in avoiding the need for the CMA to arrange a repayment when such a finding is made.

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

We note that the parties are encouraged to make contact with the CMA to engage in pre-notification discussions at least two weeks before the intended date notification (paragraph 6.40), but also that the CMA case team will normally aim to review pre-notification submissions some five to ten working days from receipt (paragraph 6.49). This appears to leave very little time for the CMA to respond and for discussions to be held between the parties and the CMA case team without delaying the completion and submission of the notification (the merger notice) beyond a period of two weeks from initial contact. Clearly in practice this period is likely to be elongated, and we consider that the draft guidance should set out a clearer time plan to reflect the need for consideration by the CMA of pre-notification submissions and the pre-notification discussions.

In order to allow for the time-efficient preparation of a merger notice, taking proper account of pre-notification discussions, we suggest that the CMA should indicate a firmer and shorter time period than the "five to ten working days" mentioned in paragraph 6.49. We suggest that the guidance should indicate that on receipt of a pre-notification contact or the latest on receipt of pre-notification submissions, a date for discussions should be established by the CMA which would normally be not more than five to ten working days from such receipt, so that in that period the CMA case team should review the submissions and be ready to hold such discussions.

We consider that the CMA case team should promptly indicate whether or not it accepts that a merger notice is complete, following receipt, especially when there have been substantive pre-merger notification discussions. We note that the draft guidance does not give any firm indication of the time period within which the CMA will inform the parties of the completeness of the notification, though it is stated that it will inform the merging parties of any missing information "generally within five to ten working days" of receipt of the merger notice (see paragraphs 6.53 and 6.58). Given that the CMA is required to carry out its first phase assessment within a 40 working day period, we consider that such a period of five to ten working days is too long and that five working days should be the maximum.

We also note that the Preamble to the draft merger notice states that the CMA may in any event require further information from the parties during the 40 days investigation period, including information that has previously been the subject of a waiver. This purported reservation of rights to the CMA to request further information even in disregard of a previous waiver, provides a further reason why the CMA should decide very promptly on the completeness of the notification.

Question 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 consider that the guidance on the CMA's use of interim measures is clear and comprehensible and that the contents of the draft template order in respect of interim measures are generally clear. However, we have the following two suggestions for improvement with regard to the draft template order:

First, as regards paragraph 9(a), we think that it is unnecessary that the addressee of the order (X in the draft template) should be required to give details to the CMA of all staff who leave or join the acquired business (referred to as the "Y" business in the draft template order). Rather, we think it would be more appropriate for this requirement to apply only in respect of "key staff" as defined in section 14 of the draft template order, and/or that it should only apply to details of significant changes in the numbers of staff who leave or join the acquired business (the "Y" business).

Second, in our view the structure and language of paragraph 11 of the draft template order is unclear and too technical for it to be easily understood by some business people who will be required to ensure compliance with such an order. We would suggest that the language of paragraph 11 should be made more user-friendly by rewording it on the lines of, for example, the following: *The CMA may give directions to a specified person or to a holder of a specified office in any body of persons (corporate or unincorporated) to (a) take specified steps for the purpose of carrying out, or ensuring compliance with, this Order, or (b) do or refrain from doing any specified act in order to ensure compliance with this Order.*

Question 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?

We believe that the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E, are logical, clear and comprehensible.

Bird & Bird LLP
London
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