Joint Working Party of the Law Society and Bar Council: CMA first tranche consultations and BIS draft "strategic steer"

In light of the fact that members of the JWP are aware that detailed comments on the CMA Consultation Drafts are being submitted by Law Firms and Counsel from whom the JWP membership is drawn, the JWP's comments are limited to the following points of general concern:

Mergers

1 **Scope of information requirements in the new merger notice:** the new merger notice requires substantially more detailed and wide-ranging information than the old form, and in some respects goes even beyond the information requirements in the Form CO under the EU Merger Regulation (including those in the Commission's current consultation draft). It is hard to see the justification for this. Although the Guidance indicates that the CMA "may be willing to grant derogations" (paragraph 6.59), that does not give us sufficient comfort that the information requirements in the merger notice will be interpreted flexibly and pragmatically. Experience under the EU Merger Regulation is that case teams tend to be conservative in assessing requests for derogation and in practice it is often very difficult to obtain derogations. As a result, the pre-notification process can often be prolonged unnecessarily, and we see a significant risk that the same could happen in the UK if the wording of the draft merger notice is adopted in its current form. This will defeat one of the main (claimed) objectives of moving to a regime with fixed timetables, ultimately resulting in Phase 1 merger reviews becoming more protracted than is currently the case. Examples of what we consider to be unnecessarily broad information requirements include:

   (a) the scope of internal documents under paragraph 12, which extends to minutes of meetings, and analysis that may be contained in emails; the documents that are required to be produced are not just those that have been prepared for the board, but also those prepared by or for "personnel working on the transaction" (which in practice is likely to include in-house counsel) and those prepared by or for "senior management". It is not clear why the CMA needs to have sight of so many internal documents in a Phase 1 review, and this approach seems out of line even with the relatively burdensome requirements of the EU Merger Regulation;

   (b) the extent of customer and competitor contact information under paragraphs 20, 31 and 34 (and guidance note 11): it seems very surprising that the CMA should feel the need to have contact information for 10-20 competitors and 10-50 customers (in each case including overseas companies if appropriate), not just for areas of horizontal overlaps but also for vertically related markets and complementary product markets. This is out of line with the approach under the EU Merger Regulation and seems wholly disproportionate to a Phase 1 review;

   (c) the extent of information required on vertical links, seemingly irrespective of the parties' market shares at any level of the supply chain: again, this seems wholly disproportionate.

2 **Use of interim orders as the CMA's default position when an enquiry letter is sent:** we have some concerns about the statement in paragraph 7.35 that "the CMA will normally make an interim order at the same time as an enquiry letter is sent out". This pre-supposes that enquiry letters will only be sent in cases that raise significant prima facie competition concerns. However, the experience of some JWP members is that the OFT has from time

to time sent enquiry letters in cases that clearly raised no substantive concerns (e.g. involving very small market share increments), and which did not proceed to a case review meeting. Making an interim order in such cases would be disproportionate and it would seem preferable for the CMA to adopt a more flexible policy towards the use of interim orders (e.g. allowing the parties a short period to make representations as to why such an order should not be made). The CMA would be able to unwind any integration steps taken during this time, so the parties would be on risk if they attempted to use this window in order to game the system by carrying out integration before an interim order was in place.

3 **Procedure for submitting UILs:** although the Guidance recommends early discussion of possible UILs in suitable cases, even during pre-notification (paragraph 8.9), it acknowledges that in some cases, parties may wish to see the SLC decision before raising the issue of UILs with the case team (paragraph 8.12). Given that parties will have only a short period of time following receipt of the decision in order to table an offer of UILs, it will clearly be important for the case team to be forthcoming with the parties as to the scope of a potential UIL package, notwithstanding the point that they cannot pre-judge the decision-maker's ultimate decision on whether the case qualifies for a Phase 2 reference and whether to accept UILs. We recognise (and support) the desire to move away from the current artificial world of sequential sealed envelopes containing variants of potential UIL offers, but equally it is important to ensure that offers of UILs do not fail simply because (e.g.) the divestment package offered does not include all relevant overlaps considered to give rise to an SLC. Similarly, in "near miss" cases, it is vital that the CMA gives a clear steer to the parties as to the deficiencies of their UIL proposal, and what is needed to make it acceptable. We sense in paragraph 8.20 of the Guidance a willingness to do this, but it would be useful to have more clarity on this point. We also think it would add to the credibility of the regime if the Guidance noted that the CMA would accept remedies that are proportionate to its view of the SLC and could and would "hand back" remedies which it thinks are not needed, despite being proffered.

4 **Composition of Phase 2 Inquiry Groups:** we note the proposal (paragraph 10.8) that, in order to avoid unnecessary duplication and facilitate an efficient end-to-end review process, the Inquiry Group should include some members of the Phase 1 case team. This is a radical departure from the current regime, in which the CC starts a merger investigation with a clean sheet of paper, and no pre-conceived ideas about whether or not the merger in question may be anti-competitive. There is a risk that the inclusion of members of the Phase 1 team may lead to confirmation bias, and we would have expected the Guidance to acknowledge this concern and describe measures to address it. The JWP has consistently warned of the dangers of confirmation bias in the new regime, both in mergers and MIRs, and we would expect new senior economics and administrative professionals to be involved at Phase 2.

5 **Access to the Decision Makers:** we are concerned that important decisions are made in the regime with no access by parties to Decision Makers in Phase 1 and a sense of declining access in Phase 2. Whilst we understand the time pressures on Decision Makers we think, at least in relation to UILs in Phase 1, parties should be able to meet with the Decision Maker to ensure clear direct dialogue on suitability of remedies.

With the potential decline in relevance (or attendance) at site visits and possible reliance on "Phase 1" information in Phase 2, we are concerned that parties may not be able to interact with Phase 2 decision makers as much as in the past and as much as required to retain confidence in the system. Full and proper hearings will continue to be essential.

Market Investigation References ("MIRs")

The greatest concern to JWP members is how little has been said so far about how the CMA plans to manage to deliver MIRs in the new statutory timetable. In our collective experience it is already proving difficult to conduct thorough, robust investigations to the relevant standards with longer deadlines than will apply from 1 April 2014. The CMA urgently needs to consider what will have to/should change in the conduct of these investigations. MIRs are not voluntary, they can result in significant change and upheaval, require extensive allocation of management resource and impose a substantial cost on the businesses involved in them, as well as being expensive for the authority to conduct. We are concerned that the credibility of the regime will be significantly undermined if thought is not given to proper preparation and consultation about change: simply aiming to do the same but quicker seems a poor recipe.

The above concerns would be particularly acute in respect of the new power to conduct investigations across markets. The JWP has serious doubts that this power will prove to be a valuable addition to the UK - in any event, from a purely practical perspective, the difficulties of managing such cases within the statutory timetable appear to us to be formidable.

BIS Strategic Steer

Whilst we have no objection to the framework described in Section 2 of the Consultation Document and welcome the steer towards more and quicker decisions, we were surprised to see three sectors singled out in paragraph 6 of the draft (including two which have their own sectoral regulators, one of which has concurrent competition powers). We think that is not appropriate and would raise unfortunate expectations of what the CMA should (or could) do.

Penalties

We are surprised at the suggestion that Penalties Decisions at Phase I could be capable of being made at "senior official" level. They should only be capable of being made at the level of CEO or his direct reports.

In respect of the expanded powers of the CMA to impose administrative penalties, the JWP does not consider that the current draft gives sufficient guidance or reassurance to businesses and their advisors as to the approach that will be adopted. These concerns are particularly acute in relation to CA 1998 investigations, where initial requests for information are frequently based on limited information held by the authorities and very broad in scope - the JWP considers that it is important to preserve the flexibility of the current system whereby advisors can discuss with CMA officials how best to respond to such requests without fear that this will be treated as non-cooperation risking the imposition of penalties on their clients.

We also do not agree with the proposal to increase the level of maximum penalties under the Competition and Markets (Penalties) Order 2014. As the consultation notes (at paragraph 3.4), no penalties have yet been imposed under the current Order, so we do not believe the case has been made out for needing to increase them.

JWP
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