# MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE (CMA2CON, JULY 2013)

## RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

**6 September 2013**

**RESPONSE TO THE CMA'S CONSULTATION ON MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE (CMA2CON, JULY 2013)**

## 1. INTRODUCTION AND SUMMARY

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the consultation (the ***Consultation***) on the draft "*Mergers: Guidance on the CMA's jurisdiction and procedure*" (the ***Guidance***).

1.2 Our comments are based on our experience of representing clients in a wide range of Phase 1 and Phase 2 merger processes conducted by the Office of Fair Trading (***OFT***) and the Competition Commission (***CC***) respectively since the Enterprise Act 2002 (the ***EA 02***) came into force, and in merger control processes in many other jurisdictions. We rely on this breadth of experience to provide these comments about the proper, efficient and most effective conduct of merger reviews by the CMA.

1.3 We have confined our comments to those areas which we feel are most significant in terms of ensuring the effective operation of the UK merger regime in providing clarity and certainty for companies that may be subject to UK merger review. The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.4 We welcome the Competition and Market Authority's (***CMA***) review of existing jurisdictional and procedural merger review practices to reflect current best practices and in particular its efforts to:

(a) increase engagement with parties during the pre-notification and undertakings in lieu (***UIL***) processes to maximise positive outcomes for merging parties; and

(b) minimise the information burden on merging parties transitioning from a Phase 1 to Phase 2 process,

albeit that we think that more can be done in both areas.

1.5 However, we are concerned that a number of issues raised in the Guidance may undermine the UK merger regime and/or impose a disproportionate regulatory burden on companies seeking to undertake transactions in the UK:

(a) the CMA's proposed use of its new, wider interim powers risks both undermining the voluntary nature of the UK merger regime as well as imposing unwarranted regulatory intervention, particularly with respect to anticipated mergers;

(b) the revised pre-notification and notification processes will significantly increase the regulatory burden on both (i) business in terms of management time and the costs of preparing submissions; and (ii) the CMA in its ability to progress the merger review process in a timely manner given the significant

additional information requirements and processes. In fact, the revised notification process will make the UK merger regime one of the most costly and protracted regimes in Europe[1];

(c) an opportunity has been missed in that access to the decision maker during the Phase 1 review process remains unduly limited. Increased access would provide the best opportunity for notifying parties to put across their case to the CMA, and would also improve the quality of decision-making, at minimal cost in terms of the CMA's resources, by allowing the decision maker unfiltered access to the parties and their arguments; and

(d) further clarification is required in a number of areas of the Guidance, as we have set out more fully below.

1.6 We have divided our more detailed comments below into the following key areas:

(a) interim measures (**Section 2**);

(b) undertakings in lieu (**Section 3**);

(c) transition from Phase 1 to Phase 2 review (**Section 4**);

(d) the increased burden on business and the CMA (**Section 5**);

(e) access to the decision maker in Phase 1 (**Section 6**);

(f) other issues raised by the Guidance (**Section 7**); and

(g) a summary of our suggested amendments for the Guidance (**Section 8**).

1.7 Additionally, to assist the CMA with its review of our response we have, in **Annex A**, indicated our responses to the Consultation questions by way of cross references to the relevant paragraphs of our response.

1.8 We would be pleased to discuss any of the points made in this response further should the CMA find it helpful to do so. In any event, we should be very grateful if the CMA were to publish the revised Guidance significantly in advance of April 2014, as we assume it intends to do, in order to give practitioners the opportunity to prepare clients for the revised procedures.

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[1] The CMA's Phase 1 review period is the longest of any EU merger regime and its filing fee is now the most expensive. Coupled with extended pre-notification and the estimated cost of preparing a 'complete' merger submission for the CMA, the UK merger regime will present a material burden on notifying parties.

## 2. VOLUNTARY REGIME VS INTERIM MEASURES

### CMA risks defaulting to a mandatory regime

*The proposed use by the CMA of its increased powers risks undermining the fundamental flexibility of the voluntary UK regime*

2.1 We are concerned that the current Guidance does not provide sufficient reassurance that the CMA will use its enhanced interim measure powers within the spirit of the voluntary nature of the UK regime.[2]

2.2 We welcome the CMA's statement that it "*attaches importance to proportionality and a desire not to burden benign transactions with delay and cost*".[3] However, there is a risk that in practice the "*low*" threshold which the CMA states it will apply to determine the appropriateness of interim measures, without having to form "*a detailed judgement on the precise risks of pre-emptive action*",[4] combined with the potentially far-reaching consequences of interim measures for merging parties, will lead to the *de facto* mandatory notification of all but the most straightforward mergers.

2.3 This would not be in keeping with the spirit of the voluntary nature of the UK regime, which it was the Government's intention to preserve; nor would it be in the best interests of the CMA, which could find itself under significant capacity constraints due to the increased number of notified mergers (in addition to, as described in greater detail below, the significantly increased administrative burden for the CMA inherent in the Guidance).

*The CMA should exercise its discretion to impose interim measures only when necessary*

2.4 The Enterprise and Regulatory Reform Act 2013 (the ***ERRA 13***) gives the CMA significantly increased flexibility to impose interim measures at an early stage in the transaction, in particular by removing the need to establish jurisdiction.[5] However, we consider that the thresholds for the CMA's exercise of that discretion (as set out in the Guidance) are too low:

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[2] While we recognise that these new powers stem from the Government's desire to strengthen the UK merger control regime, we consider it equally important not to lose sight of the Government's intention that the UK regime remain voluntary – this option being, in the Government's view, "*the most proportionate response to the problems identified* (…)" and which will also "*limit the increased cost to business and the CMA."* (see paragraph 5.7, Department for Business, Innovation & Skills, *Growth, Competition and the Competition Regime*, Government Response to Consultation, March 2012).

[3] Paragraph 7.36, Guidance.

[4] Paragraph 7.35, Guidance. Emphasis added.

[5] However, as noted in paragraph 2.5 below, this amendment does not obviate the restriction imposed by Article 21(3) of the European Union Merger Regulation on applying UK merger control law to transactions falling within the European Commission's jurisdiction.

(a) with respect to jurisdiction, while there is no statutory requirement for the CMA to *establish* jurisdiction, the Guidance should make it clear that the CMA will at least *take into account* whether it is likely that it would have jurisdiction when considering the appropriateness of making an interim order: paragraph 7.34 of the Guidance currently does not make any reference to jurisdiction under either the turnover or the share of supply test;[6] and

(b) with respect to the other thresholds applied by the CMA, we are concerned that the proposed Guidance represents a disproportionate lowering of the existing thresholds applied by the OFT:

(i) the Guidance removes any reference to "*preliminary indications that the merger raises or is likely to raise competition concerns*",[7] and

(ii) the Guidance seeks to justify minimising the assessment of the risk of pre-emptive action by stating that "*the CMA will not have sufficient information to form a detailed judgement on the precise risks of pre-emptive action*".[8] This contrasts with the OFT, which currently considers a number of factors to assess the risk of pre-emptive action as well as issues of urgency and proportionality prior to seeking interim measures.[9] While we recognise the CMA's desire to move quickly, this should not be without the CMA being able to demonstrate reasonable grounds for it to consider that pre-emptive action is taking or will take place (and not where the CMA merely "*<u>suspects</u> that pre-emptive action <u>may</u> be occurring*" or where it considers there is a risk that such action "*<u>may occur</u>*"[10]).

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6 Thus, paragraph 7.34 of the Guidance states only that "*as a matter of practice, the CMA will consider the appropriateness of making an interim order as soon as it has reasonable grounds for suspecting that (i) two or more enterprises have ceased to be distinct or will cease to be distinct during the CMA's review, or (ii) arrangements are in progress or contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct, and that integration of those enterprises may be occurring prior to completion.*" It is not necessary for the CMA to establish that the other jurisdictional thresholds for making a reference to Phase 2 (the turnover or share of supply tests) are met.

7 Paragraph 6.30, OFT 527, *Mergers: Jurisdictional and Procedural Guidance*, June 2009. In particular, the suggestion, at paragraph 7.35 of the Guidance, that the CMA will impose interim measures almost *systematically* in the context of a completed merger appears to be at odds with the Government's intention, in leaving it to the CMA's discretion to trigger the statutory restriction on further integration steps, to ensure that these remain proportionate and do not interfere unnecessarily with mergers that are not likely to raise competition concerns. See paragraphs 5.5 and 5.9, Department for Business, Innovation & Skills, *Growth, Competition and the Competition Regime*, Government Response to Consultation, March 2012. The Government took account of the majority of respondents' comments that "*an automatic power would be too blunt and disproportionate and would impact on mergers which were not likely to be anti-competitive*", noting further that "*having a discretionary power will enable the CMA to decide when to apply the power, thus making it more targeted and increasing its effectiveness*".

8 Paragraph 7.35, Guidance.

9 Paragraph 6.32, OFT 527, *Mergers: Jurisdictional and Procedural Guidance*, June 2009.

10 Paragraph 7.32, Guidance. Emphasis added.

2.5 We also consider that prior engagement with the parties will in some cases be essential in order to avoid the risk of breaching the UK's obligations under the European Union Merger Regulation (***EUMR***). Since Article 21(3) of the EUMR prevents the UK from applying the EA 02 to "concentrations with a Community dimension", before imposing interim measures the CMA must ensure that the transaction does not constitute such a concentration, which will in many cases require it to obtain further information from the parties.

2.6 Given the material impact which the CMA's new powers could have on deal processes, we would urge the CMA to make it clear in the Guidance that it would not use these powers without due consideration to the thresholds above. It therefore follows that sending an Enquiry Letter is not the appropriate trigger for imposing interim measures, without the CMA having also given due consideration to those thresholds.

**Interim measures in anticipated mergers**

*The voluntary nature of the UK merger regime should warrant only exceptional intervention with respect to anticipated mergers and never to prevent completion*

2.7 We are concerned by the suggestion that the CMA may use its interim powers to prevent closing in any circumstance which we consider is inconsistent with a policy of careful targeted intervention within a voluntary merger regime. The CMA notes that it *would not expect generally to impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction (…))*"[11], however:

(a) the freedom for parties to assess the risk of competition issues arising from their transaction and to complete their merger prior to obtaining clearance is a fundamental tenet of a voluntary notification regime. In keeping with this, we suggest that the Guidance makes clear that, in the context of anticipated mergers, interim measures will be imposed in only the most exceptional of circumstances; and

(b) indeed, we do not consider that it could ever be appropriate to use an interim order to prevent completion during a Phase 1 review, as this fundamentally undermines the right of parties to complete mergers if they are prepared to assume regulatory risk:[12]

(i) the CMA itself rightly recognises "*parties' rights to make unconditional bids to acquire share capital or assets, especially common in auction settings*"[13], which would not be compatible with

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11 Paragraph 7.32, Guidance. Emphasis added.

12 This right was explicitly preserved by Parliament in retaining the UK's voluntary merger regime. It is also questionable whether completion could, absent any further action, constitute pre-emptive action within the meaning of the EA 02, and therefore questionable whether any attempted use of the powers to prevent completion would be lawful.

13 Paragraph 7.38, Guidance.

the possibility for the CMA to issue an order to prevent completion of the transaction;[14] and

(ii) it is not clear how such a power would apply in the context of transactions subject to the City Code, which requires bidders in certain circumstances to proceed with a takeover offer.[15] An interim order to prevent completion in this context could lead to conflicting regulatory obligations on bidders and to legal uncertainty for targets and shareholders.

2.8 At an absolute minimum, in order to ensure legal certainty, we would urge the CMA to provide guidance on the exceptional circumstances in which it would consider it necessary to prevent parties from closing a transaction and confirm that it would never seek to impose an order preventing completion in a transaction subject to the City Code.

*The CMA's proposed use of interim measures in anticipated deals is unnecessary and risks derailing deal processes*

2.9 In light of our comments above, we welcome the CMA's indication at Annex C that it "*would not normally expect to make an interim order at Phase 1 in an anticipated merger.*"[16] However, we believe the Guidance should make clearer when it is likely that the CMA would intervene in the context of an anticipated merger. The circumstances in which the Guidance indicates that the CMA might consider an interim order necessary suggests that the CMA could take a more interventionist approach to anticipated mergers than would even a competition authority with suspensory powers.[17]

2.10 In fact, in those circumstances interim measures should be unnecessary as such conduct, if it genuinely raises competition issues (e.g. because it goes beyond what is objectively necessary for commercial due diligence or integration planning), would be sanctioned under the rules on anti-competitive agreements and unlawful exchange of information in any event. We are concerned in particular with any potential use of an interim order to prevent the legitimate exchange of commercially sensitive information between the parties to an anticipated merger. In our view, interim measures in this context are not only unnecessary, they are also likely to impose an undue burden on businesses.

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[14] Indeed, the CMA acknowledges that interim measures should only bite on the ability to integrate post closing, "*whilst leaving parties free to complete mergers if they are prepared to assume regulatory risk*" (paragraph 7.38, Guidance).

[15] Whilst the City Code obliges bidders to include a condition in their offer that the Offer will lapse if the transaction is referred to Phase 2, this may be the only competition-related condition to completion. In those circumstances, the bidder may be obliged under the City Code to proceed to completion once any other conditions are satisfied, even if the CMA has issued an interim order preventing completion.

[16] Paragraph 12, Annex C, Guidance.

[17] Paragraph 12(a) – (d), Annex C, Guidance.

2.11 We note that the Guidance contains a carve-out for exchange of information that "*is objectively necessary for the purposes of commercial due diligence and subject to appropriate limits and confidentiality obligations on recipients of the information*"[18]. There is nonetheless a risk that a prohibition on information exchange could derail deal processes without cause, particularly if the CMA attempts to second guess the parties on what it considers to be necessary commercial due diligence. The judgement as to what is required in the context of due diligence often requires detailed knowledge of the target business as well as other specifics of the deal, and the CMA itself recognises that it will not have such knowledge when considering whether to make an interim order at an early stage. The need for parties to agree individual derogations in relation to specific categories of information would add significant cost and delay to the deal process, as well as to the CMA - given the current Guidance and the potential sanctions available to the CMA, risk averse companies will now necessarily seek such derogations from the CMA.

2.12 We are not aware of any other regime internationally, including mandatory regimes, where intervention in standard mergers and acquisitions has been contemplated to this extent. This makes the UK uniquely uncompetitive in this respect and may deter legitimate corporate activities that benefit UK consumers and the economy. No case has been made to demonstrate that an inability to intervene has been a significant problem for the OFT. Equally, those rare cases in which such intervention could have been helpful to the OFT do not mean that all future merger cases should be subject to this heavy-handed, interventionist approach.

**Need to adopt a more flexible approach to use of template order and derogations**

*The limited derogations process after the event is cumbersome and risks imposing unnecessary delay and cost to transactions*

2.13 With respect to both anticipated[19] and completed mergers, we are concerned by the CMA's proposed use of an interim order including an extensive list of measures, from which parties may subsequently only seek derogations:

(a) the Guidance states that "*parties should not expect that the CMA [will negotiate] with the parties the need for, or scope of, the order at length*

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[18] Footnote 335, paragraph 12(a), Annex C, Guidance.

[19] It is not clear from the Guidance to what extent the CMA would rely on the template order in respect of anticipated mergers. We note that, while the template order at Annex F of the Guidance is stated to be intended for use in completed mergers only, the Guidance suggests that "*many provisions in the template order will be relevant even in the limited cases where an initial order is made in relation to anticipated mergers*" (footnote 148, paragraph 7.40, Guidance). See also paragraph 15, Annex C, Guidance, which states that "*the CMA will normally base any interim measures on the template interim order.*"

*upfront*"[20], and further places a heavy evidential burden on the parties to justify derogations from the template order;[21] and

(b) paragraph 18 of Annex C also makes it clear that the scope for any derogations to be granted from the template order is likely to be limited: "*The 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*."[22]

2.14 This limited derogations process - after the event - does not give parties sufficient comfort that they will be able to advance permissible transactions without unwarranted regulatory intervention. Parties may need to move quickly with their transaction, for example to safeguard the viability of the target business, or ensure that it can operate on a self-standing basis, for example by replacing management, securing the customer base or arranging financing. However, even though the CMA recognises that parties may have a legitimate need to continue integration in such cases,[23] the derogations process is likely to be unduly cumbersome.

2.15 In our view, the process runs the risk of damaging deal timetables and dynamics, imposing a delay and cost to the parties which could well be disproportionate to the low risks to consumer harm arising in the context of the transaction.[24] This is especially likely to be the case in the context of anticipated mergers, where we consider it particularly important that the CMA engages with the parties to agree the scope of any interim measure, prior to its imposition.

*The CMA should offer parties an opportunity to engage with it to tailor interim orders to the facts of their case, if only for a limited period*

2.16 We consider that, while it may be helpful to refer to the template order as a starting point, the CMA should give parties a greater opportunity to engage with the CMA in advance of any orders being imposed to agree interim measures specifically tailored to the facts of their case, thereby allowing the CMA the necessary time better to understand the deal context and the status of, and relationship between, the parties.

(a) In the context of completed mergers, this "window for discussion" could be as short as 48 hours.

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20 Paragraph 7.41, Guidance.

21 We consider that this position goes further than major international mandatory regimes (e.g. the EUMR and US) in preventing implementation steps here that that would not be considered to breach the suspensory obligation in those regimes.

22 Such a position applied to an anticipated merger would cut across the Government's intention for a voluntary merger regime by, for example, preventing parties from completing transactions.

23 Paragraph 16, Annex C, Guidance.

24 We note that further costs would arise in circumstances where the CMA would impose a hold separate manager and/or monitoring trustee to oversee implementation of interim measures, at additional cost to the parties.

(b) With respect to anticipated mergers, the CMA could consider extending this period to at least five working days - recognising the necessarily exceptional nature of interim measures in this context.

2.17 Merging parties would very much welcome even such a limited opportunity for discussion with respect to the necessity and scope of any interim order. Moreover, this would help strike a more appropriate balance between the CMA's powers to intervene much earlier in a transaction, and parties' continued expectation that they should not run the risk of disproportionate regulatory intervention. Such limited prior engagement with the parties should not jeopardise the target business or run the risk of causing irreversible long-run harm to consumers.

2.18 Moreover, the CMA could retain flexibility to intervene exceptionally and without such engagement, on the very rare occasions where there is a real risk of immediate irreversible harm occurring. The CMA's current proposal to impose interim orders without such prior engagement in cases when it has sent an Enquiry Letter would lead to significant costs for the overwhelming majority of parties seeking to cooperate in good faith, and therefore appears to be disproportionate given the very limited number of cases in which there may be a material risk of immediate and irreversible pre-emptive action. We consider that this would lead to worse market outcomes given that the benefits of preventing irreversible pre-emptive action in that small minority of cases should be set against the risk that the cost and delay associated with a derogations process could affect target businesses' ability to compete, as well as potentially deterring rescue bids.

**Unwinding orders**

2.19 The Guidance does not discuss in any detail the circumstances in which an unwinding order may be made, either at Phase 1 or at Phase 2. With respect to Phase 1 orders, the Guidance merely states that these would in general only be sought in "*limited circumstances*"[25]; there is no discussion of unwinding orders at Phase 2, other than some illustrative examples of action taken under the previous legal framework.[26]

2.20 Further guidance on this issue is essential - this represents a significant new legal risk for parties considering transactions with a UK nexus. Again, the ability to unwind transactions is at risk of undermining Government policy for a voluntary merger regime by introducing *de facto* mandatory notifications. We are concerned in particular that the new Guidance represents a significant lowering of the threshold for this extremely intrusive measure. For example, previous OFT/CC guidance referred to the need for "*compelling risks*" to justify the use of intrusive powers in the context of interim measures.[27] Given the draconian effect of measures to unwind actions

[25] Paragraph 7.32, Guidance.

[26] Paragraph 31, Annex C, Guidance.

[27] See paragraph 6.26, OFT 527, *Mergers: Jurisdictional and Procedural Guidance*, June 2009: "*Absent compelling risks analogous to those in CC guidance on the use of the hold-separate manager or other more intrusive powers in the context of interim undertakings, the OFT would not seek to achieve an unwinding of integration that has already occurred, but would instead leave such action to the CC in the event of reference*."

already taken by merging parties, the bar for intervention should be even higher than in respect of forward-looking interim measures.

## 3. UNDERTAKINGS IN LIEU

3.1 We broadly welcome the revised process for agreeing UILs set out by ERRA 13 and the Guidance:

(a) the new statutory timetable should help provide timing certainty for notifying parties; and

(b) the explicit opportunity to review the SLC decision before offering remedies will help parties tailor their remedy offers.[28]

3.2 We welcome the suggestion that the CMA will seek to provide guidance to the parties and be as transparent as possible as regards its thinking throughout the process in order to facilitate the offer of appropriate remedies.

3.3 However, we are concerned that:

(a) the apparent lack of substantive engagement by case teams with parties during the formal UIL process;

(b) the CMA's apparent removal of the opportunity for parties to put forward more than one remedy offer for consideration[29] with its emphasis on "best"[30] and/or "clear cut"[31] offers;

(c) the CMA's narrow approach to 'near miss' remedy offers which are capable of being successfully amended to meet the CMA's approval;[32] and

(d) a very short timetable,

together run the risk of: (i) parties offering remedies materially in excess of that required to remedy the identified SLC; and (ii) cases going to Phase II unnecessarily.

3.4 We believe that disproportionate remedies and unnecessary merger referrals do not deliver appropriate policy outcomes, effective administration or an appropriate burden on business and so run counter to the fundamental principles underpinning the CMA's new approach to merger control.

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28 Paragraph 8.12, Guidance.

29 Paragraph 8.18, Guidance.

30 Paragraph 8.19, Guidance.

31 Paragraph 8.12, Guidance.

32 The CMA notes in the Guidance the public policy benefits of successful remedy negotiations which can avoid the need for a Phase 2 reference. However, it goes on to state that it will be "rare" that the CMA considers the single permitted remedy offer will be a 'near miss' capable of being successfully modified (paragraph 8.20, Guidance).

*A) Lack of engagement by the CMA means that parties may not know what constitutes the 'best' and 'clear cut' remedy*

3.5 Once an SLC decision has been made, the Guidance appears to place the burden firmly on the parties to offer remedies that 'clear the bar' by some distance to avoid any risk of referral. There appears to be limited opportunity for engagement with the CMA on the formal remedies to be considered during the mandated five working day period. Receipt of an SLC decision does not, contrary to the presumption in the Guidance, mean the parties will necessarily know what remedy will be required to satisfy the CMA (e.g. where a range of different business assets could be packaged in a divestment remedy).

3.6 Additionally, under the draft Guidance, the parties will have had access only to the case team and not the decision maker and therefore will not necessarily have information from the case team on the structure of remedies that properly reflect the view of the decision maker. Therefore, there should be an opportunity to address the decision maker about remedies directly (please see our further comments in Section 6).

*B) Little or no opportunity to submit more than one remedy offer*

3.7 It is clear from the EA 02 (as amended), that the CMA is required to have regard to the need for "*as comprehensive a solution as is reasonable and practicable*"[33] when considering UILs. This requirement has consistently been interpreted by the OFT and Competition Commission as a requirement to ensure that any UILs are proportionate to the concerns identified, and that parties should not need to offer remedies that go beyond this.[34] It is based on this proportionality requirement that the OFT has been prepared to consider a range of alternative remedy options, from which it would select the least intrusive option.[35] This statutory duty has not been amended by ERRA 13.

3.8 We disagree with the CMA's contention that there is insufficient time in the statutory timetable to review more than one remedy offer:[36] the CMA will have at a minimum five working days, and up to ten working days, which is more than

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33 Section 73(3) EA 02.

34 The OFT states, in its guidance on exceptions to the duty to refer and undertakings in lieu of reference, which the CMA proposes to adopt unaltered, that "*the Act is clear that the purpose of the undertakings in lieu must be to remedy, mitigate or prevent the substantial lessening of competition concerned or any adverse effect which has or may have resulted from the merger or may be expected to result from it. It is therefore incumbent on the OFT to ensure that any undertakings in lieu are proportionate to the concerns identified in its decision. The scope of the undertakings in lieu should not go beyond what is necessary in order to remedy identified competition concerns in any particular case.*" (paragraph 5.15, OFT 1122, *Exceptions to the duty to refer and undertakings in lieu of reference guidance*, December 2010). Similar statements are made in the Competition Commission's Guidance on Merger Remedies (paragraph 1.9, CC 8, *Merger Remedies: Competition Commission Guidelines*, November 2008).

35 Paragraph 5.16, OFT 1122, *Exceptions to the duty to refer and undertakings in lieu of reference guidance*, December 2010.

36 Paragraph 8.18, Guidance.

adequate to review more than one remedy offer in order to reach its 'in principle' decision concerning an acceptable UIL and consistent with timetables for this part of the process in other leading merger control jurisdictions (e.g. EUMR).

3.9 We fear that if the CMA is unwilling to engage fully with parties and review more than one remedy offer, this may lead to parties 'overshooting' to 'clear the bar' and avoid any risk of referral. We consider this risk (and therefore the potential to damage the benefits arising from the merger unnecessarily) is unlikely to outweigh the burden to the CMA of considering more than one remedy offer.

*C) CMA's narrow approach to 'near miss' offers is unmerited and may lead to unnecessary Phase 2 referrals*

3.10 ERRA 13 introduced an express discretion for the CMA to suggest modifications to proposed UILs.[37] The CMA has interpreted the scope of this discretion unduly narrowly, noting that it expects the circumstances in which it would exercise this discretion to be "rare". There is no basis for such a narrow interpretation. In fact, we consider the proportionality requirement, outlined in paragraph 3.7 above, requires the CMA to exercise this discretion widely. It is in neither the CMA's interest to use public money, nor in the parties' interest in terms of time and expense, to undergo a Phase 2 process when the parties would be willing to offer a remedy that would adequately address the competition concerns indentified. More engagement, rather than less, on proffered remedies that do not address the concerns identified, is in the best interest of all stakeholders.

*Key recommendations for the revised UIL process*

3.11 We consider that the CMA should be open to greater engagement with parties to ensure proportionate remedies, where possible, can be agreed in the tight timetable following an SLC decision.

3.12 We also think the Guidance should be amended to ensure proportionate remedies can be reached within the tight timetable.

(a) The Guidance should be amended to guarantee that the CMA will review up to three remedy offers formally offered by the parties.

(b) The CMA should explicitly commit to offer to engage with the merging parties in order to seek to reduce the scope of any excessive remedy offer having regard to the CMA's analysis of what is required to remedy the SLC identified. If the CMA is willing to engage with up to three remedy offers, we would expect that it would rarely need to meet this obligation.

(c) The proposed one working day time period in which to agree an improved 'near miss' remedy offer[38] is insufficient time for parties to consider UIL amendments proposed by the CMA. Senior management at the notifying

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[37] Section 73A(2)(a) EA 02.

[38] Paragraph 8.20, Guidance.

company will be required for such key commercial discussions and so this period should be increased to at least three working days (provided this does not exceed the ten working day timetable).

*Process and timetable for upfront buyers requires further clarity*

3.13 We think that the revised upfront buyer process would benefit from further detail in the Guidance. It is unclear:

(a) how long the "*short, individually-determined period*" is for the parties to find a suitable upfront buyer.[39] The commercial difficulties of identifying and negotiating a sale with potential purchasers means that we believe the CMA should explicitly provide for a minimum of 30 working days for parties to identify an upfront buyer and be sensitive to the commercial dynamics in agreeing a longer initial period and/or any extension to that time; and

(b) how the CMA will typically structure milestones for the divestment process.[40] Again, it would be helpful if explicit reassurance could be given to business that the CMA recognises that the incentives of the buyer may differ from those of the seller and that it will engage with the seller in structuring these milestones, recognising that not all cases are the same.

3.14 We suggest that where the CMA requires an upfront buyer remedy, the Guidance should explicitly state that the additional 40 working day UIL period will be routinely invoked. The commercial realities of agreeing an acceptable divestment sale with both the CMA and an upfront buyer before its subsequent execution mean that meeting the 50 working day timetable will likely prove exceptionally challenging. We do not think it is in the public interest that, where a suitable remedy has been identified, such a remedy would be rejected because the 50 working day period is insufficient time to finalise terms with the upfront buyer and the CMA.

3.15 We also suggest that the Guidance should explicitly recognise that, if the CMA decides that an upfront buyer is required but the parties have not offered this in their remedy proposal, such a scenario would be considered a 'near miss' scenario capable of being rectified under the procedure set out in paragraph 3.20 of the Guidance.

*Monitoring trustees – not always merited*

3.16 We think it unnecessary that monitoring trustees should "*typically*" be required in upfront buyer remedies in anticipated mergers:[41] by its nature, the parties will already be actively engaged in the UIL process and in dialogue with the CMA. They are also clearly incentivised to make the remedy work in order to avoid a Phase 2 reference. As such, the imposition of a monitoring trustee, without further good cause (e.g. where there has been a material lack of cooperation from the parties)

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39 Paragraph 8.33, Guidance.

40 Paragraph 8.34, Guidance.

41 Paragraph 8.33, Guidance.

appears to be an unwarranted additional cost for the parties. In our experience, agreeing the terms of the trustee's appointment is also likely to delay the UIL process further.

*Draft remedies form – overly demanding and prescriptive given the tight timetable*

3.17 The Guidance requires remedy offers to be made using the template Remedies Form. We consider that the information set out in the template exceeds what is required in the majority of cases to allow the CMA to consider a remedy offer properly. It goes beyond what has traditionally proven necessary in UIL discussions with the OFT, and runs the risk of obviating the timing benefit that having five days to offer commitments otherwise gives the parties. We are happy to discuss with the CMA in detail which elements of the template Remedies Form we consider should be amended.

3.18 In any event, given the extensive detail required for a complete form within a very tight timetable, we would suggest that the Guidance explicitly acknowledges that:

(a) the parties must use best endeavours to provide as complete a Remedies Form as possible within the five working day timeframe;

(b) the parties must be prepared to supplement the remaining information, where reasonably required to do so by the CMA, as quickly as practicable thereafter; and

(c) failure to provide all of the information set out in the Remedies Form within the five working day timeframe will not automatically invalidate the remedy offer.

3.19 If necessary, the CMA can rely on exercising its powers pursuant to section 109 EA 02 to halt the statutory timetable should any parties fail to provide the information promptly after the five working day period.

## 4. TRANSITION FROM PHASE 1 TO PHASE 2 REVIEW

4.1 We welcome the CMA's efforts to reduce the burden on the notifying parties, through its stated intention to avoid duplication of the provision of information in the transition from a Phase 1 to a Phase 2 merger review; in particular:

(a) the ability for the notifying parties to cross-refer to information previously provided in their Phase 1 submissions in their initial Phase 2 submission;[42] and

(b) confirmation that during the Phase 2 investigation the CMA will continue to use information previously provided by the parties during the Phase 1 investigation.[43]

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[42] Paragraph 11.23, Guidance.

[43] For example, paragraphs 11.2, 11.7 and 11.14, Guidelines.

4.2 Whilst we support the CMA's objective of avoiding unnecessary duplication, we do have a significant concern regarding the CMA's proposal to retain members of a Phase 1 case team to work on a subsequent Phase 2 investigation should a merger be referred, without further guidance as to which and how many members this will be. Lord Currie has explicitly stated that the CMA will "*ensure that [it] respect[s] the importance of phase separation, preserving the role of the independent panel at phase 2 in mergers and markets cases, and safeguarding – even beyond such separation – against risks of confirmation bias.*"[44] We are concerned that the transfer of any key case team members (particularly at senior level) from Phase 1 to Phase 2 will undermine this phase separation and will result in confirmation bias by hindering the ability of the Phase 2 case team to assess the case 'afresh' and therefore unavoidably compromising the independence of the Phase 2 panel. We do not consider that a change in the decision maker alone is sufficient to achieve a fresh review.

4.3 In order to mitigate the risks of confirmation bias in the unitary authority, we suggest that the CMA provide further guidance as to which, and how many, members of the Phase 1 case team can transfer to the Phase 2 case team. In particular, we propose that the Guidance should make clear that:

(a) no members of the senior Phase 1 case team will transfer to the Phase 2 case team (i.e. specifically the inquiry director, senior economist, and other key influencing team members should be new personnel in a Phase 2 case team); and

(b) only a minority of the junior members of the Phase 1 case team will transfer to the Phase 2 case team.[45]

4.4 We believe that by restricting both the number, seniority and professions of CMA personnel that can transfer from the Phase 1 to the Phase 2 process, the CMA will be able to mitigate the potential for confirmation bias, without undermining the CMA's well-received attempts to minimise duplication between the phases. Moreover, we consider that the potential for duplication between the two case teams can be mitigated operationally at the CMA through new, improved IT systems of the unitary body.

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[44] Opening remarks of Lord David Currie at the launch of the consultation on part 1 of the CMA guidance, 24 July 2013, available at https://www.gov.uk/government/speeches/competition-and-markets-authority-guidance-consultation-launch.

[45] We think that once the CMA has had the opportunity to clarify typical Phase 1 and Phase 2 team structures, it will be better able to prescribe which team members should be allowed to transition across from Phase 1 to Phase 2. In the meantime, best principles should dictate that no senior, opinion-forming team members should transition across to Phase 2.

## 5. INFORMATION BURDEN ON BUSINESS AND THE CMA

### Overview of key issues

5.1 Following its consultation on the current reforms to the competition regime in the UK, BIS stated in its final proposals for reform that a key benefit of the CMA would be a "*Faster, less burdensome process for business*".[46] Lord Currie echoed this sentiment in his opening remarks to this Consultation, explicitly recognising that the CMA needed to mitigate the burden on business imposed by the UK merger regime.[47] However, a number of the proposals contained in the Guidance appear to achieve exactly the opposite result by:

(a) substantially increasing the information burden on notifying parties in terms of both the volume and type of information now required to satisfy the revised draft template Merger Notice for a Phase 1 merger review;

(b) substantially increasing the level of engagement required in all cases between the CMA and the notifying parties in the pre-notification process, both through the envisaged minimum two week timetable and the (inevitable) discussions concerning derogations required from the information obligations of the Merger Notice; and

(c) having to deal as a matter of course with interim measures, with the attendant delay and inconvenience described in detail in Section 2 above.

5.2 We have set out in detail below how we believe the pre-notification process and draft Merger Notice should be amended to ensure the burden on both the business community and the CMA itself is manageable and not disproportionate to the CMA's statutory objectives for the Phase 1 review.

### Pre-notification process

5.3 We broadly agree with the potential benefits afforded by the pre-notification process set out at paragraph 6.41 of the Guidance.[48]

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[46] Page 5, Department for Business, Innovation & Skills, *Growth, Competition and the Competition Regime*, Government Response to Consultation, March 2012.

[47] "*We recognise that gathering the necessary evidence in order to reach those decision can be time-consuming and impose a burden on business as well as on the CMA. We therefore intend to look closely at the way we select cases, the speed of our investigations and the way we gather and manage information, seeking in particular to exploit the opportunities presented by a new merged organisation*". Opening remarks of Lord Currie at the launch of the consultation on part 1 of the CMA guidance, 24 July 2013, available at https://www.gov.uk/government/speeches/competition-and-markets-authority-guidance-consultation-launch.

[48] Our specific reservations about the CMA's process for derogations and customised evidence are discussed further at paragraphs 5.16 to 5.23 of this response below.

*Increased engagement during pre-notification will prove a significant burden on notifying parties*

5.4 We believe the extent of pre-notification envisaged by the Guidance:

(a) increases the burden on the notifying parties without commensurate benefits to the CMA; and

(b) introduces an unnecessary degree of uncertainty to the timetable of notified transactions.

5.5 We welcome the CMA's explicit invitation to notifying parties to engage in more detailed pre-notification discussions for potentially problematic merger cases:[49] there are clear benefits for both sides in maximising engagement prior to the statutory Phase 1 review period. However, an opportunity to discuss the substantive issues of a merger at the pre-notification stage must be balanced with the notifying parties' desire (and need) to notify a merger formally, for example, where a deal timetable requires this. The CMA should not use this opportunity for early engagement to delay formal submissions where the Merger Notice information requirements have been adequately met and the parties wish formally to notify in order to commence assessment of the merger. The CMA has sufficient opportunity in its statutory 40 working day review period (significantly longer than many Phase 1 reviews in other jurisdictions, including the EU) to conduct its analysis, and to ask further questions as it sees fit.

5.6 The CMA appears to be adopting a similar approach to the EUMR pre-notification process. Therefore, in order to mitigate the concerns indentified above, we consider that the CMA should commit at least to the level of responsiveness promised by European Commission best practices. In particular, we believe that the Guidance should explicitly commit case teams to engage actively with notifying parties throughout the process and to provide any responses to any requests or queries by the notifying parties (e.g. derogation requests) within three working days.[50]

5.7 We would also suggest that the Guidance for the new case team allocation procedure,[51] where the parties have provided reasonable justification for its urgency, commits the CMA to confirming the identity of the case team within one working day of the parties' request.

*Certain merger circumstances merit specific pre-notification treatment from the CMA*

5.8 We would suggest that the Guidance explicitly minimises its expectations of pre-notification engagement for merger cases where there are no substantive competition issues. Given the CMA's significantly increased interim powers, we believe that notifying parties will increasingly notify "no issues" / "technical" mergers

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49 Paragraphs 6.43 and 6.51, Guidance.

50 Such a time period is in line with paragraph 14, the European Commission's Best Practices on the Conduct of EC Merger Control Proceedings, 20 January 2004, available at http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

51 Paragraphs 6.47, Guidance.

because the risks and costs of CMA intervention derailing deal timetables will outweigh the costs of a straightforward notification. Being unable to start the formal clock running in cases such as this is a major frustration with the current EUMR process and it would be unfortunate were this to be repeated by the CMA. Therefore, we would suggest that the Guidance explicitly:

(a) provides for additional flexibility in the pre-notification process; and

(b) permits a shorter pre-notification period.

5.9 Likewise, notifications made by parties involved in transactions governed by the City Code[52] also require modified treatment by the CMA. Given that the statutory review period has increased this has resulted in the duration of the pre-notification period and the start of the CMA's statutory timetable being more critical to parties' abilities to execute a City Code transaction. Typically, parties will aim to receive all regulatory clearances before Day 60 of the City Code (and often significantly in advance of this date). The statutory review period for a Merger Notice (the normal notification route for a City Code transaction) has increased from 30 working days (i.e. Day 42 in a City Code timetable) to 40 working days (i.e. Day 56) based on notification to the CMA occurring simultaneously with posting of the 'Offer'. This means there is very limited scope for either delay to the statutory timetable and/or dealing with a subsequent UIL process.

5.10 We recognise that the Panel on Takeovers and Mergers has the ability to stop the Code timetable. However, given (i) the potential for conflict between the Code timetable and its rules, and the CMA's statutory timetable, and (ii) that stopping the Code timetable remains wholly at the Panel's discretion, we think that the Guidance needs to go further than paragraph 6.67 in explicitly accommodating City Code transactions; in particular:

(a) an explicit recognition that speed and flexibility is crucial as well as a willingness to engage with the parties;

(b) application of the pre-notification procedures to ensure that parties can start the statutory timetable by a date no later than posting the offer document;

(c) the CMA's agreement that it will declare the merger notification "complete in principle" in advance of formal submission so that the parties can be certain when the statutory timetable will begin (i.e. the working day after they choose to submit formally); and

(d) flexibility in the CMA's approach in cases where UILs may be required, in order to try to get agreement in principle before day 60 - this is likely to involve speeding up the process by around 8 working days.

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[52] The City Code on Takeovers and Mergers, 20 May 2013, available at http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf

*Confirmation of a complete Merger Notice*

5.11 The Guidance envisages that the CMA will have a five to ten working day time period in which to confirm whether a Merger Notice or notification is complete and that its statutory timetable will start on the day after it gives this confirmation.[53] We consider this to be unacceptably long for notifying parties for the following reasons:

(a) it does not commit the CMA to a time limit: the Guidance states this will only be a guide for the CMA's response time ("*generally expected to be some five to ten working days" / "generally within five to ten working days*" [54]);

(b) notifying parties are expected to engage actively with the CMA during the pre-notification period, during which time the CMA will likely discuss the information required as well as specific derogations from the Merger Notice with the parties. This should obviate the need for such a long period for the CMA to confirm a merger notification is complete once submitted; and

(c) it should be made clear that there is only one such review period for the CMA rather than a series of successive review periods following the submission of updated drafts of a merger notification seeking the case team's sign-off for formal submission. While a five working day period to review the first draft notification is understandable, there is no justification for such a long review period for subsequent drafts – the process outlined in the Guidance could readily lead to a delay of at least 20 working days (i.e. a month) for just two draft submissions before the statutory clock can start *in addition* to any period of pre-notification discussions that have taken place prior to submission of a Merger Notice / merger notification that the parties consider to be complete.

5.12 Therefore, we urge the CMA to revise this time period to be no more than five working days, a time period which is in line with EUMR best practices.[55] Under the EA 02 (as amended), the CMA already has 40 working days for its Phase 1 review - 15 working days longer than under the equivalent EUMR process - and therefore ample opportunity to ask any further questions that arise. Additionally, it is worth noting that current EUMR practice is to back date the start of its formal Phase 1 review timetable to the date of submission, rather than the date of its confirmation that the submission is complete – even under our revised proposals, statute gives the CMA a further five working days for review from the date of a complete submission in comparison with the EUMR.

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[53] Paragraphs 6.49, 6.52, 6.53 and 6.58, Guidance. We have understood the 5 to 10 working day period detailed in paragraph 6.58 of the Guidance to relate to the time period for which parties will need to wait for the CMA's confirmation of a complete Merger Notice / notification. To the extent that the CMA means that this period relates to timings post confirmation of a complete Merger Notice / notification, then we consider that this time period is unacceptable and should be no longer than three working days.

[54] Paragraphs 6.49 and 6.58 respectively, Guidance.

[55] Paragraph 15, the European Commission's Best Practices on the Conduct of EC Merger Control Proceedings, 20 January 2004, available at http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

## Merger Notice

5.13 We welcome the CMA's flexibility, set out in the Guidance, as to the precise form of a merger submission.[56] We remain concerned however that moving from the OFT's current holistic approach, designed to focus a submission on relevant substantive competition issues, to a detailed check list of information set out by the Merger Notice will result in a disproportionate burden on the notifying parties during the Phase 1 review process.

*Burdensome new information requirements*

5.14 In particular, we are concerned about the increased volume of information required by the draft Merger Notice and its accompanying guidance notes.[57] We recognise that the CMA's intention is to detail its information requirements fully to ensure that notifying parties and practitioners are well placed to prepare 'complete' submissions.[58] However, the draft Merger Notice has the potential to require a disproportionate level of information from the parties in most cases, thereby greatly increasing the regulatory burden – this is clearly at odds with the fundamental aims of the draft Merger Notice set out in the Consultation.[59]

5.15 Additional information set out in the body of the draft Merger Notice both codifies information that under the existing regime is only suggested for inclusion ("*neither prescriptive nor exhaustive*") by the OFT's current jurisdictional guidance[60] and also includes material new information. Pursuant to section 96(2) EA 02, all of this additional information is "*prescribed information*" for the purposes of EA 02, and is therefore required to be included for a 'complete' Merger Notice under EA 02.

*Derogations are unlikely to reduce the new information burden*

5.16 The Guidance anticipates that this concern will be addressed by a system of derogation. However, based on our experience we anticipate, given the preliminary nature of a case team's assessment of a merger during the pre-notification process, that:

(a) there will be a step change compared with the current regime in the amount of information expected by case teams for a complete merger submission in most cases;

(b) less experienced case team members will, as a default, err on the side of caution in the derogation process. Based on experience, we anticipate that

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56 Paragraph 6.56, Guidance.

57 For example, the CMA requires all supporting documents prepared by or for the notifying parties assessing the merger whomever their intended audience and the CMA could now easily request in excess of 100 customer and competitor contact details.

58 Paragraph 3.20, Consultation and OFT remarks at the CMA consultation launch, 24 July 2013.

59 Paragraph 3.20, Consultation.

60 Chapter 5, OFT 527, *Mergers: Jurisdictional and Procedural Guidance*, June 2009.

they will be reluctant to grant appropriate derogations rather than use the statutory Phase 1 review period to ask further questions as they arise; and

(c) the pre-notification period will be routinely delayed by protracted negotiations concerning appropriate derogations, even in straightforward cases.

5.17 In our experience of anticipated mergers, notifying parties typically start preparing merger submissions in advance of contacting the OFT about the merger. The derogations process will therefore materially increase uncertainty for notifying parties as to the content necessary for a complete merger submission: the parties will be left with an unhelpful choice between expending unnecessary time and cost on preparing a full merger submission or risking material additional work late in pre-notification when derogations have finally been settled. Should the CMA persist with the derogation process, then a senior case team member should be available for all such discussions and the Guidance should commit the case team to reach a decision about any requests within two or three working days of being asked.[61]

*A significant burden on the CMA too*

5.18 As well as the impact on the notifying parties, we are also concerned that the extended pre-notification process, coupled with the significantly increased information requirements, will unnecessarily burden the CMA at the Phase 1 merger review stage when such detailed scrutiny is not merited.

5.19 We also query the impact on CMA resources and its ability to carry out an efficient and timely Phase 1 review even within its materially extended 40 working day timetable: it is conceivable that the CMA will need - often without reason - to engage with multiple work-streams on a given merger review, e.g. dealing with interim orders, derogations and draft merger submission discussions as well as an extensive document review exercise at the start of a review process. Addressing this through an extended pre-notification process would not be a satisfactory solution for business.

*Key recommendations*

5.20 Therefore, we strongly urge the CMA to revert to the previous approach of the OFT where guidance on the contents of submissions was given but the OFT did not set out an exhaustive checklist of information in the Merger Notice required for a 'complete' merger submission.[62] It is always open to a case team to require further information during pre-notification discussions or during the review period.

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[61] Should the CMA retain the formal derogations process, these two procedural safeguards should also apply to derogations.

[62] Chapter 5, OFT 527, *Mergers: Jurisdictional and Procedural Guidance*, June 2009.

5.21 The CMA would still be free to place all new information included in the draft Merger Notice which exceeds the information detailed in the existing Merger Notice (December 2010):

(a) in the guidance notes to the draft Merger Notice and these guidance notes should no longer be considered part of the formal Merger Notice; or

(b) in an annex to the Guidance.

5.22 However, in both cases, this information should then be considered "*neither prescriptive nor exhaustive*" by the CMA in line with current OFT practice rather than "*prescribed information*" for the purposes of the EA 02.[63] This would still provide "*clear guidance as to the type of information that the CMA may require for the purposes of a Merger Notice*"[64] as well as serving as a frame of reference for the case team in its discussions with the notifying parties as to the completeness of the Merger Notice but would not disproportionately burden, and cause uncertainty to, merging parties in all cases.[65]

*Certain merger circumstances merit specific treatment from the CMA*

5.23 The CMA should acknowledge in the Guidance that:

(a) for transactions that involve "no issues" / "technical" notifications (described more fully at paragraph 5.8 above), the information burden will be significantly reduced and derogations will be readily granted; and

(b) in hostile takeover situations, it will be unlikely that the buyer can complete a Merger Notice/merger submission in full because of a lack of access to information concerning the target business. Therefore, we suggest the CMA should commit in the Guidance to agree derogations in light of this reduced

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63 Paragraph 5.1, OFT 527, *Mergers: Jurisdictional and Procedural Guidance*, June 2009.

64 Paragraph 3.20, Consultation.

65 Nevertheless, we have listed examples of the information that should not be routinely required for Phase 1 merger review and so removed from the Merger Notice: **paragraph 12**: supporting documents "*should include but not necessarily be limited to […] documents prepared by or for personnel working on the transaction*" – too widely construed, this will place a disproportionate burden on parties to collate; **paragraph 13**: competition analyses for the last three years – too widely construed with older reports likely to be of limited use and/or application to current market dynamics, while sophisticated competition analyses are the province of large and relatively rich businesses: we are concerned that adverse inferences will be drawn from the absence of this type of work; **paragraph 14**: parties' marketing and advertising strategies; **paragraphs 18ff and 30ff**: the level of information mandated by the guidance notes to the Merger Notice to analyse horizontal and vertical effects, which is imprecisely required "where relevant", is likely to be overly burdensome on parties (for example, providing variable profit margins, see Guidance Notes 10, 17); **paragraph 22**: any internal documents relating to the parties' expansion plans - too widely construed and will place a disproportionate burden on parties to collate; **paragraph 32**: any documents analysing potential merger efficiencies - too widely construed and will place a disproportionate burden on parties to collate; and the potential breadth of contact details envisaged by the Guidance Notes.

access to target information and, in the event of a transaction governed by the City Code, in advance of the offer being posted.

### Merger review burden on third parties

5.24 We are also concerned about the CMA's intention to use its significantly expanded powers of investigation, pursuant to section 109 EA 02 (as amended by ERRA), to require third parties now to give evidence and/or produce documents during pre-notification and the Phase 1 review.[66]

5.25 Most non-notifying parties recognise the importance of responding to third party information requests from the OFT and/or CC under the current regime, but this is often a costly and time-consuming exercise for management. Therefore, we consider that it would place a disproportionate and costly burden on business to use section 109 EA against third parties, which have not sought to intervene in a merger review, unless otherwise absolutely necessary.

5.26 Therefore, we suggest that the Guidance explicitly recognises that the CMA:

(a) will contact third parties informally in the first instance rather than using its section 109 powers, for example through the existing use of merger questionnaires; and

(b) will be proportionate in its use of section 109 EA 02 against third parties and only where third parties have failed to provide adequate information within a reasonable timeframe.

## 6. ACCESS TO THE DECISION MAKER IN PHASE 1

6.1 In our view, the CMA has missed a key opportunity in the revised Guidance to grant notifying parties additional access to the decision maker during the Phase 1 review process.[67] We consider that this will improve the decision-making for all parties, including the CMA, without disproportionately adding to the burden of the decision maker.

### Access to the decision maker at the issues meeting

6.2 We suggest that, as a minimum, notifying parties have access to the decision maker at the issues meeting.

(a) First, the issues meeting represents the best opportunity for the decision maker to hear the notifying parties' case directly from the parties. We believe that this is vital in a fair and balanced decision making process. While we

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[66] Specifically, paragraph 7.12 of the Guidance, which states: "*The CMA's powers to require a person to submit information or documents, or to give witness evidence, can apply to third parties as well as the merging parties. The CMA will consider using its section 109 powers in relation to third parties where it considers such evidence to be necessary for its decision, and has doubts about whether it will receive a full or timely response to an informal request*."

[67] Paragraph 7.52, Guidance.

acknowledge that the "devil's advocate" is helpful in the current process, notifying parties will always be best placed to argue their own case.

(b) Second, the issues meeting would provide the decision maker with the opportunity to question the notifying parties directly. Whilst the decision maker already has access to the case team in order to ask them further questions or clarify any points concerning a case, he does not currently have a formal opportunity to do likewise with the notifying parties. The decision maker's presence at the issues meeting would afford him this opportunity, enabling him properly to evaluate and understand the parties' evidence and arguments first hand. Not only would this enhance the fairness and robustness of the decision, but it would also be seen to do so, which would be very much welcomed by the CMA's users.

**Access to the decision maker at the UIL stage**

6.3 Additionally, it would be highly beneficial if notifying parties were also to have access to the decision maker during the five working day period after the SLC decision in which the parties must finalise any UIL offer. This would allow the parties to discuss possible remedies with the decision maker and to increase significantly the confidence of the parties that any remedy offer would be considered fully to address the identified competition concerns.

6.4 Our experience of the current regime is that the case team often tells the notifying parties that they cannot give comfort whether a proposed UIL will remedy the competition concern identified, and that this is a matter for the decision maker alone. There is tension between this and the new regime where, as described above in Section 3, the Guidance says that parties are expected to know what remedies will be required – this tension would be resolved if the parties had access to the decision maker at the UIL stage.

6.5 Given the CMA's recognition of "*the significant public policy benefits (to consumers, the parties and the public purse) that are achieved through the UILs process*",[68] we believe that granting access to the decision maker at the UIL stage would greatly enhance the ability of the parties to offer suitable remedies and therefore assist the CMA to meet its objectives.

6.6 The administrative cost of granting access to the decision maker at these two key stages in the Phase 1 investigation is relatively small in comparison with the large burden placed on the time and resources of both the parties and the CMA should the merger be referred unnecessarily to a Phase 2 investigation.

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[68] Paragraph 8.20, Guidance.

## 7. MISCELLANEOUS PROVISIONS

### Issues letters and issues meetings

7.1 The CMA is proposing a minimum period of two working days between receipt of the issues letter by the parties and the date of the issues meeting.[69] It is critical to a robust merger review process that the parties are able to put forward their most considered case at the issues meeting given that it represents the most detailed discussion with the CMA of the substantive competition concerns. We do not consider that a period of two working days provides the parties with sufficient time to analyse the CMA's issues letter and prepare effectively for the issues meeting.

7.2 Therefore, we propose that the CMA commits to providing five working days between the issues letter and the issues meeting to ensure that the parties have sufficient time to prepare. A period of five working days at this stage will allow for the formulation of the parties' arguments and, if necessary, the careful consideration of appropriate UILs. This could save both the CMA and the parties significant costs in both time and resources if it avoids the need for a subsequent Phase 2 investigation.

7.3 Furthermore, we consider that given the importance of the issues meeting and the short time available for the parties to prepare their response to the issues letter and, in most cases, for the meeting itself, the format and content of the issues letter is crucial in order to allow parties and the CMA to focus on the key competition issues raised by the merger. We therefore welcome the CMA's commitment "*wherever possible to limit the content of the issues letter to include only theories of harm that are genuinely of concern or of potential concern*", as well as to "grade" or "rank" issues where appropriate.[70] However, we have two key concerns about the OFT's current approach to issues letters, which we consider it would be helpful for the CMA to address:

(a) whilst the OFT already makes the same commitments as to what theories of harm are included in issues letters, in practice our experience has been that issues letters typically include a long tail of potential theories of harm, which would not realistically form the basis of an SLC decision. Seeking to address these theories of harm can divert significant time and resources from the parties' response to the core issues in the case and during the issues meeting. We would encourage the CMA to focus issues letters to ensure that they include only those theories of harm that could realistically form the basis of an SLC decision; and

(b) the OFT's presentation of only the case for an SLC decision, without reference to the exculpatory evidence and arguments submitted by the parties, means that parties cannot know whether the CMA has properly taken account of that evidence, or what interpretation the case team places on it. This again diverts significant time and resources as parties typically feel obliged to restate all of their exculpatory arguments and evidence, rather than focusing on key areas of

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69 Paragraph 7.49, Guidance.

70 Paragraph 7.47, Guidance.

debate. We therefore consider that it would be helpful if, in addition to setting out the core arguments in favour of an SLC decision, the issues letter also set out the core arguments against i.e. that it is a balanced rather than one-sided statement of the issues.

**Survey evidence**

7.4 We note that the Guidance requires parties to discuss any survey designs, in both Phase 1[71] and Phase 2,[72] with the CMA before undertaking them. Surveys often take a considerable time to design and undertake and parties will often commission them prior to pre-notification. If the CMA wishes to 'sign-off' on survey designs at Phase 1, this has the potential to cause material delays to the notification process, negatively impacting deal timing.

7.5 On this basis, we consider that it is disproportionate to require the parties to discuss their survey designs with the CMA in all cases; therefore, we suggest that the CMA remove this blanket requirement. Instead we suggest that the Guidance should state that it would be best practice to discuss survey designs with the CMA unless a survey was commissioned prior to the commencement of pre-notification discussions with the CMA. In this situation, the parties would not be required to discuss the survey design with the CMA, nor would they be expected to modify or delay undertaking the survey.

7.6 Additionally, where the case team has discussed and agreed a survey design with the parties, the case team's advice to the decision maker concerning the survey should reflect this – it should not be open to the case team to raise concerns with a survey design after the survey has been carried out.

## 8. CONCLUSIONS AND RECOMMENDATIONS

8.1 We are concerned that a number of issues raised in the Guidance may undermine the UK merger regime and / or impose a disproportionate regulatory burden on businesses. Therefore, we have summarised below our suggestions, set out in this response, for amendments to the Guidance to address these issues.

**Interim measures**

8.2 The Guidance should make clear that, when imposing interim measures, the CMA will:

- **take into account whether it is likely that it would have jurisdiction** (see paragraph 2.4(a) above);
- **consider:**
  - whether there are "*preliminary indications that the merger raises or is likely to raise competition concerns*"; and

[71] Footnote 112, paragraph 6.41, Guidance.

[72] Paragraph 11.26, Guidance.

- the factors currently used by the OFT to asses the risk of pre-emptive action as well as issues of urgency and proportionality (see paragraph 2.4(b) above); and

- **offer the parties an opportunity to engage with it to tailor interim orders** to the facts of their case, in particular, in the context of anticipated mergers (see paragraphs 2.15 to 2.18 above).

8.3 **In the context of anticipated mergers**, the Guidance should make clear that:

- the CMA will **impose interim measures in only the most exceptional** of circumstances (see paragraph 2.7(a) above); and

- even when the CMA considers that interim measures are warranted, **it will not use interim measures to prevent completion** during a Phase 1 review (see paragraph 2.7(b) above).

8.4 The Guidance should **clarify** the circumstances in which the CMA will make an unwinding order at Phase 1 and Phase 2 and should impose a higher threshold for such intervention in comparison to forward-looking interim measures (see paragraphs 2.19 and 2.20 above).

**UIL process**

8.5 **In respect of agreeing UILs with the CMA**:

- the CMA should commit to **greater engagement with parties** to ensure proportionate remedies, where possible, can be agreed in the tight timescale following an SLC decision (see paragraphs 3.3 to 3.12 above);

- the CMA should **guarantee to review up to three remedy offers** formally made by parties (see paragraph 3.12(a) above);

- the CMA should explicitly commit to engaging with the notifying parties in order to seek to **reduce the scope of any remedy offer that overshoots** the CMA's analysis of what is required to remedy the SLC identified (see paragraph 3.12(b) above); and

- **the period to agree an improved 'near miss' remedy offer** should be increased from one working day to **at least three working days** provided this does not exceed the ten working day timetable (see paragraph 3.12(c) above).

8.6 **The process and timetable for upfront buyers requires further clarity, in particular:**

- the Guidance should explicitly provide for a **minimum of 30 working days** for parties to identify an upfront buyer (see paragraph 3.13(a) above);

- the Guidance should be more explicit as to **how the CMA will typically structure milestones** for the divestment process (see paragraph 3.13(b)

above) and include explicit reassurance that it will engage with the seller in each case;

- where the CMA requires an upfront buyer remedy, the Guidance should explicitly state that the **additional 40 working day** UIL period will be routinely invoked in most cases (see paragraph 3.14 above);

- if the CMA decides that an upfront buyer is required but the parties have not offered this in their remedy proposal, this should be considered a **'near miss' scenario capable of being rectified** under the procedure set out in paragraph 3.20 of the Guidance (see paragraph 3.15 above); and

- **monitoring trustees should not 'typically' be required** in upfront buyer remedies in anticipated mergers (see paragraph 3.16 above).

8.7 **In respect of the draft Remedies Form,** we consider that **the information set out in the template exceeds what is required in the majority of cases** to allow the CMA to consider a remedy offer properly (see paragraph 3.17 above).

8.8 **In respect of the draft Remedies Form,** we suggest that **the Guidance explicitly acknowledges:**

- the parties must use their **best endeavours to provide as complete a Remedies Form** as possible within the five working day timeframe (see paragraph 3.18(a) above); and

- **failure to provide all of the information** set out in the Remedies Form within the five working day timeframe **will not automatically invalidate** the remedy offer (see paragraph 3.18(c) above).

**Transition from Phase 1 to Phase 2 review**

8.9 **The Phase 1 and Phase 2 case teams should predominantly be comprised of different CMA personnel**. Therefore, the Guidance should make clear that:

- **no members of the senior Phase 1 case team will transfer** to the Phase 2 case team (see paragraph 4.3(a) above); and

- **only a minority of the junior members** of the Phase 1 case team will transfer to the Phase 2 case team (see paragraph 4.3(b) above).

**Information burden on business and the CMA**

*Pre-notification*

8.10 In respect of pre-notification with the CMA, we suggest that:

- the Guidance should, in line with European Commission best practices, explicitly commit the case teams to engage actively with notifying parties throughout the process and to provide any responses to any requests or queries

by the notifying parties (e.g. derogation requests) **within 3 working days** (see paragraph 5.6 above);

- where the parties have provided reasonable justification for its urgency, the Guidance should require the CMA to **confirm the identity of the case team within one working day of the parties' request** (see paragraph 5.7 above);

- the CMA explicitly **minimises** its expectation for pre-notification engagement for "**no issues" / "technical" merger filings** merger cases where there are **no substantive competition issues** by providing additional flexibility in the pre-notification process and permitting a shorter pre-notification period (see paragraph 5.8 above);

- the CMA explicitly commits to **enhanced pre-notification engagement for transactions governed by the City Code** (see paragraphs 5.9 and 5.10 above); and

- the CMA commits to a **five working day** time period in which to confirm whether a notification is complete (see paragraph 5.12 above).

*Merger Notice*

8.11 In respect of the draft Merger Notice, **we urge the CMA to revert to the previous position of the OFT** where it did not set out an exhaustive checklist of information in the Merger Notice required for a 'complete' merger submission (see paragraph 5.20 above).

8.12 Further, the Guidance should make clear that:

- for transactions that involve "no issues" / "technical" notifications, the information burden will be significantly reduced and derogations will be readily granted (see paragraph 5.23(a) above); and

- in hostile takeover situations governed by the Takeover Code, the CMA will agree derogations in advance of the offer being posted (see paragraph 5.23(b) above).

*Third party input during the merger review*

8.13 In respect of the CMA's extended powers of investigation, we suggest that the Guidance explicitly recognises that the CMA will:

- contact third parties informally in the first instance rather than using its section 109 EA 02 powers, for example through the existing use of merger questionnaires (see paragraph 5.26(a) above); and

- be proportionate in its use of section 109 EA 02 against third parties and only where third parties have failed to provide adequate information within a reasonable timeframe (see paragraph 5.26(b) above).

**Access to the decision maker in Phase 1**

8.14 We propose that the CMA grants the notifying parties **access to the decision maker** both at the **issues meeting** and during the five working day period in which the parties must finalise any **UIL** offer (see paragraphs 6.2 and 6.3 above).

**Other issues raised by the Guidance**

8.15 We advocate that the CMA lengthens the minimum period between receipt of the issues letter and the issues meeting from two to **five working days** (see paragraph 7.2 above).

8.16 We suggest that the CMA ensures that only those theories of harm that could **realistically** form the basis of an SLC decision are included in the issues letter. Furthermore, we consider that it would helpful if the issues letter also set out the **core arguments against** an SLC decision (see paragraph 7.3 above).

8.17 We propose that the Guidance **does not require the notifying parties to discuss survey designs** with CMA if the survey was commissioned prior to the commencement of pre-notification discussions (see paragraph 7.5 above), and, **where the case team has discussed and agreed a survey design with the parties, the case team's advice to the decision maker concerning the survey should reflect this** (see paragraph 7.6 above).

## ANNEX A – CONSULTATION QUESTIONS AND RESPONSES

| | Question | Relevant consultation response paragraphs |
|---|---|---|
| 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? | No response |
| 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? | No response |
| 3. | Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form? | 3.17 to 3.19, Section 8 |
| 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? | 3.13 to 3.15, Section 8 |
| 5. | Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above? | Sections 3 and 8 |
| 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? | 5.13 to 5.23, Section 8 |
| 7. | Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable? | Yes |
| 8. | Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers? | Sections 5 and 8 |
| 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? | Sections 2 and 8 |
| 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? | No response |