

CONSUMER COUNCIL FOR



CYNGOR DEFNYDDWYR



# Consultation on the Competition and Markets Authority's draft guidance on procedure and assessment of water and sewerage mergers

# 1. Introduction

- 1.1 The Consumer Council for Water (CCWater) is the statutory consumer organisation representing water and sewerage consumers in England and Wales. CCWater has four regional committees in England and a committee for Wales.
- 1.2 We welcome the opportunity to comment on the Competition and Markets Authority's (CMA's) draft guidance on how it will work with Ofwat on investigations into a merger of water and/or sewerage companies in England and Wales.

## 2. Executive Summary and General Comments

- 2.1 We recognise the CMA's intention for the assessment of water and sewerage sector mergers to be consistent with the general merger regime, to comply with the requirements of the Enterprise Act 2002.
- 2.2 The proposed two stage process and its timescales reflect the Ofwat consultation from July 2015 on its approach to future mergers, particularly in the examples of customer benefits and undertakings in lieu/remedies where a merger is shown to be detrimental to Ofwat's ability to use comparators in its regulation of the sector<sup>1</sup>.
- 2.3 CCWater's interest in the process for both phases is based on whether there is sufficient opportunity for input into the process for views and evidence that address how customers may be affected by
  - the implications on prices and/or services to customers due to the possible effect on Ofwat's ability to regulate the sector from the loss of comparators.
  - whether the proposed undertakings to address any detriment to Ofwat are sufficiently beneficial for customers.
  - the issues raised that justify a decision to refer the merger to a Phase 2 investigation.
  - whether the remedies proposed in Phase 2 (if applicable) are sufficient from customers' perspective.
- 2.4 As currently proposed, the only stage where CCWater (and other customer representatives) have a clear opportunity to input is at Phase 1, once the CMA has published notice of the commencement of this period of investigation.
- 2.5 However, there are further stages where a customer view may assist the CMA in ensuring that both the issues it is investigating and (if applicable) any undertakings or remedies being considered are appropriate for customers.
- 2.6 We have concerns that there is insufficient opportunity for customer input at the following stages of the process
  - If and when Ofwat or merger parties propose draft undertakings to address any detriment to Ofwat's ability to regulate (during Phase 1).
  - The letter that sets out the issues to be examined by the inquiry panel if a Phase 2 investigation occurs.
- 2.7 The draft guidance does not clearly show whether customer representatives will be able to input at the above two stages of the process. We would welcome further clarity to show this. We provide more detail in our responses to the consultation questions below.

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<sup>1</sup> CCWater's response to Ofwat's consultation on its approach to future mergers and statement of method (July 2015) - see [here](#).

### 3. Response to the consultation

- Q1. Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

The draft guidance is directed at merger parties and Ofwat principally, and in that context it is clear and detailed on the interaction between the CMA, Ofwat and merger parties, within the timescales set out for both Phase 1 and Phase 2 investigations.

However, we would like to see a more prescriptive commitment for Ofwat to publish its advice to the CMA promptly after the CMA's decision on day 40 to ensure there is transparency with customers and stakeholders, as Ofwat's advice may be the main driver of the CMA's decision. At present there is no time commitment for when Ofwat should publish its advice.

- Q2. Is the level of detail helpful? Are there any parts of the draft guidance which you feel would be improved by being either more, or less, detailed?**

If the CMA decides before day 40 that undertakings are required in lieu of a reference to Phase 2 (UIL), this will be because there is evidence the merger will be detrimental to Ofwat's ability to make regulatory comparisons.

In this scenario, parties have five working days after the reference decision within which to provide details of such undertakings to the CMA. If no undertakings are offered within five days of the decision the CMA will refer the merger for a Phase 2 investigation.

Within 50 working days of the reference decision the CMA gives detailed consideration to the undertakings offered and publishes draft undertakings for comment. However, in some sections of the draft guidance it's not a 'given' that the CMA will publicly consult on draft UILs:

- page 20, *'If the CMA decides to consult on the UILs offered...'* ; and
- page 49 *'In light of the CMA's timetable to make a decision on the UILs offered Ofwat may consider this its provisional decision and if the CMA decides to consult on the UILs offered Ofwat will provide its final opinion on the UILs at least two days before the start of the consultation period'.*

However, the timetable on page 43 suggests the CMA will consult.

We would welcome greater consistency and clarity in the guidance to confirm that CCWater, or any other party, has the opportunity to comment on the proposed undertaking(s). It may be helpful for the CMA to receive a view as to whether undertakings offer a benefit to customers proportionate to the possible detriment caused by the loss of comparator.

- Q3. Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?**

We would like to see greater clarity on the appropriate points in the process where CCWater and/or other customer representatives can provide views or evidence. This is in addition to the opportunity to make a submission in the early part of Phase 1.

In cases where the CMA intends to proceed to a case review meeting (in more complex cases), it will notify Ofwat of that intention as soon as practicable and share and discuss the issues it wishes to address in a draft letter which Ofwat will consider before it is sent to the merger parties.

The 'issues' letter will normally be sent on or after day 25 of the Phase 1 process. The CMA will consider any response Ofwat subsequently makes to the merger parties' response to the issues letter.

We note that the draft guidance does not require the CMA to publish the 'issues' letter or invite comments to the 'issues' letter under this new process. The 'issues' letter and meetings are between the CMA, Ofwat and the merger parties.

We think it would be useful for the letter (or a version of it) to be published to allow for transparency to show the issues are being addressed as part of the merger inquiry, and to enable stakeholders such as CCWater to comment or provide further evidence if necessary. This should aid the CMA in its assessment of the issues it has identified, and in turn assist the CMA in its assessment of any UILs or remedies proposed.

Our response to Question 2 also highlights where clarity is needed as to how and when CCWater or other parties should be consulted on UILs proposed at Phase 1.

**Q4. Do you have any other comments about the draft guidance?**

We support the statement in the draft guidance that says that CCWater will have an interest in ensuring merger parties are compliant with any required UILs or remedies, and may bring to the CMA's attention any concern that these requirements are not being complied with.

The document also states that, "*The CMA will tend to favour a remedy that can be expected to show results in a relatively short time period - provided it is satisfied that the remedy is both reasonable and practicable and has no adverse long-run consequences*". We also support this.

## **Enquiries**

Enquiries about this consultation response and requests for further information should be addressed to:

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