

# Water and sewerage mergers: Draft guidance on the CMA's procedure and assessment

Consultation document

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# 1. About the consultation

## Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance on the CMA's procedure and assessment in water and sewerage mergers. This guidance will replace the CMA's current guidance on water mergers, *Water Merger References: Competition Commission Guidelines* (CC9).<sup>1</sup> It will also replace paragraphs 17.1 to 17.6 of *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), issued in January 2014, and the *Mergers of Water or Sewerage Undertakings in England and Wales: Explanatory Note* (CMA2supp), issued in April 2014.
- 1.2 The purpose of this guidance is to explain the CMA's approach to its assessment of mergers involving two or more water and sewerage or water only companies,<sup>2</sup> at phase 1 and phase 2.
- 1.3 The CMA is a non-ministerial department formed on 1 April 2014. It is a primary competition and consumer authority which took over a number of functions formerly performed by the Office of Fair Trading and those of the Competition Commission. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.

## Scope of the consultation

- 1.4 The geographical scope of this consultation is England and Wales. The general merger regime, under the Enterprise Act 2002, applies to water enterprises in Northern Ireland and Scotland.
- 1.5 The draft statement of intent for water and sewerage mergers, found in Appendix C of the draft guidance, sets out how the CMA and the Water Services Regulation Authority (Ofwat) will work together in practice, throughout the phase 1 merger investigation.<sup>3</sup> This will be finalised between the CMA and Ofwat in due course and is not within the scope of this consultation.

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<sup>1</sup> Adopted by the CMA board in April 2014.

<sup>2</sup> Referred to in this consultation document and in the draft guidance as 'water enterprises'. Similarly, the term 'water mergers' is used to refer to mergers between water enterprises that fall within the scope of the special water merger regime.

<sup>3</sup> The draft statement of intent has been annexed to the draft guidance document for information purposes only.

- 1.6 Although relevant to the CMA's assessment of mergers involving water enterprises, we are not seeking views on the content of Ofwat's approach to future mergers and statement of methods which has been the subject of a separate consultation exercise carried out by Ofwat.<sup>4</sup>

## Background

- 1.7 The Water Act 2014 amends the Water Industry Act 1991 to reform the special water merger regime to bring it into closer alignment with the general merger regime. The Department for Environment, Food and Rural Affairs expects these reforms to commence in early November 2015. Once commenced, these reforms will, among other things, remove the need for an automatic reference of a water merger for a phase 2 investigation and introduce a process that allows for a phase 1 investigation.<sup>5</sup>
- 1.8 In line with the general merger regime the Water Act 2014 allows the CMA to accept undertakings in lieu of a reference.
- 1.9 The reforms also require Ofwat, during a phase 1 investigation under the new special water merger regime, to provide its opinion to the CMA on water mergers being considering and for the CMA to consider this opinion.
- 1.10 The draft guidance outlines the legal framework, processes and methodology used by the CMA to operate the new special merger regime. The draft guidance is designed to provide further information on how the CMA approaches issues that are specific to water mergers. Where the special water merger regime operates in the same way as the general merger regime under the Enterprise Act 2002, the draft guidance references the CMA's general merger guidance including: *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2); *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), adopted by the CMA board; and *Merger Remedies: Competition Commission Guidelines* (CC8), adopted by the CMA board. The draft guidance should be read alongside these and other existing published guidance.
- 1.11 We have prepared the draft guidance based on an expectation that the Department for Environment, Food and Rural Affairs will introduce, by way of statutory instrument, the same statutory deadlines for a phase 1 investigation in water mergers as general mergers, namely 40 working days to decide

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<sup>4</sup> You can download Ofwat's [statement of method](#) from its website.

<sup>5</sup> Under the current special water merger regime, the CMA has a duty to refer mergers between two or more water enterprises in England and Wales for a phase 2 investigation if the turnover of the water enterprises is greater than £10 million.

whether the test for a reference for a phase 2 investigation is met and, from the date of that decision, five working days for merger parties to offer undertakings in lieu of a reference (UILs), ten working days for the CMA to decide whether such offered UILs might be acceptable and 50 working days (with a possible 40-working day extension) to reach a final decision on the acceptance of UILs.

- 1.12 This guidance will be finalised once the merger provisions of the Water Act 2014 have commenced. Therefore references to the Water Industry Act 1991 in the draft guidance should be read as if the Water Act 2014 provisions are effective for the purposes of this consultation.

## **Consultation process**

- 1.13 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the content of the draft guidance and, in particular, to the questions raised in Chapter 2 of this document. We want to ensure that the guidance is clear, comprehensive and useful for its intended users.

### ***How to respond***

- 1.14 We are seeking the views of interested parties, particularly those undertakings regulated by Ofwat. Please respond to as many of the questions as you are able to and, where relevant, please support your answers with any evidence or examples you may have. We encourage you to respond to the consultation in writing (by email or alternatively by letter) using the contact details provided at paragraph 1.17 below.
- 1.15 When responding to this consultation please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.16 In pursuance of its policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, it would be helpful if you could also provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

## ***Duration***

- 1.17 The consultation will run for six weeks, from 2 September to 15 October 2015. Responses should be submitted by post or email, by no later than 15 October 2015, and should be sent to:

Jemma Baker  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD

Email: [jemma.baker@cma.gsi.gov.uk](mailto:jemma.baker@cma.gsi.gov.uk)

## ***Compliance with government consultation principles***

- 1.18 In consulting, the CMA has taken into account the government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on [GOV.UK](http://GOV.UK).

## ***Data use statement for responses***

- 1.19 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 1.20 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

- 1.21 If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

***After the consultation***

- 1.22 After the consultation, we will publish a final version of the guidance and a summary of the responses received that fall within the scope of the consultation. As noted above, we propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.



## 2. Questions for consideration

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