Dear Amanda,

We set out below the observations of Mayer Brown (myself and David Harrison) upon the above consultation (taking your numbered questions).

**2.2(a) "… Are there any aspects of the CMA's practice on which further information would be useful?"**

Noting the quite severe civil and criminal penalties for non-compliance with a section 109 notice, we wonder whether the guidance should not say more about the following elements which will be important tools for respondents to ensure that they can meet section 109 commitments:

– whether the use of the word "may" in paragraph 26 of the guidance (with regard to the practice of the pre-discussion of a draft 109 notice before a final and binding notice is sent) should not be replaced by the words "will (save in exceptional circumstances)" (or words to that effect) so as to indicate that "pre-consultation" of a draft notice will be the "norm". Given the many variables in terms of accessing and producing internal documents, prior consultation would seem important and proportionate;

– we note that the guidance is silent on the establishment of the time period in which a section 109 notice response will be required and whether a response might be staggered. This issue is clearly related to the pre-discussion of a draft 109 notice, but given the severe penalties for non-compliance, must surely merit some explanation.

**2.3 "The CMA would welcome the views of stakeholders on any other aspects of the draft guidance."**

We wonder whether the draft guidance should not explain the rights of the merging parties to "access" the internal documents which the CMA may gather from third parties in order to protect their rights of defence. Current CMA practice and procedure in this area appears to lag behind, say, the rights of access to the file in second stage EU merger cases (see, inter alia, Article 18(3) of the Merger Control Regulation and paragraph 42 of the Best Practice Guidelines on merger control proceedings). If CMA practice is to evolve towards more comprehensive requests for internal documents, then we would suggest that procedural rights of defence must evolve in parallel.

Paragraph 16 of the draft guidance makes clear that document requests of third parties will not normally be made subject to a formal 109 notice. We wonder whether this is balanced. Third party documents can have a very material bearing upon merger proceedings and that means that it is essential that third party documents are produced with the requisite degree of care and accuracy and against a backdrop of sanction(s) for incorrect or incomplete (etc.) information provision. It seems to us that it would be proportionate to make all internal document requests (both merging and third parties) subject to the same duty of care implicit in the section 109 notice sanction provisions (in particular in second stage merger proceedings where there will be substantive issues and where the CMA guidance states that 109 notices are most likely to be used). We note that under US merger control, the use of a Civil Investigative Demand ("CID") in relation to third party documents/comments is the normal approach in second stage proceedings and introduces a strict and formal set of court sanctions for inaccurate/incomplete information.

We trust that the above comments are helpful.

With best regards,

Julian Ellison and David Harrison