

4 December 2020

# **RESPONSE TO CMA CONSULTATION – PROPOSED REVISIONS TO CMA2**

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## **1 Introduction**

- 1.1 AlixPartners is a global consulting firm that assists clients with merger control proceedings in the UK and globally. In particular, AlixPartners has extensive experience of submitting economic analysis to competition authorities globally, and of assisting clients with forensic evidence gathering and e-discovery in merger control inquiries. AlixPartners' wider consulting business also assists in merger investigations by providing market expertise, assessing whether firms are failing from a turnaround and restructuring perspective (such that one of the parties may be satisfy the competition authorities' criteria for being viewed as being an exiting or failing firm), and quantifying merger efficiencies. AlixPartners regularly assists clients in both phase 1 and phase 2 merger inquiries.
- 1.2 Addleshaw Goddard is a London headquartered global law firm which advises a range of clients on merger control in multiple jurisdictions. Addleshaw Goddard has particular experience in advising clients on UK merger control. Addleshaw Goddard acts on a range of merger control matters from initial advice, briefing papers to the Mergers Intelligence Unit, Phase 1 investigations, Phase 2 investigations, cases with remedies and appeals to the Competition Appeal Tribunal and Courts.
- 1.3 AlixPartners and Addleshaw Goddard welcome the opportunity to respond to the CMA's consultation in respect of proposed updates to CMA2. In doing so, we have highlighted areas where, based on our combined experience, there are changes that we believe the CMA should consider though we have not commented on every proposed change. Our principal concerns are with the proposed changes to consultation and process in phase 2 merger inquiries.
- 1.4 As advisers who experience merger control proceedings daily alongside the CMA, we are invested in ensuring that the process runs smoothly and efficiently, whilst ensuring that the best administrative decision making is taking place. Our suggestions focus on increasing the transparency of merger control proceedings so that the parties can engage more fully with the CMA's evidence (including third-party evidence) and ensuring that the CMA's analysis has been fully tested and is robust. That should promote the quality of decision making, which is in the interests of our clients but, more importantly, it is in the interests of the CMA and the United Kingdom as a whole.
- 1.5 We welcome an update to CMA2 to more fully reflect the CMA's current practice and to minimise overlap with other guidance now published separately (following the inception of the CMA). We also welcome the additional guidance on the CMA's likely approach to managing multi-jurisdictional merger control.
- 1.6 Our specific observations are set out below. We would be very happy to discuss these points further with the CMA and look forward to continuing to work productively together.

## **2 Jurisdiction**

### *Minority investments and material influence*

- 2.1 Compared with many regimes globally that assess jurisdiction based on the parties' turnover, the UK's share of supply test introduces flexibility and an ability to review a wider range of transactions for the CMA. In particular, it permits the CMA to investigate mergers where the parties' sales revenues in the UK are very low, and where the focus of parties' businesses and merger rationale relates to sales in other countries. However, for businesses, it introduces a lack of clarity in certain cases about whether the threshold is met, and this uncertainty will be increased by the end of the EU Brexit Transitional Period as the "one stop shop" under the EU Merger Regulation will come to an end as regards companies' sales into the UK. This should

be borne in mind when considering the following proposed changes. In addition, we note that on-going cases at the Competition Appeal Tribunal involve the application of the share of supply test; the judicial interpretation of the bounds of this test will obviously be important and so should be included in any updated guidance.

#### *Minority investments and material influence*

- 2.2 We recognise the updates in respect of the CMA's decisional practice in relation to material influence and note that there are cases in which material influence may arise with very small ownership stakes. However, we would emphasise that, in our experience, these cases are likely to be very rare and we therefore express some reservations about the removal of these cases being 'exceptional' in the wording of the proposed guidance and the increase in potential scrutiny for minority investments below 15%.
- 2.3 Whilst we agree that considering board participation by minority investors in these cases will be important, it is not wholly determinative and we would encourage evidence to be assessed both in the round and in the context of actual actions and influence that can be taken and exerted by the companies concerned.

#### *Publication of material facts*

- 2.4 We agree that further clarity on the CMA's view on when material facts about a transaction have been made public will assist merger parties to understand the CMA's approach and expectations (although we note that this is a test set out in statute). Merger parties usually desire certainty as much as the CMA. As a result, we would welcome further detail on the CMA's thinking on when a display on an acquirer's website would be sufficiently 'prominent'. Not all acquisitions represent front-page news for companies (in particular where they concern only one jurisdiction or is of modest importance in the context of their overall business). Our view is that publication on the 'news' or 'announcements' section of a website would be sufficiently prominent as would a specific, separate announcement on a readily accessible page on the website. Certainly, these would be visible to the parties' customers, suppliers and competitors, and to the CMA's Mergers Intelligence Unit.
- 2.5 From the perspective of merger parties, they are not in control of whether trade or national press actually publish stories about a transaction; where they have taken steps to ensure that the facts are public on their website (wherever sensibly placed) they should not be subject to uncertainty about whether that is sufficiently public for the four month period to begin running. This is particularly the case (given the points made above about the share of supply test) for small companies and small transactions where they may well have displayed the information on their website but it may not be widely published as a result of the size of the parties or the transaction.

#### *Aggregation of intra-group and third party sales for the purposes of share of supply*

- 2.6 Whilst we recognise that the current version of CMA2 explains that the CMA may aggregate intra-group and third party sales for the purposes of the share of supply test, we note that both the *Roche/Spark* and *Montauban/Simon* transactions involved specific circumstances weighing in favour of that approach which ought to be exceptional.

### **3 'Fast track' cases**

- 3.1 We recognise the need for the CMA to ensure that it is able to work productively and efficiently with merger parties, in particular in cases where merger control proceedings (and particularly remedies discussions) are on-going in multiple jurisdictions. As the CMA rightly recognises, this may well result in a number of cases where merger parties and the CMA would benefit from a

fast tracked process where some procedural rights are foregone in pursuit of an efficient and consistent global process. There are, of course, also cases where merger parties in UK-specific transactions may wish to shorten the review period if it is likely that the CMA will refer the transaction to a phase 2 inquiry. We welcome that the CMA has clearly defined different tracks for such a process, including the potential for a fast track phase 1 remedies case.

- 3.2 However, it is important to ensure that, in practice, the CMA consults with parties in this regard. Importantly, it does not necessarily follow that merger parties should automatically accept, in phase 2 cases, that the SLC test is properly met on the balance of probabilities. Whilst the fast track process may be helpful in some cases (in particular in global remedies cases), the acceptance of such a position could potentially have significant implications for merger parties. It seems to us that there is no obvious need for merger parties to state unequivocally that the test is met. Merger parties are accepting a reduced period (with the inherent effect on their procedural rights) in return for a swifter and more streamlined review. In those circumstances, it should still be open for the merger parties to take the position that they do not believe the test is met (but in the interests of the wider transaction they have accepted administrative intervention). Indeed, the CMA's function in assessing remedies is to consider those remedies as set against the issues identified – even in cases where a fast track procedure is used.
- 3.3 We do see some benefit to the phase 1 decision maker being involved in remedies discussions and have seen that work well in some phase 1 cases. However, CMA case teams are capable of having useful remedies discussions without involving the decision maker and, in many cases, merger parties value the 'fresh eyes' of a decision maker from outside of the case team. We would therefore caution against this becoming routine and would favour an approach where this is possible at the merger parties' election.

#### **4 Evidence gathering and analysis in Phase 2 decision making**

- 4.1 A number of the proposed changes to CMA2 relate to the CMA's evidence gathering from both the merger parties and third parties during both phase 1 and phase 2 merger inquiries. We agree that CMA2 should reflect the CMA's practice. However, as the CMA looks to revise its guidance and consider its procedures in light of its additional case load following the EU Exit Transition Period, we encourage the CMA to take into account the following considerations.
- 4.2 The phase 2 process is intense and pressured for both the CMA and for merger parties. Initial evidence gathering, analysis and comment all takes place in parallel against a statutory deadline. Whilst conducting the inquiry, the CMA must manage its competing obligations with respect to confidentiality, disclosure and consultation whilst also managing the process efficiently. This results in a balance being struck between administrative efficiency and engagement with the merger parties on the theory of harm and the evidence gathered. Our view of the current phase 2 process is that this condensed period of the time at the beginning of the phase 2 process and at various key stages hinders the merger parties' ability to submit meaningful evidence to the CMA in a way that properly explores a clear theory of harm, and to explore and comment on any third party evidence the CMA receives. We therefore have a number of concerns about the consultation's suggestions in respect of minimising these opportunities further.

##### *The CMA's own analysis*

- 4.3 At the start of an inquiry, the CMA will consider the specific further evidence gathering and analysis that it intends to carry out. At present, our experience is that the CMA's engagement with the merging parties is largely limited to a single meeting discussing the data that the parties

have available, or there might be a very high level discussion about the possibility of carrying out a customer survey.

- 4.4 What would be welcome would be an opportunity to engage with the CMA as to the sort of analysis that it provisionally intends to carry out and what economic issues that it wishes to explore. The purpose of this engagement would be for the parties' advisors to understand this potential analysis and the data it requires, not least as they can comment on any analytical or data issues. In a similar vein, there would be merit if there could be a meeting to discuss the design and structure of survey questions, how the survey is conducted, and who will be surveyed. At present, there is typically no discussion or substantive engagement on survey design.
- 4.5 At Phase 2, the CMA's working papers provide the first opportunity for the merging parties to substantively comment on the key inputs into the CMA's provisional findings. In this regard, it would be helpful that the CMA would commit to endeavouring to ensure that the scope of these papers is sufficiently extensive that it at least covers the CMA's initial thinking on the core matters that will be covered in the provisional findings. Otherwise, the risk is that the CMA's provisional findings will contain substantive new material on which no input from the parties has been sought.
- 4.6 There would also be merit if the case team could have an informal call with the parties' advisors about these working papers. The purpose of this call would be simply to ask questions about the analysis that has been done, rather than the conclusions.
- 4.7 This is important since at the hearing with the merging parties the CMA primarily wishes to hear business people's responses to factual questions, rather than there being any substantive engagement on the working papers.

#### *Internal documents*

- 4.8 The CMA's procedure in merger cases focuses on potential theories of harm that are provisional but assist both the case team and merger parties in assessing the transaction and its possible effects against various strands of evidence. This is helpful in that the parameters of the theory of harm assist in defining the evidence required by the CMA to prove to the requisite legal standard that the relevant test is met. It also assists merger parties to consider the evidence that they can and should produce to assist the CMA's investigation and aid the CMA's understanding of their industry and businesses.
- 4.9 The CMA rightly focuses on merger parties' internal documents in its investigations but whilst these can be strong evidence of merger parties' thinking, these must be viewed in their proper context. Often they have a specific purpose and at other times have been drafted without the depth of thought (or supporting evidence) that the CMA credits them with. Whilst the CMA does treat these as only one strand of evidence, merger parties can be frustrated that the process does not allow them to assist the CMA in understanding these documents fully or to produce other evidence of action that explain why the statements in the documents are misleading or should not be interpreted out of context (including by reference to whether they were used for decision making and by reference to other documents that may be contradictory). In both phase 1 and phase 2 investigations, the conclusions drawn from internal documents are presented at a late stage providing merger parties with very limited time to assist the CMA further.<sup>1</sup>

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<sup>1</sup> Whilst, on the one hand, it would be fair to say that merger parties should know what their own documents say, that is not always practical or right given that the CMA's requests for information (in particular where it uses its formal powers)

### *Third party evidence*

- 4.10 Similar concerns often arise in respect of third party evidence provided to the CMA. Merger parties are very often presented with only very limited extracts or conclusions (often anonymised or heavily redacted) setting out third party views on a transaction or competitive dynamics. In both phase 1 and particularly phase 2 inquiries, the timetable is such that the merger parties are left with very little time to produce evidence that contradicts or supports third party evidence (particularly where this is presented in vague, high level terms and without any supporting evidence) – even where merger parties believe it to be fundamentally flawed.
- 4.11 In phase 2, in particular, the limited time after provisional findings are released to comment meaningfully or to adduce new evidence which can be properly assessed can be an insurmountable obstacle for some transactions. Again, our experience is that merger parties are keen to assist the CMA and, in many cases, can be frustrated at late stages of the administrative process if the limited information provided discloses that the CMA has a flawed understanding of the relevant markets or competitive dynamics or the questions asked of third parties lack the rigour of the CMA's own guidance on surveys undertaken by merger parties.
- 4.12 It is against this backdrop that we express some reservations about the proposals (some of which are already in practice) to reduce the publication of third party evidence in phase 2 cases. Whilst the CMA treats some third party evidence with caution, given that it can be self-serving, tainted by non-merger specific disputes, or simply ill informed. In some cases, an important check and balance is the ability for the parties to at least understand the gist of that evidence through a hearing summary. If this procedural safeguard is removed in some cases due to the CMA not considering it appropriate to summaries more informal oral evidence, not only are merger parties' procedural rights affected, but the overall robustness of the decision making process is significantly weakened. This is not remedied by the 'gist' of an adverse case being put to merger parties in provisional findings. Again, by that point in an investigation, merger parties are left with very little time to point the CMA in the direction of alternative views or evidence or to produce evidence that provides more balance. Indeed, the CMA itself is time constrained at that point from meaningfully being able to take on board such further evidence whilst also being able to meet the statutory deadline for its decision. In our view, more engagement on the theory of harm and particularly the balance of evidence in a way that is not necessarily formulaic would be helpful.
- 4.13 As an example, we would support good early engagement between the CMA and merger parties in relation to the CMA's evidence gathering. We consider that the early data call / meeting during the phase 2 process is very useful in considering both the types of evidence that the merger parties can provide and the consistency of it between the merger parties. As advisers, we believe that the decision making process would be assisted by having the parties' input (or at least the input of the parties' advisers) on the questions to be asked of third parties. Ultimately, whilst this is quite rightly a matter for the CMA, we consider that collaboration on those questions (at least in the early stages of an inquiry) would allow the CMA to ask better questions with fuller understanding. It would also ensure that the merger parties have had a clear opportunity to challenge (on the one hand) and support the CMA (on the other) in obtaining the best possible evidence, thus avoiding situations where merger parties' only recourse is to the courts due to concerns about not having asked the right questions. Such an approach allows merging parties to consider their available evidence to assist the CMA in areas of concern and to produce it early, thus assisting the CMA's review. Finally, this approach would go some way to ensuring

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can result in thousands of emails from a range of custodians being required to be disclosed by the CMA. It is also important to appreciate that people will often not remember documents even if they are the main recipient – particularly email exchanges where business people may receive many emails every day – that were written some time ago.

confidence in the critical thinking applied to third party anecdotal evidence as compared with the empirical evidence. Given that the proposed changes point towards increased reliance on oral, rather than written, evidence of third parties this is even more important.

- 4.14 We would therefore encourage the CMA to consider whether collaboration in this way can be built into the early stages of its evidence gathering (in particular in phase 2 cases) and whether appropriate safeguards (in terms of full disclosure by advisers to merger parties into a confidentiality ring) would be appropriate.

*Written submissions from merger parties*

- 4.15 In a similar vein, as advisers we keenly feel the burden of the length and depth of written submissions to the CMA, in particular in phase 2 cases. We agree that the three main junctures of response to the issues statement, annotated issues statement (and working papers) and provisional findings are the key written submissions. However, it is important that merger parties are able to submit evidence to the CMA at any point and we would encourage caution in seeking to limit the submission of evidence (in particular given the concerns set out above).
- 4.16 We are aware that multiple submissions place a strain on case team resources (as well as advisers and parties) but the reality of the pace of CMA merger investigations is that evidence gathering in response to the CMA's areas of concern can take time. Again, merger parties are more readily able to assist the CMA in cases where the CMA's thinking is discussed with advisers openly and as early as possible. If the dialogue encouraged above is adopted, the need for multiple submissions can potentially be reduced in practice. Similarly, we have found it particularly useful where the CMA engages with the merger parties about the desired format and topics of submissions (or their summaries) and we would encourage the CMA (and in particular inquiry groups in phase 2 cases) to engage as transparently as possible in this regard. For example, the CMA could indicate on a non-binding basis that it welcomes submissions on particular detailed points.