

RESPONSE TO CMA CONSULTATION

Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (including the CMA's mergers intelligence function)

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RESPONSE BY ALLEN & OVERY LLP

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1. This response represents the views of the law firm Allen & Overy LLP (**A&O**) on the Competition and Markets Authority's (**CMA**) consultation on its *draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (including the CMA's mergers intelligence function)*, dated 6 November 2020 (the **Draft Guidance**). **Part A** provides comments on the draft updated CMA2 guidance and **Part B** provides the same with respect to the draft CMA56 guidance.

Summary

2. We welcome the opportunity to provide a response to the CMA's consultation on the Draft Guidance. Our views are based on A&O's extensive experience advising clients on the application and process of UK merger control and interaction with the CMA.
3. We also welcome the fact that the CMA is taking the opportunity to update and streamline its guidance. In particular, we welcome the CMA's efforts in (i) updating statutory and case references throughout the Draft Guidance (though we note that the CMA should consider the implications of the recently published National Security & Investment Bill in multiple places throughout, as, depending on the timing for finalising the guidance, a substantial number of statutory references could become out of date rather quickly), and in (ii) removing from the draft revised CMA2 guidance information which is covered in other guidance (and providing appropriate cross-references). We think that the overall result of this effort will be increased efficiency and certainty for merger parties when they use the CMA's guidance as a reference tool.
4. Where the Draft Guidance introduces new procedures or approaches, our points are focused on either requesting further clarification on how these will be implemented, or making recommendations for how these could be best implemented in our view. In a few instances, we have provided feedback about the CMA's current practices, including suggestions for further revisions to the Draft Guidance that we would welcome. Otherwise, our points are focused on suggestions of how the wording of the Draft Guidance could be improved to provide greater clarity and accuracy.
5. We would be pleased to discuss any of the points made in this response further if the CMA would find it helpful to do so.
6. We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

A. Response to draft CMA2

General

7. Since the consultation for the Draft Guidance was opened on 6 November 2020, the UK Government has published the National Security and Investment Bill (the **Bill**). The Bill, as currently drafted, impacts the Draft Guidance in several ways. For example, it removes the possibility for the Secretary of State to make public interest intervention notices and special public interest intervention notices on the national security public interest ground, and, more generally, it removes CMA responsibility in relation to national security public interest interventions by opening a separate, parallel process for those. In addition, the references to the lower jurisdictional thresholds for certain 'relevant enterprises' that have been added to the Draft Guidance will no longer be relevant if the Bill (as currently drafted) comes into effect. This impacts several sections of the Draft Guidance.¹ While we appreciate that it is

¹ Including paragraphs 4.4 to 4.7, 4.71(b) and chapter 16.

difficult to update the Draft Guidance while there is still uncertainty as to whether (i) the Bill will pass through Parliament and come into law, and whether (ii) the scope of the Bill will be amended from its current form before coming into law, we think it would be useful for the Draft Guidance to be updated once the Bill is in a more finalised form in order to prevent the Draft Guidance from becoming outdated soon after being published.

8. We welcome the willingness expressed in several parts of the Draft Guidance² for the CMA to engage in remedy discussions with the merger parties at an earlier stage of the phase 1 and/or phase 2 processes (including during pre-notification discussions). This flexibility will be important in any efforts to coordinate the CMA merger review process timetable with merger control filings made outside the UK. It also increases the likelihood that suitable remedies can be found and offered as UIs at phase 1, thereby avoiding the regulatory and administrative burdens that a phase 2 investigation would entail. It will be important that, in transactions where early engagement is appropriate, case teams are genuinely willing to engage in the detail of these discussions and involve members of the remedies, business and financial analysis (RBFA) team early on (in particular in phase 1 cases where our experience is that RBFA is not often brought in until late in the process, or is brought in solely for IEO issues). Our experience is also that some case teams struggle with progressing remedy discussions, while also needing to get on top of substantive issues – this will need careful management internally to ensure that the process is as effective as possible. The Legal Services should also not be overly cautious about concerns of “pre-judgment” such that it inhibits the ability of parties to engage in these early remedy discussions.
9. We note that the Draft Guidance³ includes a new provision for multi-jurisdictional transactions whereby the CMA might decide not to open an investigation into a merger immediately if the transaction is subject to review by competition authorities outside the UK and where, should competition concerns be found, remedies agreed or imposed following those proceedings are likely to address any competition concerns arising in the UK. The CMA reserves the right, however, to open a formal investigation at any point before expiry of the four month statutory period if remedies in other jurisdictions do not fully eliminate any competition concerns related to the UK. We welcome the potential that this new provision has for avoiding parallel filings in respect of certain global and cross-border deals. However, considering the importance of certainty for merging parties and the potentially significant consequences for deal timing that could arise should the CMA subsequently decide to investigate the transaction late in the transaction timetable when other jurisdictions’ processes are concluding, or within the four-month statutory period post-completion, it would be helpful if the CMA could provide further clarity and guidance on how this provision would operate in practice and in what circumstances. We therefore request that the CMA provide further guidance on the circumstances in which it would be likely to accept remedies agreed with other authorities as sufficient such that the CMA need not open an investigation. In particular:
- Would this approach only apply in cases involving competition concerns with indirect effect within the UK, or also for those cases with clear and direct competition concerns in the UK? For example, would the approach apply only to global mergers where there are no physical assets or entities in the UK but where the parties may provide services, or are an intermediate part of a supply chain?
 - Would the CMA be satisfied with remedies provided to other competition agencies where these remedies are not enforceable by the CMA?
 - Would the CMA only consider this approach in cases where clearly defined structural divestments are being required by other authorities and there is clearly a sufficient pool of suitable potential purchasers for the divestment business? It would be helpful if the CMA could set out how it might approach the consideration of whether to review a transaction where behavioural remedies are

² Including in the updated phase 1 process table in chapter 5, paragraph 6.19 and footnote 121.

³ Including in paragraphs 8.3 and 18.7 of the revised CMA 2 guidance and in paragraph 4.3 of the revised CMA 56 guidance.

being required e.g., would the CMA most likely conclude that, in cases where behavioural remedies are being offered, it would always likely require its own undertakings from merging parties that the CMA could enforce for the benefit of UK consumers?

10. We likewise welcome the willingness expressed by the CMA⁴ to depart from the approach described in the guidelines in order to align the CMA's investigation with the processes of other competition authorities outside of the UK (including through use of the updated "fast track" procedures and early remedy discussions).

Introduction

11. Paragraph 2.11 provides an overview of the sectoral regulators that the CMA routinely consults with about mergers where the sectoral regulators are likely to have industry-specific knowledge. We suggest that this paragraph should also reference Ofwat and its statutory role to provide an opinion to the CMA in relation to water mergers under the Water Industry Act 1991.

Jurisdiction and relevant merger situations

12. Paragraph 4.2 provides an overview of the types of transactions and arrangements which could be considered to be a relevant merger situation. The paragraph states that outsourcing arrangements "may" give rise to a relevant merger situation. Paragraph 4.17 on the other hand states that outsourcing arrangements "will not generally result in enterprises ceasing to be distinct", and that they will only be considered to do so in limited circumstances. We therefore suggest that paragraph 4.2 should be amended by adding the text in bold: "*the creation of a joint venture, or outsourcing arrangements (in certain circumstances) may also give rise to relevant merger situations*".
13. In paragraph 4.27, the CMA has removed from the Draft Guidance the previous reference that material influence will only arise "exceptionally" when acquiring shareholding of less than 15%. Whilst we appreciate that the CMA considers that it has the flexibility to consider whether shareholdings of less than 15% give rise to material influence, our strong view is that, for reasons of transaction certainty, the CMA should continue to recognise that material influence will only arise rarely from shareholdings below 15% (while making it clear that the CMA will assess the specific circumstances of each transaction to determine if smaller shareholdings could lead to material influence). It is notable that the recent decisions referenced on this point (i.e. Amazon/Deliveroo and RWE AG/E.ON) are cases where material influence was considered for shareholdings still above 15%. Therefore, recognition that shareholdings less than 15% give rise to material influence only in rare instances is consistent with the CMA's currently very broad consideration of material influence in any event.
14. Paragraph 4.34 states that the CMA will consider the "right to appoint" a director to be a potential sign of material influence before that right is exercised, even where there is uncertainty about whether this right might be exercised at all. We suggest that this paragraph should be amended to clarify that, if the CMA establishes jurisdiction on the basis of a right to appoint a director, the CMA would not then later seek to assert jurisdiction when and if that right is actually exercised in the future.
15. Paragraph 4.63 (and its paragraph heading) refer in the context of the share of supply test to the "procurement of" goods or services. Our view is that introducing this new language, not found in the legislation, is unhelpful. We suggest that the CMA should use language that is either (i) consistent with Section 23 of the Enterprise Act 2002 which only refers to "supply", or (ii) is consistent with the rest of the Draft Guidance by referring to "acquire" instead of "procurement of".

Notification of mergers to the CMA

⁴ Including in paragraphs 1.6 and 18.7.

16. The current CMA2 guidance includes in paragraph 6.2 the following statement: “*the fact that a merger has not been notified does not negatively affect the CMA’s substantive assessment of the competitive effects of a merger*”. This paragraph has been deleted from the Draft Guidance. We suggest that the paragraph should be restored in the Draft Guidance because it underlines an important feature of the voluntary system, which is that merger parties must make their own assessment as to whether a transaction could give rise to competition concerns and should be proactively notified. This feature reduces the regulatory burden of merger parties and the administrative burden on the CMA in relation to transactions which are unproblematic from a merger control perspective. It should be uncontroversial that, if the CMA chooses to investigate a non-notified merger, the fact of its non-notification by the merging parties will not impact the substantive assessment of that merger. We would therefore suggest that this explicit point be reinstated.
17. Paragraph 6.8(b) warns that completing a merger before obtaining merger control clearance could result in a completed transaction being “*unwound by disposal of the acquired business (or otherwise remedied by disposal of other business or assets) following an investigation*”. We suggest that the reference here to transactions being “*unwound*” is incorrect, as it implies that the business and/or assets in question would have to be restored to the seller, whereas what the CMA is actually referring to is a requirement to divest to a suitable third party the business and/or assets that were acquired in the completed transaction. The examples cited by the CMA are all cases where the acquirer had to divest the business to a suitable third-party, and in that sense the transaction was not ‘unwound’. This is an important legal point and should be clarified. This point is also one that frequently appears in CMA press releases, and results in many queries about whether the CMA is actually unwinding a transaction (in the true legal sense of that term).
18. The Draft Guidance has deleted the section on informal advice. We understand that this mechanism is rarely used in practice, and therefore we agree with its removal. Our view however is that it is important for the CMA to be willing to discuss novel issues with merging parties in some form, even if not through the current informal advice mechanism. The Merger Intelligence Committee might be a suitable first contact point for these sorts of queries, which can then be escalated internally at the CMA as appropriate.
19. Paragraph 6.14 sets out requirements for the CMA to open pre-notification discussions with the merger parties. This includes either a signed share purchase agreement (or equivalent) or evidence of a good faith intention to proceed with a transaction. The paragraph states that the CMA would expect, for public bids, at least a public announcement under Rules 2.4 or 2.7 of the Takeover Code to be made before opening a phase 1 investigation. We would welcome clarification in this paragraph that the CMA would nevertheless begin pre-notification discussions with parties to a public bid prior to either a 2.4 or 2.7 announcement, where there is evidence of a good faith intention to proceed.
20. The current CMA2 guidance advises merger parties in paragraph 6.39 to begin pre-notification discussions at least two weeks before the intended date for notification. This paragraph has been deleted from the Draft Guidance. While we appreciate that pre-merger discussions now often last longer than two weeks, and therefore the previous advice is outdated, we think that it would be helpful to provide an indication of the typical timings for pre-notification discussions somewhere in the Draft Guidance (perhaps in paragraph 6.17, which currently only states that the CMA will endeavour to review pre-notification submissions and revert “*within a reasonable timeframe*”). Better still, frequent updates of the CMA’s average length of pre-notification discussions and Phase 1 and Phase 2 processes would be a very welcome development, and would assist with the CMA’s stated aim of regulating mergers in a transparent way.
21. Paragraph 6.23 states that merger parties are free to supply the information required in the merger notice in the written format of their choice. The current CMA2 guidance states that one of the reasons for this flexibility is that the CMA wants to “*obtain the information necessary to carry out its responsibilities under the Act without placing undue burdens on the parties*”. This wording has been

removed from the Draft Guidance. We think that avoiding an undue burden on the merger parties is an important goal for any merger review process and therefore we recommend restoring this wording.

Fast track processes and conceding an SLC

22. We welcome the new section in the Draft Guidance which expands significantly the previous fast track reference procedure. While previously it was possible for merger parties to apply to the CMA to fast track cases to a phase 2 review, the Draft Guidance now also make it possible to fast track cases to consideration of UILs in phase 1, or to concede SLCs in phase 2. This flexibility, in conjunction with the CMA's increased willingness to enter remedy discussions early in the review process, will be essential when trying to co-ordinate the CMA merger review timetable with other filings made outside the UK for multi-jurisdictional transactions. It will also increase the scope for the CMA review process timeline to be shortened in cases which clearly give rise to competition concerns and where a straightforward remedy package can be identified to address those concerns. As noted above, it will be important that case teams are genuinely committed to advancing discussions on remedies early in the process where appropriate.
23. Paragraph 7.14 states that the cases which are most likely to be suitable for fast track to phase 2 are those for which competition concerns are identified that "*would, by their nature, impact on the whole or substantially all of the transaction, and not just one part*". We suggest that this be expanded to recognise that cases in which the competition concerns go to an area of the business that is of significant importance for the transaction rationale, or where there is substantial post-merger value (even where those business areas might not be "*whole or substantially all of the transaction*"), are also eligible for fast track treatment.

The Phase 1 assessment process

24. Paragraph 9.4 states that the CMA will often need to raise information requests during the phase 1 assessment process to request information beyond what was provided in the initial Merger Notice or in response to the enquiry letter. It also states that the deadline for responding to these requests will often be "*a relatively short (but reasonable) period*". From our experience, it is important for the merger parties to be able to review and discuss information requests with the relevant business contacts internally to determine whether there might be any difficulties or restrictions in collecting the requested information. It is therefore important, to the extent possible, for the merger parties to see formal information requests in draft form before they are issued. We would welcome the CMA amending this paragraph to state that they will endeavour to provide draft information requests in advance where it is possible to do so. This results in a more efficient process for all involved.
25. Paragraphs 9.19 to 9.20 and 9.28 to 9.31 describe the procedure for phase 1 cases raising more complex or material competition issues. This includes a state of play meeting (typically held between working days 15 and 20) where the CMA informs the merger parties about any competition concerns raised to date, including feedback from market testing. The CMA also indicates whether or not it will proceed to an issues letter – if so, an overview of the theories of harm which will be included in the issues letter is provided during the meeting. The issues letter is then sent to the merger parties and an issues meeting is usually held two working days later.
26. In our experience, merger parties often find it difficult to prepare for the issues meeting because of the short amount of time they are given to prepare after receiving the issues letter. Paragraph 9.31 states that the information provided during the state of play meeting should ensure that the merger parties understand the theories of harm in the issues letter. Our experience however is that the state of play meeting is often short and formalistic and does not provide sufficient information to prepare in this way. We think it would be helpful if more insightful feedback is given at the state of play meeting, including in particular more information about third-party feedback (which is until that point a complete unknown for the merger parties) and a more detailed overview of the theories of harm (rather

than just the headline areas in which the CMA has concerns). This will result in a more productive issues meeting and response to the issues letter, which is advantageous to all involved.

27. In addition, Paragraph 9.29 has removed from the Draft Guidance the reference to the CMA helping the merger parties to prepare for the issues meeting by grading the issues in the issues letter according to how likely they are to lead to the test for a reference to a phase 2 investigation being met (and therefore allowing the merger parties to focus on the most important issues). If the CMA is going to continue only allowing two working days to prepare for the issues meeting then we recommend restoring this provision to the Draft Guidance, and for a sense of the priority issues to be set out at the state of play meeting and in the issues letter.

Phase 2 inquiries: overview

28. Paragraph 10.5 sets out the procedures that apply in relation to the outside interests of the phase 2 Inquiry Group members. The CMA 2 guidance currently states that outside interests of appointed members “are” disclosed online, whereas the Draft Guidance has amended that to say that outside interests “may be” disclosed online. Given the importance of transparency in merger control proceedings we suggest restoring the original wording (or that it be clarified in which instances outside interests will not be disclosed).
29. Footnote 169 cross-refers to footnote 191, however we think that is a cross-referencing error.

Phase 2 inquiries: key stages prior to provisional findings

30. Paragraph 11.5 sets out the contents of the phase 2 opening letter. It states that, in some cases, the phase 2 opening letter will include an information request. We would like to stress the importance to the merging parties that this information request is carefully scoped only to request the specific information required by the CMA to advance its assessment, and that it is not used as a standard and overly broad request for information. Our experience is that the information request with the first day letter is often based on overly broad standard form precedents, and is not appropriately tailored to the case and what information is already on file. It would be better for the information request to come a few days later, and be more appropriately considered (particularly in cases where the majority of the phase 2 case team are new and have not transferred from the phase 1 case team).
31. Paragraph 11.15 relates to submissions of technical economic analysis. It would be helpful if the CMA could acknowledge in this paragraph that they are willing to engage in technical economic discussions at an early stage of the phase 2 process, including discussions about the phase 2 case team’s own economic methodologies.

After provisional findings

32. Paragraphs 13.4 to 13.9 set out the reasons why there is no general right for the merger parties to have “access to file” within CMA merger control proceedings (except for where disclosure of information is necessary because it forms part of the “gist of the case” that the merger parties have to answer). While we appreciate that this position is in accordance with settled precedent, we would like to stress the importance of the merging parties being provided with sufficient information (including third party survey responses that the CMA has relied on) to allow them to be able to effectively respond to the case made against them.

Communication and publication of decisions, undertakings and orders

33. Paragraph 19.8 sets out the procedure for excising confidential information from the full provisional findings report. It states that the merger parties will typically be given a brief period of time (which can be as short as only a few hours) in which to make final representations about confidential information in the report. It also states that, if the CMA is fully satisfied that all confidential material

has been treated appropriately, it can publish the report without first giving the merger parties an opportunity to comment. Given the importance to the merging parties of ensuring that all confidential information is properly excised, we suggest that the merging parties should be given an opportunity to comment in every case where it is possible for them to do so. In addition, as the provisional findings reports often are long documents (reaching over a hundred pages), we suggest that the merging parties should be given sufficient time to complete this exercise effectively (which in our view should be at least 48 hours).

B. Response to draft CMA56

Information requests to the parties to the merger or to third parties

34. Paragraph 2.5 of the Draft Guidance sets out the conditions that must be met for the CMA to make a decision to investigate a merger following requests for information. We query whether it is necessary to specify as a condition that “*further information is required to investigate the potential competition concerns*”. It will generally always be the case that further information is required to investigate potential competition concerns in cases where the CMA thinks there is a reasonable chance that the test for reference to an in-depth phase 2 investigation will be met.

How the CMA will respond to parties contacting the CMA

35. Footnote 5 states that the CMA will only consider a briefing note prior to a signed merger agreement in exceptional circumstances. Public offers are provided as an example of this. It would be helpful if the CMA could provide further explicit guidance (in line with its practice) on when it would consider a briefing paper for public offers prior to a signed merger agreement. In particular, the CMA should clarify that it will accept receipt of and review a briefing paper in circumstances where, in the context of a UK public bid, the potential acquirer has made an announcement pursuant to Rule 2.4 and/or 2.7 of the UK Takeover Code.
36. Paragraph 3.5 states that that the CMA may send short questions to merger parties following complaints from third parties. Previously the CMA56 guidance stated that questions would remain short to “*avoid imposing unnecessary regulatory burdens on parties to a transaction as a result of insufficiently substantiated complaints*” and stressed the CMA’s desire to “*preserve the benefits of the voluntary notification regime*”. We consider it of the utmost importance and an important benefit of the UK’s voluntary system that the CMA avoids excessive regulatory burdens on businesses in cases where there is no reasonable basis for competition concerns. We would request that this language be reinstated to recognise this point, and in particular to recognise that third parties (specifically competitors) often adopt a strategy of complaining to the CMA in cases where mergers are in fact pro-competitive.

What the CMA will do following engagement with the merger parties

37. Paragraph 4.1 describes what steps the CMA will take in the event that it decides, following engagement with the merger parties, to open an investigation to decide whether to make a reference. In particular, it states that the CMA will typically provide the merger parties with the option to notify the transaction if the merger is anticipated. Footnote 7 states that “*the merger parties will typically be expected to commit to submitting a draft merger notice to the CMA within 10 working days*”. We request that the CMA explicitly recognise in this footnote that the 10 working day period would, by ordinary course, be extended where completion of a transaction is not expected to take place for a long period of time. An example of this would be in circumstances where other regulatory filings are required.