Baker McKenzie.

2 December 2020

CMA Consultation on Proposed revisions to CMA2

Baker McKenzie Response

Baker McKenzie[1] welcome the opportunity to comment on the CMA's proposed new guidance on merger jurisdiction and procedure (the "**Guidance**"). We comment in our capacity as an international law firm, on behalf of the firm and no individual client.

Our team has extensive experience advising clients on mergers triggering UK jurisdiction, in addition to international mergers with a UK dimension (previously largely subsumed into EU filings), and on UK public interest reviews. We have been monitoring closely competition law and institutional changes expected from 1 January and have responded separately to your post-Brexit transition period guidance.

While we look forward to working more closely with the CMA in future, and have every respect for the CMA's expertise and professionalism as an institution, we are concerned about a number of recent enforcement trends, reflected in the Guidance (and indeed, the proposed Mergers Assessment Guidelines, also subject to consultation), which we consider to be disproportionately interventionist and to raise significant planning and coordination difficulties for businesses, as well as increasing the CMA's own workload for minimal return.

In essence, we recognise the material changes – over a number of years - in the way that the CMA uses and describes its powers, evidenced across a range of incremental changes in approach. Collectively, these bolster the CMA's ability to call in cases for review after completion, and to demand increasing volumes of information from parties. We appreciate that the CMA considers that there has been under enforcement and that it is being "tougher on mergers" but the process is now suffering from a considerable number of tensions and strains.

This is in large part due to structural problems within the design of the UK regime that are likely to increase post 1 January 2021. While we appreciate this consultation is not about reform (given the structure is set out in primary legislation), there is a strong sense within the legal and business community that the UK merger review regime is broken or at least not fit for purpose. In many jurisdictions, assessing whether jurisdiction is established is a matter of applying simple, numerical tests. In the UK, such an assessment takes considerably longer, is not definitive, and places significant regulatory risk on parties, despite the nominally "voluntary" nature of the system. This is in the context of deals where, due to the competitive auction / negotiation dynamics, purchasers are under severe pressure to be unconditional on UK merger control clearance. We therefore call for reform of UK merger control.

[1] Baker & McKenzie LLP is the UK registered entity of Baker McKenzie, a Swiss Verein.

We note international best practice on establishing jurisdiction is to avoid market share tests. In particular we note ICN Recommendations[2] that:

- "Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws",
- "Notification thresholds should be clear and understandable", and
- "Mandatory notification thresholds should be based on objectively quantifiable criteria" - with a Comment that while voluntary notification thresholds might utilise market share information, when such thresholds are "used to determine whether the competition authority has jurisdiction to review the transaction or to provide safe harbors, competition authorities should use objective criteria or provide guidance to assist parties in determining which transactions meet the thresholds or qualify for the safe harbor protection."

While it may be argued that the above does not apply as the system is voluntary, we would also note that the corollary of having a voluntary system has been the CMA's powers to impose interim enforcement orders ("**IEO**"s). Again, while not the subject of this consultation and proposed Guidance,[3] we query the benefit of a voluntary system with IEOs over a standstill regime, where parties at least benefit from greater legal certainty as to how their case will be handled. There is a great inefficiency and waste of resources – both for the CMA and the relevant parties – in having to handle compliance with IEOs.

As such we would advocate a mandatory system.

With respect to the Guidance at hand we have a number of comments.

As highlighted in the recent Competition Appeal Tribunal ("**CAT**") judgment in *Facebook v CMA*[4] (relating to the *Facebook/Giphy* transaction), UK merger procedures rely on a high degree of collaboration and engagement between merging parties and the CMA. We fully agree, and believe that implicit in this is that the CMA must also engage with merging parties, and play its part in creating conditions where the best outcomes for consumers can be achieved, while also paying regard to the constraints faced by businesses and helping businesses mitigate those pressures.

Against this background, we are particularly concerned:

- that the CMA's approach to establishing jurisdiction - in particular through its interpretation of material influence and application of the share of supply test - has become too loose, undermining legal certainty and the ability to sensibly advise merging parties; and
- that the CMA's exercise of investigative powers when reviewing prospective mergers has become too onerous, particularly in cases where the transaction is cleared in Phase 1. That is, the use of such powers is bordering on the disproportionate.

We also have some comments on points in the Guidance around coordination with overseas authorities, and about a number of other discrete procedural points.

Having said that, we welcome the CMA's efforts in updating its guidance materials periodically. Insight into the CMA's intended approach to jurisdiction and procedure has rarely been so important. Many businesses well versed in the EU Commission "one stop shop" review will have little

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[2] ICN Recommended Practices For Merger Notification And Review Procedure, available at https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/icn-recs/.

[3] (Albeit briefly touched upon at paragraph 6.8).

[4] [2020] CAT 23, at e.g.,128, 156-159.

familiarity with the CMA and the nuances of the UK process, and in particular with the circumstances in which notification, while voluntary, is advisable. A statement of intent from the CMA - even if we hope that certain details will be revisited, as detailed below - is helpful in this regard.

References to paragraph numbers below are to the proposed revised CMA2 guidance (the Guidance, as defined above) unless specified otherwise.

1. The CMA's approach to establishing jurisdiction

a. Preliminary comments

The CMA's caseload will increase from 1 January, while merging companies will also face the burden of a potential additional filing, and increased risk of divergent outcomes. It is imperative that the CMA's tests for establishing jurisdiction are well understood. We have seen a trend, reflected in the Guidance, for the CMA to adopt a 'robust' approach to establishing jurisdiction, which we think needs consideration.

b. Approach to share of supply test (when establishing jurisdiction)

The proposed Guidance on the CMA's approach to the share of supply test (when establishing jurisdiction) will be of concern to business (paragraphs 4.63-4.70).

While reflective of the CMA's expansionist approach in *Roche/Spark Therapeutic*, which is footnoted extensively, we note that this approach is yet to be tested by the Courts and, indeed, the CMA does not refer to its *Sabre/Farelogix* decision, where the CMA's jurisdiction has been challenged as tenuous, with judgment awaited.

While it is long established that the CMA's assessment of "share of supply" at the jurisdictional stage may differ from that ultimately adopted in the course of its substantive review, we believe it paramount that the CMA must ensure that the set of goods/services considered for jurisdictional purposes corresponds to a "reasonable description" - in accordance with Guidance paragraph 4.63(b), which is unchanged from the existing guidance.

The CMA's discretion in assessing this must be constrained by the bounds of reason, objectively assessed, and we would propose that this be defined as corresponding to or within the realms of what the relevant industry would recognise as a sensible categorisation or coherent product or service line, based on their existing business analysis/strategy (which might include business papers setting out the rationale for the proposed merger). The CMA's approach in recent cases, such as possibly *Sabre/Farelogix* and *Roche/Spark Therapeutic*, has been tenuous, with the result that transactions with arguably little to no UK nexus are subjected to an onerous regulatory review.

As noted, this compares unfavourably with our experience assessing notifiability of transactions internationally. In Germany, to name but one example, a client's position can be confirmed quickly through the application of simple, clear to apply, tests.

In our view, it is inappropriate for the CMA to cherry pick functionalities, subsets or customers/revenues or other parameters that allow it to stretch the share of supply test to assert jurisdiction but that do not correspond to how the industry generally organises itself.

The CMA's current overly expansionist approach means that there is no legal predictability, and a disproportionate burden on businesses pressured to notify out of caution alone - with both the cost of compiling an additional filing/cooperating with an additional procedure, but also the increased risk of inconsistency in regulatory outcomes. Creative definitions of share of supply also increase the parties' burden in responding to information requests, as their existing data and business analyses will unlikely correspond to the parameters advanced by the CMA.

c. Assessing material influence

Hopefully a semantics point alone, but we also note the CMA has dropped its reference to only "exceptionally" examining whether there has been conferral of material influence in cases where the 15% shareholding threshold is not met (paragraph 4.27 departs from existing CMA2, paragraph 4.20 in this regard). The Guidance proposes that "any" shareholding may be examined, and that even shareholdings of under 15% may attract scrutiny where certain additional factors are present that indicate the ability to exercise material influence over policy.

Is this change in emphasis a statement of intent on the part of the CMA? CMA practice to date suggests that it is indeed exceptional that the CMA will consider material influence to be conferred under this threshold. Removing the "exceptional" qualifier risks leading to an increase in cautious notifications that do not in fact meet the material influence threshold, a waste in resources for all concerned, not least the CMA. We therefore suggest that the "exceptional" qualifier be retained for clarity.

d. Upfront reference to the transfer or pooling of employees as an arrangement potentially giving rise to a relevant merger situation

We note that an explicit reference to the transfer or pooling of employees has now been added to paragraph 4.2 on the definition of a relevant merger situation. We would find it helpful if the Guidance could provide additional detail on when the transfer of employees specifically will trigger jurisdiction.

2. Approach to investigative powers when reviewing prospective mergers

a. Increased exercise of information gathering powers, including at Phase 1, coupled with increased use of fining powers

In our experience, the CMA has now become the most interventionist merger authority in the world in terms of the intensity and scope of requests for information ("**RFIs**"). The fact the CMA can require formal interviews in a merger context is emblematic.

Perhaps it is telling in that regard that paragraph 6.55 no longer refers to the CMA not wishing to place undue burdens on parties. In our view, this wording - and spirit - should be reinstated, given the intensity and burden of RFIs we are now seeing, even at the pre-notification stage.

We welcome, conversely, the CMA's wording on short "but reasonable" deadlines being offered for response (paragraphs 9.4-5) and that parties encountering difficulties with compliance should discuss this with the CMA. Our recent experience is that deadlines are often impractically short, particularly with respect to document searches, and when coupled with requests for compliance statements signed

by senior personnel. We have found the CMA reluctant to show flexibility on deadlines, or stopping the clock after as little as a few hours delay.

These tight deadlines have been accompanied by increasingly wide/open-ended requests, meaning that businesses must also factor in time to develop a methodology for defining scope of any document search (no mean feat, particularly if called on later to justify the methodology and prove it has been adhered to), with the parties bearing responsibility for ensuring their response is correct and complete in all material requests, and the CMA at most prepared to comment but not "sign off" on a given methodology (CMA Guidance on requests for internal documents in merger investigations, paragraph 28).

Numerous practical issues arise, to name only a few: the need for the company itself to identify and isolate relevant information, the need to procure third party IT or technical support, the need in some cases to access archive systems, or the need to manage diverging rules on privilege in different jurisdictions.

The recent uptick in enforcement has borne testimony to the practical challenges faced by businesses in complying with such requests. Since the *HungryHouse* fine in 2017, a spate of penalties have been imposed on parties which have, for a variety of reasons (ranging from problems with search methodology to technical oversight) inadvertently submitted inadequate initial submissions, subsequently corrected, sometimes within days of the deadline. The highest of these fines for a single breach was £30,000, the statutory maximum.

The CMA's growing voracity for imposing fines accompanies an increased use of the s.109 formal power to request information, previously most common at Phase 2. We have seen these formal notices issued even at pre-notification stage, and we note the Guidance now describes these as the standard at Phase 1 (paragraph 9.8). Increased use of such notices effectively accelerates deadline for compliance and re-characterises the tone of the - voluntary - notification process from collaborative to inquisitorial.

b. Specific suggestions for how the Guidance might be enhanced

In light of the above, it is our view that the Guidance could be enhanced by proposing that the CMA will:

- Be more collaborative in agreeing scope of any search with the parties, prior to issuing requests.
- Ensure requests are proportionate to the likely potential risks to competition posed by the transaction, based for instance on factors such as UK revenues involved, size of increment, and whether the transaction is also being examined by an overseas regulator with a stronger jurisdictional tie.
- Discuss with businesses what the practical constraints will be in complying, including for instance the need to seek sign off at different entity levels or in different jurisdictions, or the need to devote resource to addressing parallel requests from other regulators.
- Ensure timelines reflect both the size and complexity of any request, in addition to the particular hurdles faced by the individual merging parties in complying.

c. Comments on the Merger Notice

We also consider that the CMA should re-visit the standard Merger Notice, which asks for a significant amount of information and supporting documentation. In our experience, the current Merger Notice is not used proportionately according to the potential competition issues at hand and/or the size of the deal and affected markets. The Merger Notice attempts to cover all theories of harm,

requiring detailed analysis and supporting evidence. We do not consider that this volume of information is likely to be required in the majority of merger cases. As a result, parties now face an increased, disproportionate regulatory burden.

We appreciate that the CMA encourages parties to seek derogations but the result of these discussions is a protracted pre-notification period, which is highly unsatisfactory. We do not consider that the CMA should be front-loading these discussions on information requirements at the pre-notification stage, rather it should use greater discretion in deciding whether it needs to ask for the information at all in the first place. The present level of information required by the Merger Notice creates a high baseline for the CMA to analyse most cases from which derogations can be requested, which is overly burdensome. The Merger Notice appears to be designed to assist the CMA with all the information necessary in order to reach a final decision, which is inappropriate. Rather, the threshold should be the provision of sufficient information to enable the CMA to carry out market testing. We would also encourage the CMA to consider introducing a "short form" variant of the Merger Notice for less complex cases.

3. Coordination with overseas authorities

a. Coordination of benefit to all, but parties' procedural rights need protection

We welcome the CMA's acknowledgement that merging parties may be subject to other regulatory processes (paragraph 8.1).

We also welcome the CMA's statement that it may decide not to open an investigation where remedies imposed or agreed under other proceedings would be likely to address competition concerns that might arise in the UK (paragraph 8.3), in addition to its acknowledgement that there can be substantial benefits to all parties of coordination between authorities in multi-jurisdictional mergers, and ensuring that potential remedies are consistent between jurisdictions (paragraphs 18.1-2). We would welcome more guidance on how the CMA handles/intends to handle this in practice. Further, we consider it would be beneficial for the CMA to state in the Guidance why, in such circumstances, it can be satisfied that it has complied with its relevant duties, particularly given the duty to refer. (The Guidance currently refers to the CMA potentially opening a formal investigation where overseas remedies do not "fully" eliminate UK concerns, but we think this would not always be proportionate).

Related to this, we note the suggestion that it will become more common for the CMA to ask questions about cases which are not notified to it but are notified elsewhere (paragraphs 8.3-4 and 18.7). We think a risk arises that the CMA will seek information without triggering its own review timelines or procedural protections that would apply were a party to directly notify the CMA of a transaction. The Guidance is also not specific as to limits on the CMA's ability to ask such questions.

We also have concerns about the proposed approach to confidentiality waivers. While the use of waivers is not uncommon internationally, we are concerned that the Guidance (paragraphs 9.22, 18.4 and template) suggests that parties will have to inform the CMA of any other filings and that the terms of the signed waiver will (automatically?) extend to permit unlimited disclosure of confidential information and documents that parties share with the CMA to those other authorities. There are real reasons why this is inappropriate, e.g., risks involved in sharing commercial secrets or otherwise sensitive information in certain jurisdictions, or risks of undermining privilege over information that would be considered privileged in other jurisdictions (even if not in the UK).

Similarly, while not covered in this Guidance, we note the National Security and Investment Bill (Clause 59) proposed changes to s. 243 of the Enterprise Act 2002, which would also make it easier for the CMA to disclose information to overseas authorities without merging parties' consent, with such changes also applying to mergers that have no national security dimension. We would view this as an unwarranted infringement on parties' procedural rights.

Separately, we think the Guidance should be clearer about the circumstances in which "certain stages of the process" at either Phase 1 or 2 might be omitted in cases also subject to review in other jurisdictions (paragraphs 9.2 and 18.7). While we wholeheartedly support the adoption of a flexible approach - and constriction of timelines - in cases subject to review in multiple jurisdictions, the Guidance would ideally clarify how the CMA would ensure that this would never be done to the detriment of the merging parties and their right to a fair regulatory process, e.g., through a consent mechanism.

b. Specific suggestions for how the Guidance might be enhanced

In light of the above, it is our view that the Guidance could be enhanced by proposing that the CMA will:

- Coordinate information requests with those of other regulators (where parties have consented to information sharing), particularly with the EU Commission, where a business operates on a pan-European scale and it is only now a quirk of Brexit that an independent UK notification is required.
- Indicate - as soon as practicable - if it intends to open its own investigation into a matter primarily notified to an overseas authority. A time-limit could be specified that the CMA will adhere to, e.g., not more than 4 weeks from a merging party making it aware of the overseas notification.
- Consider that it is *not* under a duty to refer cases addressed overseas where hypothetical concerns in the UK are not fully eliminated by overseas remedies, but may adequately be so.
- Delineate clearly the scope of information requests it will make in such cases. These should not be akin to a case formally notified to the CMA. Ideally requests would be limited to minimal additional UK-specific information, for instance UK revenues, lines of business and customers.
- Inform - and seek consent from - merging parties before seeking to either share information with overseas regulators that the parties have provided to the CMA, or to procure information provided by the parties to overseas regulators.
- Related to this, clarify that confidentiality waivers will be requested on a country-by-country basis, and that parties will have real choice to decline to offer them. Additionally, there should be an option for the waiver to cover information but not necessarily documents.
- Not omit procedural stages in its own review unless with the consent of the merging parties.

4. Other discrete points

a. Timing/process in Phase 1

We note the theoretical extension of the pre-notification phase in that the Guidance (page 43) now stipulates a 2 week window before even a *draft* notification may be submitted, but we do not see this

as a significant departure from current practice, where pre-notification is typically longer than the 2 weeks stipulated in the existing guidance.

We are also somewhat concerned at the change in language on what will be communicated to parties at State of play meetings (paragraph 9.19) from the CMA giving parties "as much information as possible" under the existing guidance to now simply "informing" them of competition concerns. Given the tight timeline between a State of play and Issues Letter or Meeting, we believe that the CMA should reinstate its commitment to be as full as possible when communicating its concerns at the State of Play so that the parties fully understand the theories of harm (as the CMA acknowledges should happen, per paragraph 9.31) and are better placed to set out their position in reply to the Issues Letter or Meeting. In a recent case we worked on, limited detail was communicated at the State of Play about the CMA's position on jurisdiction and theories of harm. Where jurisdiction arguments are complex and based on share of supply, this can be a significant hindrance for the parties' rights of defence. The importance of having a comprehensive overview of the substance at the State of Play is heightened in light of footnote 153, which states that no written information about the theories of harm will be provided before the Issues Letter. Alternatively, the CMA should consider being open to discuss with merging parties in advance of the State of Play its preliminary concerns, even if on an informal and non-binding basis.

In the case of non-notified transactions that are called in by the CMA post-closing, communication by the CMA is all the more important. We would welcome guidance to the effect that the CMA will commit to greater transparency, at an earlier stage, in such cases, as the State of Play currently takes place too late in the 4 month timeline for parties to be able to plan or respond to concerns.

Finally, we have some comments on sections of the Guidance describing the Issues Letter/Meeting process. We believe that the constriction in timing for the interval between receipt of the Issues Letter and the Issues Meeting from "at least two working days" to "usually 48 hours" is potentially detrimental to the parties (paragraph 9.31), as the latter implies that in some cases that interval could be shorter than two working days, an unduly short time period for the parties to fully prepare. There is also no longer a reference (in paragraph 9.36) to parties providing an agenda for the Issues Meeting (only a reference to a presentation is retained), which could work to the detriment of parties, who may wish to retain control over how the meeting is organised given that the meeting is an opportunity for them to present their case.

b. Undertakings in lieu

We are also concerned at the suggestion that the decision maker may choose to be party to discussions around Undertakings in Lieu ("**UILs**"). The existing guidance (footnote 159) states that a decision maker would leave the room prior to any such discussion but this has now been amended seemingly to give the decision maker the choice where remedies are complex or at the parties' request (paragraph 9.37). We believe that the decision maker should only be privy to such discussions at the request of the merging parties, given the clear risk of any substantive decision being prejudiced by the knowledge that merging parties were prepared to offer UILs (which may have been for procedural expediency and not because they believed their transaction would otherwise give rise to a significant lessening of competition).

Similarly, we were surprised at the apparent extension of circumstances in which the decision maker may be expected to be privy to UIL discussions pre-notification. Existing guidance states that such discussions will not be disclosed to the decision maker. We believe this to be the correct position, for the reasons stated above. The Guidance (paragraph 6.19 and new footnote 121) now states that UILs in pre-notification discussions will not "usually" be disclosed to the decision maker in advance of a

decision, and further that decision makers may be present at such discussions exceptionally where remedies are complex and also "where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating". We believe the latter risks catching a large number of cases and is not an appropriate test. As above, we believe the decision maker's presence at or awareness of such discussions should be at the discretion of the merging parties.

c. Fast track processes

We welcome the addition of guidance on the possibility of fast tracking cases to UIL, as was recently done in *Stryker/Wright*. This is a clear procedural efficiency.

The CMA's Guidance on certain multi-jurisdictional cases being less suitable for fast track, however, gives us some pause. The Guidance suggests (paragraph 7.16) that the CMA may not agree to fast track in some cases that would otherwise be appropriate but where this would otherwise not be conducive to the efficient conduct of the CMA's investigation, such as where this could hinder the ability of the CMA to align its proceedings with those of another jurisdiction. We would welcome an assurance in the Guidance that, where fast track is refused in such circumstances, this will not be to the detriment of the parties and that the merging parties will be able to challenge refusal decisions if needed.

d. Stress testing of third party evidence

We have some concern that, while the Guidance acknowledges that third parties may have commercial incentives to raise concerns and that the CMA must scrutinise these views and evidence carefully (paragraph 9.13), it is not specific as to how veracity of such evidence will be tested. This is also a point relevant to the CMA's proposed new Merger Assessment Guidelines. We have some concern that the credibility of evidence provided by merging parties is explicitly subject to a degree of scrutiny and testing, but that the CMA's processes for assessing third party evidence are not so clear. This should be addressed, whether in these guidelines or the revised Merger Assessment Guidelines.

e. Phase 2

We are surprised that the Guidance proposes that putbacks from the parties' own submissions will now only be to check for confidential information and not to confirm factual accuracy (paragraph 12.8). We are not sure what the rationale is for this limitation and it strikes us that the risk of parties' submissions being misquoted or taken out of context is elevated.

f. References to relevant enterprises and thresholds

While an administrative point only, we note that these references will require amending following passage of the National Security & Investment Bill.

5. Final comments

Baker McKenzie thank the CMA again both for the CMA's efforts in keeping its guidance notes current, and also for the opportunity to comment on guidance as it evolves.

We are happy to engage with the CMA further on any of the points discussed above. Please feel free to contact any of the following should that be helpful:.

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