

Draft CMA Merger Guidelines Consultation

CMS Comments

1. INTRODUCTION

- 1.1 CMS Cameron McKenna Nabarro Olswang LLP (“CMS”) welcomes the opportunity to respond to the CMA’s consultation on its revised merger guidelines.
- 1.2 We have not commented on all of the proposed changes made in the guidelines; instead we have focused our comments what we identified as the key issues in relation to the CMA’s proposals. We would be open to discussing our observations with the CMA further.

2. GENERAL COMMENTS

- 2.1 We welcome the CMA’s consultation at this time. With the end of the Brexit transition period, and end of the one-stop shop approach of the EU Merger Regulation leading to an increased need to screen mergers against the UK merger control rules, it is essential that the CMA focuses on ensuring that the UK merger control process is fit for purpose. Not only is this obviously important to companies seeking to assess whether or not to make a notification, but having an effective merger control regime should assist the CMA in ensuring that the demands on its resources are manageable and that it can dedicate resources effectively across all of its functions.
- 2.2 We recognise that the objective of the consultation is to update current guidance, and that it does not represent a wider reform of UK merger control. That said, we strongly urge the CMA to use this opportunity to focus on ensuring that the current regime operates with clarity and certainty and that the CMA conducts its processes efficiently and proportionately. Both practitioners and clients have, in recent years, found UK merger control to become more challenging and more uncertain. In particular, the application of the CMA’s jurisdictional tests has become more expansive leading to considerable difficulties and uncertainties for business in assessing the need to notify, and the requests and timing demands placed on merger parties have become more burdensome and are often unrealistic.
- 2.3 The introduction of the National Security and Investment Bill by the UK Government in mid-November 2020 will place increased regulatory demands on parties conducting M&A in the UK. This is a very significant development for companies investing in the UK and the Bill is anticipated to result in a significant number of notifications. The CMA needs to be mindful of this and, where possible, operate a streamlined merger control process so that the UK continues to represent an attractive venue for acquisitions and investment.
- 2.4 Lastly, we encourage the CMA to be proactive in keeping its merger control process under review and in seeking feedback from both practitioners and companies. It is critically important that companies can place trust in the CMA to review mergers robustly yet fairly and transparently.

3. JURISDICTION

- 3.1 Whilst we welcome the updated section on jurisdiction in the Draft Revised Guidance reflecting the CMA’s recent decisional practice, we consider that the guidance could benefit from greater clarity in how the CMA applies its tests.

- 3.2 ***Notion of enterprise.*** The amendments on what constitutes an enterprise, interpreting recent jurisprudence, would benefit from additional detail. The guidelines indicate that the CMA will consider “*whether the combination of components results in a degree of economic continuity in the activities of the business being transferred*” and further that the fact that “*a target business may no longer be, or has not yet started, actively trading does not in itself prevent it, or a combination of its assets, from being an enterprise*”. Further guidance as to the following would assist businesses and practitioners:
- 3.2.1 The extent to which the CMA could look ahead, be it months or years, when determining whether future supply could constitute an enterprise.
 - 3.2.2 The extent of development of any pipeline products or services to be considered by the CMA as sufficient to constitute an enterprise.
 - 3.2.3 The degree of economic continuity, either significant or otherwise, that the CMA will consider in its assessment.
- 3.3 ***Material influence.*** The statement that shareholdings below 15%, and indeed the CMA’s indication that *any* shareholding, may confer material influence is likely to create greater uncertainty and difficulty in determining whether the jurisdictional threshold is met. We would welcome further guidance on when, in practice, a shareholding below 15% would be likely to constitute material influence (for example, the additional factors, beyond the level of shareholding, that would be taken into account).
- 3.4 The (retained) guidance that a relevant factor for determining material influence is whether “*a company’s appetite for pursuing certain strategies would be reduced because of a perception that these strategies would be likely to cause conflict with the acquirer*” lacks clarity and it is doubtful whether this could be definitively assessed by a notifying party. Moreover, it is unclear if this criterion would only apply where there are other factors present which mean that the target would in the face of such conflict, be likely to acquiesce with the views of the acquirer (for example, the range of factors which may be deemed to confer *de facto* joint control described in the EU jurisdictional guidelines).
- 3.5 ***Share of supply.*** Recent and ongoing appeals have highlighted the issues that can arise through the CMA’s application of the share of supply test. The CMA’s wide margin of discretion when identifying a description of goods or services has been notably reinforced by the Draft Revised Guidance (in particular, by inclusion of the wide range of considerations the CMA can take into account, as set out in para 4.70). While we understand the CMA’s motivation, it should also take into account the unpredictability that can arise through increasingly creative and novel applications of the share of supply test, and the consequent difficulty this can cause merger parties that are deciding on the necessity and merits of (a resource-intensive) engagement with the CMA.

4. PROCESS

- 4.1 We consider the CMA’s processes can be made considerably more effective and efficient, and less onerous for parties. In particular,
- 4.1.1 ***Pre-notification.*** The CMA should focus on making pre-notification more efficient and more predictable for parties.
 - (a) The Draft Revised Guidance refers to the CMA scheduling “*a pre-notification meeting or telephone call/videoconference [when the CMA considers it is] desirable*”. We consider the CMA should go a step further and schedule such meetings at the pre-notification stage as a matter of course in pre-notification

discussions to allow the parties to engage in meaningful dialogue with the case team at an early stage. It would be especially useful for the CMA to provide parties details at this point as regards likely information requests and potential timings.

- (b) In addition to case-by-case discussions on “*what information is likely to be required for a complete Merger Notice*” currently proposed at pre-notification, the CMA should consider providing further guidance in the Merger Notice itself about the level and nature of information required.
- (c) Where markets are more complex, the CMA should be open to having briefing meetings with the parties at the pre-notification stage in order to facilitate discussion and understanding of market dynamics (rather than this being picked up at a late stage, e.g. in an Issues Meeting).

4.1.2 ***Use of section 109 requests.*** The CMA’s use of section 109 requests currently imposes significant burdens on parties and the Draft Revised Guidance does not seek to address or alleviate this. For example, section 109 requests are (often through no particular fault of the CMA) sometimes incoherent or unclear in their scope and, if fully complied with, would result in an unmanageably large or irrelevant set of documents being produced. The CMA should seek to adjust its practices, avoid incremental and repetitive requests and, where appropriate, consult with the parties on a draft request (which can be appropriately refined) as well as provide upfront guidance on how parties can efficiently respond to information requests.

4.1.3 ***State of play calls.*** The Draft Revised Guidance indicates the purpose of state of play discussions “*is to inform merger parties about any competition concerns that have been raised in the CMA’s investigation to date, including feedback from the CMA’s market test, and whether or not the CMA is to proceed to an issues letter.*” State of play calls should seek to provide a comprehensive summary of the CMA’s case. More transparency (at an earlier stage) on the CMA’s provisional views can only improve the quality of decision-making, given the extremely compressed issues letter process that may follow. Our experience is that the CMA can often only provide very high level information (for example, in circumstances where it is apparent that the CMA’s analysis has not been finalised), limiting the extent to which parties can meaningfully engage on complex issues raised in issues letters.

4.1.4 ***Timing of issues meeting.*** There is currently too little notice provided to parties in advance of an issues meeting and the Draft Revised Guidance repeats the pre-existing position that the parties will be provided a short interval “*usually 48 hours not counting weekends or public holidays*” “between receipt of the issues letter and date of the issues meeting in which to prepare. A minimum of 48 hours’ notice is far too short to be conducive to informed and good administrative decision-making. Issues letters are now routinely substantial in length and convey complex theories of harm. The CMA will have spent weeks in order to internally formulate, evidence and test its theories of harm, in contrast to the 48 hours that may be provided to merger parties to respond. This is both unfair, in that such a short period may mean a notifying party is unable to meaningfully address all the issues raised, and also risks wasting valuable public resources in cases where a phase 2 referral would have been averted had additional time been made available following the issues letter to assuage the CMA of a particular competition concern. Given the elongated nature of the current pre-notification process

(and common use of section 109 notices as a means of extending the four month review period for completed transactions), there is no compelling reason why the issues letter cannot follow more closely after the state of play call (or at least earlier in the phase 1 process)

4.1.5 **Phase 2.** We welcome the further guidance on the fast track processes, and in particular consider the conceding of an SLC at phase 2 a positive development allowing the parties and the CMA to focus on core issues regarding remedies. Nonetheless it is our view that the phase 2 process needs to be further streamlined. In keeping with the CMA's initiative "*to omit certain stages of the process where to do so would lead to greater efficiency*", we suggest that the process is further revised to achieve the following.

- (a) The CMA at phase 2 should seek to actively avoid duplicating the information gathering process at phase 1.
- (b) In addition to the conceding of an SLC, the process needs to allow for key issues, including remedies, to be addressed earlier on in phase 2 akin to the CMA's practice in market investigations.
- (c) The phase 2 process generally needs to involve greater engagement between the CMA and the parties.

5. INTERACTION WITH FOREIGN MERGER CONTROL AUTHORITIES

5.1 We welcome the addition of sections addressing the CMA's engagement with foreign competition authorities with respect to mergers being concurrently reviewed in other jurisdictions (referred to below as "parallel reviews"). The addition of these sections is particularly timely given the CMA's expectation that it will undertake dozens of additional parallel reviews following the end of the Brexit transition period.

5.2 We find helpful the clarification that waivers of confidentiality will be sought as a matter of course in parallel reviews. Together with the recent publication of a confidentiality waiver template, this provides a level of certainty to parties and practitioners regarding the CMA's general intention to engage and coordinate with foreign regulators on substantive and remedial aspects of parallel reviews.

5.3 We do consider however that the guidance would benefit from further detail. In particular, the CMA refers to the possibility of parallel reviews leading to (i) an investigation not being opened, (ii) where an investigation is opened, that developments in another jurisdiction may be taken into account by the CMA to align the CMA's assessment of a merger, its review timetable, or outcomes of its review, including remedies, and (iii) the involvement of the phase 1 decision maker in remedies discussions prior to an SLC decision.

5.4 In view of the CMA's experience to date dealing with foreign authorities, as well as its expectations going forwards, further clarity and examples would be helpful as regards:

5.4.1 When would remedies proposed in other jurisdictions be considered likely to address concerns in the UK? Presumably it is not sufficient that the markets considered in parallel reviews are broader than national in scope and to some extent include the UK.

5.4.2 In the case of remedies addressing to some extent concerns in the UK, when could these remedies be considered not to be comprehensive, such that further CMA investigation is warranted?

- 5.4.3 EU Commission representatives have recently remarked that the CMA will not receive any preferential treatment following the Brexit transition period. Will the CMA adopt a similar (non-preferential) approach to all foreign authorities as regards cooperation on substantive and procedural aspects of parallel reviews?
- 5.4.4 How does the CMA's cooperation and alignment strategy towards foreign authorities sit with the CMA's objective in being an international leader in digital strategy?
- 5.4.5 Noting the specified linkage between certain procedural innovations introduced in the Draft Revised Guidance, e.g. fast track consideration of UILs/phase 2, and the alignment with foreign regulators' timetables, does the CMA envisage departing from its standard processes in certain circumstances to facilitate the agreement of remedies in foreign jurisdictions? For example, in a phase 2 investigation, would the CMA consider curtailing its typical review process to coordinate with remedies imposed in a foreign jurisdiction?

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