

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

(CMA2 and CMA56)

1 Introduction

- 1.1 Dentons welcomes this opportunity to comment on the CMA's draft revised guidance (CMA2con and CMA56con). It is important for stakeholders that the CMA's guidance documents accurately reflect its current practices.
- 1.2 The stated purpose of the draft revised guidance is to provide general information and advice on the procedures used by the CMA in operating the merger control regime set out in the Enterprise Act 2002 (CMA2con) and the operation of the CMA's mergers intelligence function (CMA56con). Accordingly, we have limited our comments to the clarity and sufficiency of information the draft revised guidance provides, rather than how the CMA actually approaches its review of mergers.
- 1.3 We would be happy to discuss any part of our response further with the CMA.

2 Jurisdiction and relevant merger situations

Enterprises

- 2.1 Paragraphs 4.13 and 4.18 of CMA2con provide guidance on when the CMA will consider that a transfer of assets constitutes an enterprise.
- 2.2 In *Eurotunnel*, the Supreme Court prescribed two criteria which must be satisfied for a transfer of assets to be regarded as an enterprise:¹
- "(i) they must give him more than he might have acquired by going into the market and buying factors of production, and (ii) the extra must be attributable to the fact that the assets were previously employed in combination in the "activities" of the target enterprise"*
- 2.3 The CMA's draft guidance arguably oversimplifies the first criterion of the *Eurotunnel* test:
- "An enterprise would generally require something more than bare assets, related to the fact that the assets being transferred were previously employed in combination in the activities of the business being acquired"* (para 4.13)
- "The CMA will consider whether what is being acquired amounts to more than 'bare assets', owing to the fact that the assets were previously employed in combination in the activities of a business (or would be employed in combination to commence active trading)"* (para 4.18)
- 2.4 The reference to *"more than bare assets"* in these paragraphs does not clearly equate to *"more than might have been acquired by going into the market and buying factors of*

¹ *Société Cooperative de Production Seafrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75, paragraph 39.

production". There is thus a risk that the draft revised guidance indicates that the CMA only intends to apply the second criterion of the *Eurotunnel* test.

- 2.5 We recommend that this part of the guidance be clarified to better align with the two requirements established by the Supreme Court.

The share of supply test

- 2.6 Paragraph 4.63 (b) of CMA2con discusses what goods or services the CMA will have regard to in determining whether the share of supply test is met. The guidance now includes "overlaps involving pipeline products or services" in that assessment (referencing the CMA's decision in *Roche Holdings, Inc. / Spark Therapeutics, Inc.*)
- 2.7 While the Enterprise Act 2002 confers a broad discretion on the CMA to choose a specific category of goods or services supplied or procured by the merging parties for the share of supply test, it does not contemplate future overlapping goods and services or overlaps involving pipeline goods or services – i.e. goods or services that are not currently supplied by the parties. Section 23 of the Enterprise Act makes clear reference to goods/services that **are supplied or were supplied**. We are therefore concerned that paragraph 4.63(b) of CMA2con is inconsistent with the Enterprise Act.
- 2.8 Even if that was not the case, and the Enterprise Act permitted the share of supply test to be met by goods or services not yet supplied in the United Kingdom, there is insufficient guidance and certainty on how the CMA will approach such matters. For example:
- (a) For pipeline products, how far down the pipeline do the products have to be?
 - (b) Could this be applied to any merging party that undertakes R&D (for example, R&D into new models of electric razors)?
 - (c) Would the CMA seek to apply the share of supply test in other scenarios where goods or services are not currently supplied in the UK, having regard, for example, to planned entry into the UK by a party?
- 2.9 We urge the CMA to consider whether paragraph 4.63(b) of CMA2con is consistent with section 23 of the Enterprise Act. If it believes it is (which we do not), then it ought to provide greater certainty and clarity around its approach to this issue.

3 Pre-notification process

- 3.1 The CMA notes in *Figure: The key stages of a typical Phase 1 investigation*² that the duration of the pre-notification process will differ on a case-by-case basis, but that pre-notification ought to take a minimum of two weeks.
- 3.2 In our view, this does not accurately reflect the potential duration of pre-notification, which in our experience can run to three months in cases that are not especially complex (i.e. which are clearly not candidates for a Phase 2 reference).

² CMA2con, page 43.

- 3.3 The CMA's data confirms that pre-notification periods vary significantly. In slides presented to the Law Society Competition Section on 4 June 2020³, the CMA showed the length of pre-notification in April and May 2019 and April and May 2020.
- (a) In April 2019, pre-notification varied from less than 10 days to almost 60 days, with approximately one third of cases taking over 50 days; and
 - (b) by May 2020, the average pre-notification period exceeded 40 days.
- 3.4 The guidance should better reflect these realities by providing indicative timeframes for anticipated mergers.
- 3.5 Additionally, in our view paragraphs 6.17 to 6.19 CMA2con are not fully representative of the volume of information the CMA usually requests in pre-notification. While the type and volume of information requested in pre-notification will turn on the characteristics of each case, the guidance should acknowledge that the CMA will often gather most of the information required from the parties for its Phase 1 assessment during the pre-notification process.
- 3.6 Finally, paragraphs 6.17, 9.6 and 9.8 CMA2con do not acknowledge the market testing the CMA often undertakes during the pre-notification period and how this might affect the pre-notification timetable. It has been our experience that this can delay timing for the start of the formal Phase 1 assessment. This should be included in the guidance.

4 Fast track processes

- 4.1 Paragraphs 7.7 and 7.13 CMA2con state that merger parties can request a case to be referred "early" during the Phase 1 investigation or during pre-notification, either for the consideration of undertakings in lieu of reference or for a Phase 2 investigation. However, it is not clear whether there is a cut-off point after which the CMA will decline a request for a fast track procedure on the grounds that a significant amount of information gathering has already been carried out. It would be helpful if the CMA could provide further guidance on this.
- 4.2 To make a fast track procedure to a phase 2 investigation, the merging parties are required to accept in writing that the test for reference is met and that they agree to waive their right to challenge during a phase 1 investigation (paragraph 7.13). Paragraph 7.16 outlines how the CMA is able to decline such a request and the reasons for doing so.
- 4.3 We recommend the CMA states how it will treat a declined application, and in particular the acceptance that the test for reference is met, in its decision-making. This is essential if the fast-track procedure is to be considered by parties in anything other than clear-cut cases.

5 Phase 2 assessment process

Parties' submissions

- 5.1 We are concerned that the revised guidance reduces the scope for the merger parties to adduce further evidence and respond to concerns the CMA may have as regards the merger during the Phase 2 process. In particular:
- (a) there are only three stages during the Phase 2 process at which the CMA clearly commits to review submissions made by the parties: in response to the issues

³ Presentation to the Law Society Competition Section on 4 June 2020: CMA Merger Control during the pandemic (speakers: Colin Rafferty and Anna Caro).

statement, in response to the annotated issues statement (and any working papers disclosed at the same time) and in response to the provisional findings. Submissions provided outside these stages may not be taken into account⁴; and

- (b) it appears that fewer working papers will be disclosed to the parties – the draft revised guidance confines this to "key" working papers, the number and nature of which will vary on a case by case basis.⁵

- 5.2 The CMA expresses a concern that "*the [Phase 2] process is not suited to accommodating unsolicited submissions at other times.*" We agree that Phase 2 investigations need to be undertaken in a well-structured and efficient way. However, we are concerned that the proposed guidance does not provide any clarity on when submissions outside of the three main stages will or won't be taken into account. Absent further detail, such a statement may not be consistent with administrative law.

Final report

- 5.3 Paragraph 13.22 outlines the CMA's procedure for publishing its final report. We note the CMA has changed the standard of what will be published from "as is necessary to facilitate a proper understanding" to a standard of "reasons and information the CMA considers appropriate". It is crucial for companies and their advisers to have a clear and full understanding of the CMA's decisions and the standard of what information is relevant should remain an objective one. We recommend the guidance revert back to its previous drafting.

6 Multi-jurisdictional mergers

- 6.1 Paragraph 8.3 of the CMA2con states that the CMA may take into account merger control proceedings in other jurisdictions, and decide not to open an investigation if remedies imposed or agreed would be likely to address competition concerns in the UK. However, under paragraph 8.4, the CMA may still consider whether to open a formal investigation at any point before expiry of the four-month statutory period.
- 6.2 In cases where merging parties had remedies imposed or agreed in another jurisdiction, which would address any concerns in the UK, the continuing possibility of the CMA opening an investigation could cause unreasonable uncertainty and delay. We anticipate that a popular approach, in particular following the end of the Brexit transitional period, will be to informally engage with the CMA on such matters via a briefing paper.
- 6.3 This option appears to be covered in paragraph 3.2(c) of CMA56con. We recommend for clarity and consistency that it is also discussed, with as much detail as possible on the certainty the CMA will be able to provide, in CMA2.

7 Public interest mergers

- 7.1 We understand that the public interest merger regime for national security mergers is likely to be superseded by procedures outlined in the National Security and Investment Bill (the Bill). The Department for Business, Energy and Industrial Strategy (BEIS) proposes to remove the existing national security regime from the scope of the Enterprise Act 2002⁶ and give the

⁴ CMA2con, paragraphs 11.12 and 11.13.

⁵ CMA2con, paragraphs 12.2 and 12.3.

⁶ *National Security and Investment Bill, European Convention on Human Rights Memorandum for the Bill as introduced in the House of Commons*, BEIS, 10 November 2020, paragraph 48.

Secretary of State the power to give directions to the CMA (for example, not to investigate a national security merger)⁷.

- 7.2 While further changes may yet be made before the Bill receives Royal Assent, to ensure the revised guidance is not immediately out of date, it may be prudent to defer finalising it until the Bill receives Royal Assent.

8 Conflicts between CMA guidance notes

- 8.1 Paragraph 1.5 states "*where there is any difference ... between this guidance and other guidance produced or adopted by the CMA, the most recently published document takes precedence*". However, paragraph B.3 of Annex B states "*in case of conflict between this guidance and any other guidance, [CMA2] prevails*". We have no preference on which guidance should take precedence in the event of an inconsistency, but these two statements should be aligned to give clarity to merger and other interested parties.

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4 December 2020

⁷ S.31 National Security and Investment Bill (210 2019-21, as introduced) and *Memorandum from the Department for Business, Energy and Industrial Strategy to the Delegated Powers and Regulatory Reform Committee*, 10 November 2020, paragraphs 44-48.