

**CMA CONSULTATION ON DRAFT REVISED GUIDANCE ON THE CMA'S
JURISDICTION AND PROCEDURE IN RELATION TO MERGERS**

EVERSHEDS SUTHERLAND'S RESPONSE TO THE CMA'S CONSULTATION

1. Introduction

1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to comment on the CMA's consultation on its draft guidance "*Mergers - the CMA's jurisdiction and procedure: CMA2*" (the "**Draft Guidance**") and "*Guidance on the CMA's mergers intelligence function: CMA56*" (the "**Draft MIF Guidance**"). Our comments are based on the experience of our Competition, EU and Trade team in advising clients on UK merger control cases as well as merger control processes in multiple jurisdictions globally for cross-border transactions.

1.2 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.

2. Executive summary

2.1 The Draft Guidance and the Draft MIF Guidance provide a helpful update on the CMA's jurisdictional and procedural approach.

2.2 Particularly in the context of the CMA's broader role going forward post-Brexit, it will be important for merging companies to have as much clarity and certainty as possible as to both (a) whether the CMA has jurisdiction over a transaction and (b) how the CMA's process can align with other merger control or regulatory processes in other jurisdictions. This will support the CMA's goal of enabling companies to engage at an early stage with the UK merger control regime and, as appropriate, with the CMA.

2.3 We therefore welcome the approach outlined by the CMA in relation to multi-jurisdictional mergers. We agree with the CMA that it will be important for the CMA to have flexibility in its procedures and approach in order to align with cross-border merger control processes.

2.4 In relation to the CMA's jurisdiction we have made a number of suggestions which we consider will help provide merging companies with greater clarity on this point.

2.5 We also set out below a number of other practical and substantive points that we believe could be usefully addressed or clarified in the Draft Guidance.

2.6 For ease of reference, our response follows the chapter headings of the Draft Guidance and Draft MIF Guidance. Paragraph references throughout this response are to the Draft Guidance or Draft MIF Guidance, as relevant.

3. **Comments and observations: Mergers - the CMA's jurisdiction and procedure: CMA2**

Chapter 4 - Jurisdiction and relevant merger situations

3.1 *National security*

3.2 We note that due to the proposed changes to the Enterprise Act 2002 set out in the National Security & Investment Bill ("**NSI Bill**"), paragraphs 4.4 - 4.7 of the Draft Guidance relating to national security may be no longer applicable once the NSI Bill comes into force in early 2021. We consider that it would be helpful for merging parties if the new guidance could take account of the changes proposed under the NSI Bill. Should the new guidance be published before the NSI Bill has come into force, we consider that it should be updated once the NSI Bill is fully operational and that this should be acknowledged in the Draft Guidance.

Control

3.3 In relation to material influence in particular, in paragraph 4.20 of "*Mergers - the CMA's jurisdiction and procedure: CMA2*" (published January 2014) (the "**Current Guidance**"), it is stated that "exceptionally" a shareholding of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present. In the equivalent paragraph in the Draft Guidance (paragraph 4.27), the word "exceptionally" has been removed ("*even shareholdings of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present*").

3.4 Our understanding is that it is very rare that the CMA would find material influence in the case of a shareholding of less than 15%. We consider that the word "exceptionally" should be reinstated, as we are concerned that its removal will increase uncertainty for merging parties.

Share of supply test

3.5 We note that paragraphs 4.62 - 4.73 of the Draft Guidance, which deal with the share of supply test, are broadly rooted in the CMA's recent decisional practice in, for example, *Illumina/Pacific BioSciences*, *Roche Holdings/Spark Therapeutics*, and *Sabre/Farelogix*. We also note that the decision in *Sabre/Farelogix*, is at the time of writing the subject of proceedings before the Competition Appeal Tribunal ("**CAT**"). Our view is that it will be important for the Draft Guidance to take account of and acknowledge the proceedings in *Sabre/Farelogix* (and that it would be preferable for the Draft Guidance to take account of the CAT judgment in this case).

3.6 In addition to the general point raised above, we have the following specific comments on certain provisions of this section of the Draft Guidance:

3.6.1 In paragraph 4.56 of the Current Guidance, the CMA states that it will "*often*" be the case that the share of supply used corresponds with a standard recognised by the industry in question (whilst noting that this need not necessarily be the case). In paragraph 4.63(b) of the Draft Guidance, this wording has been changed such that the share of supply "*may*" correspond with a standard recognised in the industry in question. We consider that linking the share of supply test to standards recognised by the industry in question is more likely to give certainty to merging parties, enabling them to better assess whether or not the share of supply

test is likely to be met, and is also more likely to reflect the commercial realities of the markets being considered by the CMA. As such, we would suggest that the CMA refrains from moving away from the position as set out in the Current Guidance.

- 3.6.2 We note that the remainder of what constitutes “*any reasonable description of a set of goods or services to determine whether the share of supply test is met*” in paragraph 4.63(b) of the Draft Guidance is drafted broadly and we consider that this is likely to generate considerable uncertainty. For example, the CMA refers to the fact that competitive interactions between firms can also result from overlaps involving pipeline products or services. We are only aware of one case in which the CMA based share of supply on overlaps involving pipeline products (i.e., *Roche Holdings/Spark Therapeutics*), which was a pharmaceutical industry case. It is unclear to us whether this point in the Draft Guidance relates only to pharmaceutical industry cases. If it does, then we consider that it would be helpful for the CMA to make this explicitly clear in the revised guidance. If it does not, then we would encourage the CMA to include further guidance on how this approach would apply in practice (for example, what will the CMA consider to be a “*pipeline product*”).
- 3.6.3 Paragraph 4.64(c) of the Draft Guidance states that in determining whether the merger has a sufficient UK nexus the CMA will have regard to the nature of the relationships between the merger parties and their customers, and that in doing so, the CMA will consider relationships that are not governed by contract, as well as other relevant factors. We consider that this is a broad description which is likely to generate uncertainty. We consider that it would be helpful for the CMA to provide further guidance on the types of relationships which will be considered as relevant, and on what falls within the scope of “*other relevant factors*”.

Chapter 5 – The Phase 1 process: overview

Engagement with third parties

- 3.7 The Draft Guidance suggests (in the table beginning on page 43, “*Stage 2A*”) that the CMA is “*likely to engage with third parties*” during pre-notification. We appreciate that the CMA’s practice has changed in recent times to enable early stage engagement with third parties during pre-notification where this is agreed in advance by the merging parties. We agree that this can be helpful and an efficient way to proceed in some cases. However, this approach is not appropriate in all cases, especially those where the transaction in question remains confidential throughout the pre-notification process. Our concern is that the current language of the Draft Guidance does not make this clear and that pre-notification can be undertaken confidentially without recourse to third parties (and so if the language were to stay as drafted this could act as a disincentive on companies to engage early on in pre-notification discussions). We therefore suggest that it is important to make clear in this part of the Draft Guidance that the CMA would only engage with third parties during the pre-notification stage with the merger parties’ prior consent. We understand this to be the CMA’s practice in any event.
- 3.8 Similarly, the Draft Guidance suggests (in the table beginning on page 43, “*Stage 2B*”) that when the CMA sends initial enquiries to the parties as regards a completed merger, it will engage with third parties and may issue an invitation to comment. It would be helpful if the CMA could confirm

whether it would only do so after it has received responses from the merger parties themselves.

Chapter 6 – Notification of mergers to the CMA

Public bids

- 3.9 Chapter 6 of the Draft Guidance deals with notification of mergers to the CMA, including the process for commencing pre-notification discussions. In this context, paragraph 6.14 of the Draft Guidance states that, in the case of a public bid, *"the CMA will expect at least a public announcement of a firm intention to make an offer or the announcement of a possible offer in order to open a phase 1 investigation."* It would be helpful if the CMA could confirm, in the case of a public bid, that it is acceptable to start pre-notification discussions before submitting a Case Team Allocation Form ("**CTAF**"), which we understand is the CMA's practice in any event.

Rejection of a Merger Notice

- 3.10 We note that the Draft Guidance contains a new section, titled *"Rejection of a Merger Notice after commencement of the initial period"*. Paragraph 6.25 of this section sets out the reasons for which the CMA can reject a Merger Notice. We agree that it is reasonable for the CMA to reject a Merger Notice for the reasons stated in paragraphs 6.25(a) and 6.25(b).
- 3.11 We do, however, have significant concerns over the CMA's proposal to reject a Merger Notice if *"the merger parties fail to provide information which should in fact have been included in the Merger Notice, or fail, without reasonable excuse, to provide on time, any information requested by the CMA using its powers under section 109 of the Act."* (paragraph 6.25(c)).
- 3.11.1 On the face of paragraph 6.25(c), it implies that a failure to respond to a section 109 notice within the required timeframe would 'restart the clock' on the whole investigation. We assume that is not the intent of this paragraph and that the CMA will continue with its current practice (whereby such a failure to respond would 'stop' the clock, rather than 'restart' it).
- 3.11.2 The CMA currently has a rigorous process for scrutinising a Merger Notice before it is submitted, through pre-notification. We would expect that those discussions would determine what is required for the Merger Notice. To the extent there is a significant omission, for example a failure to describe an overlap, the CMA has other powers better suited to dealing with that (such as its powers in respect of misleading information).
- 3.11.3 Given the uncertainty that paragraph 6.25(c) would create for merging parties, we consider that it should be removed and clarification provided that failure to respond to a section 109 notice within the required deadline would 'stop' the clock, rather than 'restart' it.

Chapter 9 – The phase 1 assessment process

Interviews

- 3.12 Paragraph 9.8(c) of the Draft Guidance states that the CMA may request individuals to submit to a formal interview *"in some cases"*. It would be helpful if the CMA could elaborate on when this power would be used. For example,

is this likely to be a fall back if the written responses to information requests are not sufficient?

Time between receipt of the issues letter and the issues meeting

- 3.13 Paragraph 9.31 of the Draft Guidance confirms that the time between receipt of the issues letter and the issues meeting is unchanged from the Current Guidance. Our experience is that this interval is short and that, in fact, the quality of evidence which the CMA receives at the issues meeting would be improved by providing parties with an additional 24 hours to prepare for the meeting, after receipt of the issues letter. This is because, while the Draft Guidance notes (in paragraph 9.20) that the case team will outline theories of harm during the 'state of play' discussion, many of the specific points merger parties will need to respond to only become fully apparent on review of the issues letter.
- 3.14 Similarly, we consider that providing parties a further 24 hours to submit the written response to the issues letter would also improve the quality of evidence the CMA receives, at what is a crucial point in the investigation.

Chapter 12 – Provisional findings

'Put-back'

- 3.15 The Draft Guidance (at paragraph 12.8) states that the CMA will typically not 'put-back' draft text to parties to verify factual accuracy "*where the draft text is directly taken from information already provided to the CMA.*" This includes information from both phase 1 and phase 2, such as "*previous written submissions, responses to written questions, or agreed notes of oral evidence*". In these circumstances, 'put-back' will be limited to the purpose of identifying potentially confidential information (to the extent parties have not previously been given the opportunity to do so).
- 3.16 We consider this could potentially be problematic in situations in which information has been extracted from internal documents which:
- 3.16.1 may not be entirely accurate (for example, a marketing presentation or an internal operations document reflecting something that has been subsequently updated/amended); or
- 3.16.2 contain conflicting statements (or different numerical values) referring to the same subject (this is especially likely in the case of numerical values – for example economic analysis and financial data).
- 3.17 In our experience, during the phase 2 process, the fact checking that takes place through 'put-back' is often extensive – covering both 'facts' in the merger parties' documents, and, on occasion, the CMA's interpretation of individual documents or conclusions the CMA has made on the basis of previous submissions.
- 3.18 We are concerned therefore that, given the importance of the fact checking exercise that the 'put-back' process provides, there is a risk in limiting the 'put-back' process to confidentiality claims. We consider that this risk is especially high with regards to economic analysis, financial data and the CMA's interpretation of parties' documents.

Chapter 16 – Public interest mergers

The new National Security and Investment ("NSI") Regime

- 3.19 Further to our comments above regarding the national security sections of Chapter 4, we note that the NSI Bill regime is not referred to in the Draft Guidance. All references to public interest / national security / the role of the Secretary of State are to the existing regime.
- 3.20 Given the impact the NSI Bill is projected to have on a large number of transactions, and the changes it is proposing to the existing public interest regime, we consider that it is imperative for the revised guidance to address the interplay between the CMA merger control process and the new foreign direct investment regime. We consider that guidance is needed on, for example, how the CMA's review process in 'typical' merger investigations could be affected by the Secretary of State's powers in section 31(2) of the NSI Bill to "*direct the CMA to do, or not to do, anything under Part 3 of the Enterprise Act 2002 (...) if the Secretary of State reasonably considers that the direction is necessary and proportionate for the purpose of preventing, remedying or mitigating a risk to national security*" and the provision at section 31(5) of the NSI Bill that states that "*The duty of the CMA to comply with a direction given under this section applies regardless of any other duty imposed on the CMA.*".
- 3.21 In addition, as noted above, the Draft Guidance continues to refer to "*national security, including public security*" as one of the public interest intervention grounds (for example, at paragraph 16.5) as well as to the lower thresholds for mergers involving relevant enterprises (for example, at paragraphs 4.4 - 4.7).
- 3.22 However, our understanding is that changes to the Enterprise Act 2002 and the relevant Statutory Instruments, proposed in Schedule 2 of the NSI Bill (Minor and Consequential Amendments and Revocations), would see the national security ground for public intervention, the list of relevant enterprises and the lower jurisdictional thresholds revoked once the new regime comes into force. We consider that it would be helpful for merging parties if the new guidance could take account of the changes proposed under the NSI Bill. Should the new guidance be published before the NSI Bill has come into force, we consider that it should be updated once the NSI Bill is fully operational.

Chapter 18 – Multi-jurisdictional mergers

- 3.23 We welcome that the CMA is looking to assess multi-jurisdictional mergers in a flexible way and that it has set out a number of ways in which this might take place. We set out below some suggestions which we consider may strengthen these options.
- 3.24 We consider that the course of action proposed in paragraph 18.7(a) of the Draft Guidance, by which the merging parties update the CMA on the progress of proceedings in other jurisdictions, is sensible and helpful and will support alignment of merger control review across multiple jurisdictions. It would be helpful if more clarity could be provided in the revised guidance. e.g. through examples, as to when the CMA will choose to open a formal investigation "*at a later stage*".
- 3.25 While we agree that the provisions of the Draft Guidance regarding 'fast tracking' of cases (referenced in paragraph 18.7(c)) and 'concession' of an SLC (referenced in paragraph 18.7(d)) are helpful in the context of multi-

jurisdictional mergers, we consider that the Draft Guidance should in addition clarify or add that the resulting phase 2 investigation could be 'fast tracked' as well. The Draft Guidance currently refers to supporting an efficient process. However, there is no explicit acknowledgement that the phase 2 process could be shortened by taking this approach. We appreciate that there is a clear and set process for phase 2 investigations. We also understand that the CMA will not want to commit to a shortened phase 2 investigation in every case. However, our concern is that without some clearer acknowledgement that a phase 2 process could be shortened an Inquiry Group may find it more difficult to shorten or skip particular elements of phase 2 and for merging companies it is likely to be more difficult to commit to a 'concession' (which is a significant step) without having more explicit comfort on timing.

- 3.26 In addition, for cases where the CMA has a waiver to exchange confidential information with other competition authorities, we consider that it would be helpful for the CMA to state in the Draft Guidance that it would seek to align its information gathering process (as described in Chapter 9) with other regulators to the extent that is possible. For example, if a waiver has enabled the CMA to obtain information from another competition authority it would be welcome if the CMA were to exclude that information already in its possession from the scope of its own information requests.

4. **Comments and observations - Draft Guidance on the CMA's mergers intelligence function: CMA56**

Mergers subject to review by competition authorities outside of the UK

- 4.1 We note that paragraph 3.2(c) of the Draft MIF Guidance sets out a change from the current *Guidance on the CMA's mergers intelligence function* (the "**Current MIF Guidance**"), in relation to mergers that have been or are being investigated by competition authorities outside of the UK. The Draft MIF Guidance notes that this should be detailed in the briefing paper, including whether the parties intend to offer (or otherwise expect to be subject to) remedies in those proceedings that may prevent an SLC in the UK (in cases where markets are broader than national in scope).
- 4.2 Similarly, the Draft MIF Guidance goes on to note (in paragraph 4.3) that one circumstance in which the CMA may not open an investigation immediately (where the mergers intelligence committee still has questions about the deal) is where a transaction is subject to review by a competition authority outside the UK and any remedies imposed or agreed in those proceedings, in the event that competition concerns are found, would be likely to address any competition concerns that could arise in the UK.
- 4.3 We consider that it would be beneficial for the Draft MIF Guidance to be amended to include a provision that merger parties should be specifically informed (in response to a briefing paper or inquiry letter) that the CMA is not currently minded to open an investigation, but that this is subject to the outcome of the remedies process in the parallel proceedings and an assessment of whether they will address / change the situation in the UK market.

Eversheds Sutherland (International) LLP

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