

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

November 2020

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**RESPONSE TO THE CMA'S CONSULTATION ON ITS 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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1. Introduction

- 1.1 Freshfields Bruckhaus Deringer LLP (*Freshfields*) welcomes the opportunity to comment on the Competition and Markets Authority's (*CMA*) public consultation on its draft revised guidance in relation to "*Mergers: Guidance on the CMA's jurisdiction and procedure*" (**Draft Revised CMA2**) and "*Guidance on the CMA's mergers intelligence function*" (**Draft Revised CMA56**) (together, the **Draft Revised J&P Guidance**).
- 1.2 We believe that clear guidance on the CMA's approach to jurisdiction and procedure is a vital component of the CMA's voluntary merger control regime. The Draft Revised J&P Guidance should provide clarity to merger parties as well as to third parties affected by the mergers of competitors, suppliers or customers.
- 1.3 We welcome that the CMA has updated parts of the Draft Revised J&P Guidance to reflect procedure and incorporate positive developments that will allow the CMA's merger investigations to run more smoothly (for example, guidance on briefing notes, the removal of the informal advice process, guidance on fast track options). We do however consider that the Draft Revised J&P Guidance can be improved – to the benefit of both the CMA and merging parties – through the inclusion of further detail and clarification in relation to some of the topics covered. We have set out our thinking in further detail in the following sections.

2. Jurisdiction and relevant merger situations in Chapter 4, Draft Revised CMA2

Material influence

- 2.1 The amendments to the guidance on 'material influence' reserve the CMA's right to have regard to a broader range of factors, but the amendments also have the effect of reducing certainty for merger parties. Given this, further guidance is appropriate. In particular:
- (a) At paragraph 4.27 of the Draft Revised CMA2, the possibility of a shareholding below 15% attracting CMA scrutiny is no longer described as 'exceptional'.¹ Rather, even shareholdings less than 15% might attract scrutiny where 'other factors' indicate the ability to exercise material influence over policy. In these circumstances, the CMA will have regard to whether there is a 'reasonable chance' that the test for a reference under the Act will be met. In particular, given that this scenario is no longer described as exceptional, presumably increasing the number of times that such factors will be taken into account, we consider that the Draft Revised CMA2 should include further detail on the types of 'other factors' that may be considered relevant. The guidance should also include an explanation of what the CMA considers to be a 'reasonable chance' that the test for a reference under the

¹ Paragraph 4.20 of the current CMA2 dated January 2014.



Act will be met, for example, whether a ‘reasonable chance’ equates to ‘more than fanciful’ or ‘more than a mere possibility’ or some other standard.

- (b) Paragraph 4.25 of the current CMA2 dated January 2014 provides that it is appropriate for the CMA, when considering whether material influence has been gained, to have regard to a party’s right to obtain board representation where the CMA considers the prospect of that right being taken up in the future to be “*more than fanciful*”. Such a requirement has been removed in the equivalent paragraph 4.34 in the Draft Revised CMA2, but the right or ability to obtain board representation can be considered by the CMA “*even where there remains some uncertainty around whether, or when, this right or ability might be exercised*”. We agree that the CMA should be able to consider a right or ability to obtain board representation even if there is some uncertainty about its exercise. However, we consider that the prospect of the right or ability should still be more than fanciful. Therefore, we suggest that the “more than fanciful” standard be re-inserted into paragraph 4.34 of the Draft Revised CMA2.

Share of supply test

- 2.2 The CMA has included examples of recent CMA decisional practice with respect to the share of supply test in paragraphs 4.62-4.70. Further detail on how the share of supply test will be applied to pipeline products would be useful. For example, with respect to pharmaceuticals, the guidance could include the CMA’s view on the stage of clinical development (Phase I, II or III) at which it will typically consider a product to have sufficient prospects for future commercialisation.
- 2.3 The CMA has attracted significant criticism for stretching the share of supply test beyond its reasonable application in cases such as *Roche / Spark* and *Sabre / Farelogix*. Regardless of our view that the share of supply test cannot be applied as widely as the CMA has sought to do in those cases, and should not be applied so widely given the negative effect on business certainty and the consequent chilling impact on economic activity, it will be necessary for the draft guidance to reflect the upcoming decision of the Competition Appeal Tribunal in case no. 1345/4/12/20 *Sabre Corporation v Competition and Markets Authority*.

‘Found not to qualify’ decisions

- 2.4 The CMA’s published decisions in cases found not to qualify generally provide little detail on the reason for the CMA’s decision. This limits the ability of parties to assess whether a relevant merger situation may have been created in other similar cases. Most recently, the CMA’s decision in *CSL Behring / uniQure* gave no indication of the reason for the transaction not qualifying and it is unclear whether this related to the nature of the assets which were the subject of the commercialisation and licence agreement, a lack of material influence, or not satisfying the share of supply test. As the Draft Revised CMA2 goes out of its way to include examples of cases where the CMA considers a relevant merger situation has been created, one might fairly expect the revised guidance also to include examples where the CMA has decided that a relevant merger situation has **not** been created. The CMA could provide this guidance in a general sense, without identifying the particular parties or cases. Additional



guidance in this regard would be useful for parties to self-assess and would result in a more efficient use of the CMA's resources.

3. Reasonable chance test in Chapter 6, Draft Revised CMA2

3.1 The Draft Revised CMA2 sets out at paragraph 6.4 that the CMA will take a decision to investigate “*if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met (ie there is a reasonable chance that an investigation will identify a relevant merger situation that gives rise to a realistic prospect of a substantial lessening of competition)*”. The ‘reasonable chance’ test is also referred to in the Draft Revised CMA56.

3.2 As set out in paragraph 2.1(a) above, it would be useful for the CMA to include in both sets of guidance further detail on how it interprets the ‘reasonable chance’ standard, for example, whether a ‘reasonable chance’ equates to ‘more than fanciful’ or ‘more than a mere possibility’ or some other standard.

4. Fast track and concession processes in Chapter 7, Draft Revised CMA2

4.1 The inclusion of guidance on how parties might seek to make the process more efficient by fast tracking or conceding a substantial lessening of competition (**SLC**) is useful. These processes have the potential to save the CMA and merger parties significant time and resources. For example, the period for third party consultation could be reduced considerably, as third parties will have the opportunity to comment on the draft UILs or during Phase 2. As described in greater detail below, we suggest that further detail in the Draft Revised CMA2 be included to assist parties to assess whether these options are worth pursuing.

Fast track for the consideration of UILs

4.2 The parties are required to accept in writing that the test for reference is met i.e. that there is sufficient evidence available that there is a realistic prospect that the merger will result, or has resulted, in an SLC. This option is described as differing from hypothetical discussions with the CMA case team, on a without prejudice basis, on possible remedies. This option raises the following considerations, which could helpfully be addressed in the Draft Revised CMA2:

(a) The Draft Revised CMA2 should set out the procedural safeguards that will be in place to ensure that the Phase 1 process can continue fairly if the CMA declines a fast track request. For example, whether the concession can be made on a without prejudice basis; which CMA staff would receive such a request on a confidential basis, and how they would be ringfenced; and any other protections that will be put in place to ensure a fair Phase 1 process if the request is declined.

(b) The Draft Revised CMA2 should include guidance on the extent to which the CMA will publish details of the merger parties’ acceptance that the test for reference is met (particularly in cases where the request is declined but also in cases where the request is accepted). Such a written acceptance could have other consequences for the merger parties (for example, use by third parties in a challenge to a subsequent clearance decision), which may act as a disincentive to pursuing this option. It would be useful if the CMA could set out: (i) whether the fact that a request was made and the terms of the



request/acceptance will be treated as confidential and any references redacted from the published version of the CMA's reasoned decision; and (ii) whether the CMA's practice in preparing its reasoned decision would vary at all in these cases because of the acceptance e.g. a high level, less detailed competitive assessment as a result of the compressed process.

- (c) The Draft Revised CMA2 provides that the request can be made 'early' during the phase 1 investigation. It would be useful for the CMA to include details as to how early this would need to be, or if there is a point at which the CMA can state definitively that it would be too late to explore this option (e.g. X working days after the state of play call).

Fast track to phase 2 investigation

- 4.3 The same considerations as set out above in paragraphs 4.2(a)-4.2(c) apply in relation to the option to fast track to a phase 2 investigation. In relation to paragraph 2(b) and the level of detail in the CMA's reasoned decision, the CMA could take advantage of a fast track to phase 2 request by publishing a less detailed reasoned decision and instead focusing its resources on phase 2, including the preparation of the issues statement.
- 4.4 In addition, this option requires that the CMA must have evidence in its possession at an early stage in its investigation that it believes objectively justifies a belief that the test for reference is met. It would be helpful if the Draft Revised CMA2 could include further detail on the nature of the evidence that the CMA would require (e.g. whether evidence from the merger parties would suffice or third party evidence would also be required) and whether the CMA would be willing to discuss informally with the parties that it considered this threshold to be met before the parties submitted their written acceptance and request. Again, further detail on the likely backstop date for making such a request would be useful.

Conceding an SLC

- 4.5 This option allows the merger parties to concede in Phase 2 that the CMA has evidence that establishes, to the required legal standard, that the merger has resulted in or may be expected to result in an SLC. The parties would be required to accept in writing that an SLC arises within a specific market and agree to waive their right to challenge that position. We understand and support the timing calculus that sits behind this proposal. However, this option raises the following considerations, which should be addressed in the Draft Revised CMA2:
 - (a) The Draft Revised CMA2 should set out the procedural safeguards that will be in place to ensure that the Phase 2 process can continue fairly in the case of a declined request (in the same way as described at paragraph 4.2(a) above).
 - (b) The Draft Revised CMA2 should include guidance on the extent to which the CMA will publish details of the merger parties' concession that the merger has resulted in or may be expected to result in an SLC and any impact the concession will have on the final report (in the same way as described at paragraph 4.2(b) above).



5. Interactions with other proceedings in Chapter 8, Draft Revised CMA2

5.1 Paragraphs 8.3-8.5 and 18.7(a) in the Draft Revised CMA2 provide that the CMA will take into account remedies imposed or agreed with authorities in other jurisdictions that would be likely to address UK competition concerns when deciding whether to open an investigation on its own initiative. That is potentially a very helpful tool in ensuring alignment between different merger control processes, and we welcome it. However, it does leave a material risk of the CMA subsequently deciding that it will nonetheless open its own investigation. Indeed, the draft guidelines are explicit that the CMA reserves its right to open a formal investigation at any point before the expiry of the four-month statutory period. It would be useful, therefore, if the Draft Revised CMA2 could provide for a process under which the CMA could give the merger parties a “comfort letter”, or some other written view, even if necessarily conditional on certain events, that the remedies could in principle address UK competition concerns and that it will not therefore open an investigation so long as such remedies are pursued. In parallel, it would be helpful if the CMA were able to include a clear statement that the information it requires from merging parties to monitor their progress in other jurisdictions should not amount to a requirement for the provision of a merger notice by the back door.

6. The phase 1 process in Chapter 9, Draft Revised CMA2

6.1 The Draft Revised CMA2 includes at paragraph 9.8(c) some guidance on the CMA’s use of section 109 notices to conduct formal interviews by requiring an individual to give evidence in person or by telephone or videoconference. It would be useful if the CMA could provide further guidance on:

- (a) the circumstances in which these powers are likely to be used;
- (b) how these interviews will be conducted (including CMA attendees; whether interviews will be recorded; whether a transcript will be made available; and whether there are any restrictions on attendees disclosing the contents of the interview to non-attendees who are within their business or firm); and
- (c) the procedural protections that will apply, such as the presence of legal representatives, the privilege against self-incrimination, and legal professional privilege.

6.2 We suggest that some of the amendments to the guidance on the phase 1 process should be reversed:

- (a) Paragraphs 7.11 and 7.12 in the current CMA2 dated January 2014 provide that the merger parties are informed (in an anonymised form) of the nature of concerns expressed by third parties to enable the merger parties to respond to them; and that the CMA will seek to test any issue material to the outcome of a case directly with the market participant best-placed to supply facts and evidence on that issue. These details appear to have been removed from the Draft Revised CMA2. We believe that these aspects are central to the merger parties’ and third parties’ rights of procedural fairness and should be expressly referenced in the Draft Revised CMA2.
- (b) Paragraph 9.31 in the Draft Revised CMA2 states that the CMA will provide the merger parties with a “*short interval (usually 48 hours, not counting*



weekends or public holidays) between receipt of the issues letter and the issues meeting to allow them time to prepare". This is a departure from the current timeframe of "at least two working days" (paragraph 7.38 in the current CMA2 dated January 2014). We suggest that the timeframe for receipt of the issues letter be restored to at least 48 hours before the issues meeting (not including weekends or public holidays). In our experience, 48 hours is already a short period of time and it is a significant logistical task to gather the views of the merger parties on the key issues identified by the CMA in time before the issues meeting. These views often include those of senior management and other key individuals located in different time zones. In our experience, this interval is necessary to gather additional information in response to the issues identified by the CMA which, in many cases, has resulted in the narrowing of the issues significantly. The time is used to prepare presentation materials and clear, concise responses to the issues letter, which we trust the CMA finds useful. Therefore, we consider that it is in the interests of all participants, including the CMA, to set a **minimum** timeframe of 48 hours (excluding weekends and public holidays) between the issues letter being received and the issues meeting.

7. Phase 2 inquiries in Chapter 11, Draft Revised CMA2

- 7.1 The Draft Revised CMA2 states at paragraph 11.13 that a CMA phase 2 investigation "is formal in nature and the process is not well suited to accommodating unsolicited submissions at other times"; and that while the CMA will seek to take submissions provided outside of key stages (set out in paragraph 11.12) into account, "to the extent possible within the applicable statutory timescales, it may not do so where this would risk undermining the effective functioning of the CMA's investigation". Such a rigid approach is not consistent with the parties' rights to a fair hearing. The CMA is required to consider the evidence before it and the parties must be permitted to defend themselves effectively – neither of these essential requirements should yield to a predetermined administrative timeline. We suggest that this paragraph be amended: (i) to reflect the CMA's strong preference for parties to provide submissions during the set key stages to the extent possible; and (ii) to remove any discretion for the CMA to disregard submissions for the purposes of administrative convenience. To the extent that parties' submissions might not be taken into account by the CMA, this should occur only in the most exceptional circumstances.

8. Public interest mergers in Chapter 16, Draft Revised CMA2

- 8.1 In due course, it would be helpful for the CMA to provide additional guidance on how the CMA expects the separate review process under the National Security and Investment Bill will impact or interact with the CMA's merger investigation for mergers involving businesses active in the designated national security sectors.

9. Annex C, Draft Revised CMA2: Ancillary restraints

- 9.1 It is useful that the CMA has largely retained the principles which have been developed under the European Commission's *Notice on restrictions directly related and necessary to concentrations* (2005/C 56/03) (the **EC Notice**). We suggest the following amendments.



- (a) Paragraph C.5 reflects the EC Notice that it is not sufficient that an agreement has been entered into in the same context or at the same time as the merger. However, paragraph C.5 does not include an equivalent statement to that provided in footnote 1 of paragraph 12 in the EC Notice (i.e. that “*Likewise, a restriction could, if all other requirements are fulfilled, be ‘directly related’ even if it has not been entered into at the same time as the agreement carrying out the main object of the concentration.*”) We suggest that an equivalent note be included in the Draft Revised CMA2 because the timing of entry into a related agreement should not be determinative of whether it is directly related to the implementation of the merger.
- (b) Paragraph C.16 of the Draft Revised CMA2 is the equivalent to paragraph 23 of the EC Notice and provides that non-competition clauses must remain limited to products and services forming the economic activity of the enterprise transferred. However, paragraph C.16 does not include the following sentence which appears in paragraph 23 of the EC Notice: “*This can include products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed.*” We suggest that this sentence be included in paragraph C.16 as it is a non-exhaustive list of useful examples. Such a statement would not be inconsistent with the CMA’s revised guidance on ‘enterprises’ at paragraphs 4.10 to 4.19 in the Draft Revised CMA2.

10. Briefing notes, Draft Revised CMA56

- 10.1 The additional guidance on briefing notes that can be submitted to the CMA’s mergers intelligence function is useful.² We suggest the following amendments:
 - (a) The Draft Revised CMA56 states at paragraph 3.2 that briefing notes should be no more than five pages. In certain circumstances, five pages may not be sufficient. It would be helpful if paragraph 3.2 were amended to increase the maximum page limit or include a provision for the parties to submit a longer briefing note with the CMA’s prior permission, to reflect current practice.
 - (b) Paragraph 3.3 of the Draft Revised CMA56 provides the CMA’s general rule that it will consider a briefing note only if there is a signed merger agreement or, in exceptional circumstances, at least evidence of a binding intention to merge (or in the case of a public offer, the binding nature of the offer). We suggest that the threshold for submitting a briefing note should be aligned with the threshold for submitting a Case Team Allocation Form i.e. evidence of a good faith intention to proceed.

11. The burden on parties

- 11.1 The current CMA2 dated January 2014 includes a statement at paragraph 6.55 that: “*The CMA wishes to obtain the information necessary to carry out its responsibilities under the Act without placing undue burdens on the parties.*” The current CMA56 updated 5 September 2017 includes a statement at paragraph 14 in relation to

² The Draft Revised J&P Guidance refers to “briefing note” everywhere except in paragraph 6.10(b) of the Draft Revised CMA2 which refers to a “briefing paper”. For consistency, we suggest that this reference be replaced with “briefing note”.



follow-up questions to briefing notes: “*The CMA wishes to obtain the information necessary to carry out its responsibilities under the Act without placing undue burdens on the parties.*” Similar statements have not been carried across to equivalent paragraphs in the Draft Revised J&P Guidance.

- 11.2 We acknowledge that the CMA has included in paragraph 1.1 of the Draft Revised CMA2 a statement that its “*merger control procedures are designed to fulfil this duty in an efficient manner, while ensuring that the merger parties’ rights to due process are fully respected. The CMA is also required to balance the rights of the merger parties with those held by third parties.*” We suggest that the Draft Revised CMA2 include a similar express reference to avoiding undue burdens on parties and that this could be incorporated into the new paragraph 1.1 as a core feature of the CMA fulfilling its duty in an efficient manner.

12. Concluding remarks

- 12.1 We appreciate the opportunity to respond to this consultation. We would be happy to discuss with the CMA any of the issues raised in this response if that would assist.

