

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

**Submission from the Joint Working Party of the Bars and Law Societies of the UK in Competition Law (JWP)<sup>1</sup>**

**4 December 2020**

**1 Introduction**

- (1) The Joint Working Party (“**JWP**”) welcomes the opportunity to comment on the Competition and Markets Authority’s (“**CMA**”) consultation on *Mergers: Guidance on the CMA’s jurisdiction and procedure* (**CMA2**) and *Guidance on the CMA’s mergers intelligence function* (**CMA56**) (together the “**Current Guidance**”). Together the draft revised CMA2 (**CMA2con**) and CMA56 (**CMA56con**) are referred to as the “**Draft Revised Guidance**”.
- (2) By way of general comment, we consider that the CMA has an opportunity to make important and necessary changes to the UK merger control regime in order to streamline the process for the benefit of all interested parties. This is particularly important given the increased workload the CMA expects following the end of the Brexit transition period. In this regard, while we consider that there are many jurisdictional and procedural aspects of the UK merger control regime that are, in our view, in need of a significant overhaul, we have not elaborated on any amendments that would require legislative change in this Response.
- (3) We have several observations on aspects of the proposed changes to the Current Guidance which we outline below in **Section 2**, while noting that we have not commented on every proposed change.
- (4) In addition, **Section 3** highlights other issues that could, and in our view should, be addressed. Improving the efficiency of merger reviews will be critical particularly as the CMA’s caseload increases in the coming months and years, putting further strain on its resources. Therefore, we consider it is an appropriate juncture to outline certain elements of the CMA’s merger processes which could be further improved without the need to resort to legislative reform.
- (5) We would be happy to discuss any aspects of our response with the CMA.

**2 Response to consultation documents**

- (6) We have focused on key aspects of the changes to the Current Guidance in this Section, without commenting on every proposed change.

**2.1 The update to the Current Guidance is timely**

- (7) As a preliminary point, we are pleased that the CMA has taken the opportunity to update the Current Guidance given the evolution of the CMA’s practices in recent years and the

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imminent end of the one-stop shop principle under EU merger control. As the CMA continues to adapt its processes to reflect experience following the end of the Brexit transition period, we would support the CMA conducting regular and more frequent reviews of its guidance materials than in the past.

- (8) Linked to this, it is notable that the Draft Revised Guidance does not refer to the National Security and Investment Bill which was introduced on 11 November 2020. We recognise that the existing public interest regime under the Enterprise Act 2002 (the “**Act**”) will continue to apply in the meantime and the new regime purports to be “*divorced from competition regulation*”. However, given this wide-ranging new regime will affect an estimated 1000+ UK transactions a year, we would encourage the CMA to update its guidance promptly to reflect the new regime when it comes into force.

## **2.2 Need for greater jurisdictional clarity**

- (9) The updated commentary regarding the concept of a relevant merger situation, specifically the definitions of “enterprise” and “material influence” and the application of the jurisdictional thresholds, has been updated to reflect the CMA’s decisional practice and decisions of the UK Courts. Clarity and codification of the CMA’s practice is welcomed (particularly given the potentially greater reach of UK merger control post-Brexit) to assist parties to transactions and their advisers.
- (10) The difficulty is that jurisdictional tests, even non-bright line ones, still have some outer boundaries to generate a binary yes/no legal answer; they are not questions of degree or of expert economic appraisal. As set out below, the Draft Revised Guidance not only codifies existing practice but appears to go further in the direction of legal uncertainty.
- (11) Current decisional practice already raises important issues:
- Due to the elaborate mechanics involved in the CMA’s application of the share of supply test in some cases, the CMA’s basis for jurisdiction can be unclear for the duration of Phase 1 (Roche/Spark) or even the duration of Phase 2 (Sabre/Farelogix). This is unsatisfactory both for the CMA and the parties and in contrast to every peer regime where jurisdiction is established early as a threshold requirement for the taxpayer and private costs incurred by merger review process (which is unusually intense at Phase 1 in the UK by international standards).
  - The CMA’s practice on its no-jurisdiction (or Found Not To Qualify or FNTQ) decisions is of no assistance. For example, the recent FNTQ decision in ME/6893/20 *CSL Behring/uniQure* relating to a pipeline drug contains no reasoning at all on why the CMA found that enterprises had not ceased to be distinct. As such, it provides no self-assessment value to parties genuinely seeking to form a view on UK jurisdiction. If that is the approach then the CMA should reinstate informal advice on jurisdictional questions where (unlike on questions of substance) the parties are unable to self-assess.
- (12) Moreover, the Draft Revised Guidance compounds these issues by, with each change, making less certain its wording on the definition of an enterprise, material influence and the share of supply test. The lack of legal certainty impacts on the incentives of merger parties to enter into deals with a (however small) UK nexus as the cost and duration of CMA review, even only at Phase 1, is among the highest in the world. Where such small deals would have been or are benign, this ultimately impacts on the UK economy and consumers.

*Definition of “enterprise” prior to any market presence*

- (13) The Draft Revised Guidance suggests that the existence of an enterprise cannot be ruled out in circumstances where a target business may no longer be or *has not actively started* trading.<sup>2</sup> However, the Supreme Court judgment cited in support of this proposition was clear that the question of the circumstances in which a firm may be said to acquire an enterprise whose “activities” are no longer actively being carried on turned on the concept of “economic continuity”.<sup>3</sup> The relevant decisional practice for pipeline assets understood broadly – i.e., that have never had a market presence but may in future do so -- is instructive in this regard, including the decision of the Office of Fair Trading in *Project Canvas*, where it found that the question of whether the contributions of the JV partners were sufficient to constitute an enterprise turned on whether they would transfer *existing* enterprises to the joint venture.<sup>4</sup>

*Material influence*

- (14) The Current Guidance provides that the CMA may examine any shareholding of 15% or more in order to see whether the holder might be able to exercise material influence and that only exceptionally might a shareholding of less than 15% attract scrutiny, where other factors indicating the ability to exercise material influence over policy are present. The CMA has removed this 15% threshold in the Draft Revised Guidance, which provides that the CMA may examine *any* shareholding and no longer refers to cases where a shareholding of less than 15% might attract scrutiny as “exceptional”. This lack of certainty on the shareholding levels that might give rise to material influence makes it more difficult for merger parties to self-assess.

*Share of supply*

- (15) While we understand that the CMA has discretion in applying the share of supply test and wants to ensure that it retains discretion to review mergers which it considers might raise competition concerns, it is also important to provide a degree of certainty on the application of the jurisdictional tests to merger parties. It is difficult for merger parties to assess whether the share of supply test may be satisfied if the metric used to assess the “*specific category of goods or services supplied or procured by the parties*” does not correspond to a standard recognised by the industry in question.
- (16) The CMA has updated the Draft Revised Guidance with its decisional practice regarding pipeline products, in particular by reference to *Roche/Spark*.<sup>5</sup> While there is, to date, no judicial support for the application of the share of supply test to pipeline products,<sup>6</sup> for the Draft Revised Guidance to be useful it should provide guidance on the level of certainty required regarding future commercialisation of pipeline products (such as Phase I, II and III for healthcare sector, and associated timelines).
- (17) It would also be helpful to obtain greater clarity regarding the circumstances in which the share of supply test might *not* be met. It is notable that the examples cited in the Draft

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<sup>2</sup> Paragraph 4.18 CMA2con.

<sup>3</sup> *Société Coopérative de Production SeaFrance SA v Competition and Markets Authority* [2015] UKSC 75, para. 39.

<sup>4</sup> OFT Decision: *Anticipated joint venture between The BBC, ITV, Channel Four, Channel 5, BT, Talk and Arqiva – Project Canvas*, decision of the OFT of 19 May 2010, paragraph 10.

<sup>5</sup> CMA Decision: *Anticipated acquisition by Roche Holdings of Spark Therapeutics*.

<sup>6</sup> Noting, in particular the active reference to ‘supply’ in the statutory wording, which means the test must be met immediately prior to any reference decision.

Revised Guidance include only cases *in favour* of jurisdiction, consisting of only one CMA-era case<sup>7</sup> and two OFT cases from 2008.<sup>8</sup>

- (18) It is clear from the Draft Revised Guidance that the CMA will be reluctant to provide more legal certainty for fear of providing a soft jurisdictional safe harbour. In this respect, we understand the competition policy logic for the CMA to be able to review certain acquisitions of pipeline innovation projects by e.g. dominant incumbents which might foreclose future competition, following the debate launched by the publication of academic work on “Killer Acquisitions” relating to transactions in the healthcare sector.
- (19) The better view is to seek legislative change to create legal certainty for such circumstances rather than stretch existing concepts beyond even their own limits. The alternative is an opaque prolonged determination process that ultimately results in, at best, highly creative and unpredictable interpretations of existing concepts and, at worst, litigation and potential errors of law or application of the current tests.
- (20) Finally, we note that the CMA does not refer to its decision in *Sabre/Farelogix* (or the pending appeal to the Competition Appeal Tribunal).<sup>9</sup> Given that the CMA’s decisional practice on jurisdictional issues has been subject to little judicial oversight in recent years, the CAT’s judgment in this case will be particularly instructive and the final version of the Draft Revised Guidance should only be issued once this jurisprudence can be incorporated.

### **2.3 The need for interaction with other processes will raise challenges and will require greater flexibility**

- (21) The Draft Revised Guidance includes a number of statements which signal the CMA’s willingness to coordinate with other international regulators and to adopt a flexible approach with respect to aligning with other processes. As the CMA and merger parties grapple with additional burden of parallel reviews post-Brexit, pragmatism in this regard is to be welcomed and should aim to remove undue duplication. In this regard, the CMA has indicated that it may decide not to open an investigation immediately where a transaction is subject to review by another competition authority and any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that might arise in the UK.<sup>10</sup>

*No unreasonable delay in starting the clock for alignment reasons only*

- (22) However, while regulatory alignment is to be welcomed, in circumstances where parties proactively choose to submit a merger notice, it would not be appropriate for the CMA either to delay its normal review processes over the objections of the parties in normal circumstances, in line with the statutory duty of expedition in s103 Enterprise Act to decide “as soon as reasonably practicable” which is aimed at the “prevention or removal of uncertainty” and ensures that the CMA’s decision on duty to refer is made “as early as it is sensible to do so”.<sup>11</sup> To ensure that a decision to delay is sensible, if the CMA did consider it necessary for the efficient running of the case, we would expect the CMA to engage in a dialogue early to minimise disruptions to deal timetable. Merger parties run the risk if they

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<sup>7</sup> CMA Decision: *Completed acquisition by Google LLC of Looker Data Sciences, Inc.* (13 February 2020)

<sup>8</sup> OFT Decisions: *Completed acquisition by GFI Group Inc of Trayport Limited* (28 May 2008) and *Completed acquisition by the BUPA Group of the Cromwell Hospital* (24 June 2008).

<sup>9</sup> *Sabre Corporation v. Competition and Markets Authority*, Competition Appeal Tribunal

<sup>10</sup> Paragraph 8.3 CMA2con.

<sup>11</sup> Section 103 EA02 and Explanatory Note.

encourage speed and this results in dis-alignment with other processes that a delay could have mitigated.

*No forced starting of the clock in an anticipated merger*

- (23) Equally, in line with practice in peer jurisdictions, it would not be reasonable or sensible in future cases forcibly to commence CMA statutory timetables for an anticipated transaction without the merger parties' consent and the Draft Revised Guidance should commit to this. A distinction can be drawn to completed transactions involving non-cooperative parties, where they may well be a public policy interest in commencing formal review without agreement. However, the latter will likely not apply to case involving interaction with other (mandatory, suspensory) merger processes abroad, and third parties suffer no prejudice in respect of a merger that has not completed.<sup>12</sup>

*Slipstreaming remedies processes in other jurisdictions*

- (24) It is helpful that the CMA has indicated that it may decide not to open an investigation immediately where a transaction is subject to review by another competition authority and any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that might arise in the UK.<sup>13</sup> However, the CMA notes its ability to subsequently investigate post-closing if it does not consider that remedies elsewhere fully eliminate competition concerns in the UK. While the CMA's position on jurisdiction is understandable, the CMA must accept that this will likely result in parties submitting merger notices to the CMA in a significant number of international deals to minimise deal risk. Such an approach will create further pressures on the CMA's processes and so we would encourage the CMA to adopt an active dialogue with merger parties (and other regulators) in cases involving parallel reviews to avoid the CMA investigating late in the merger process, without due warning. We would expect that the example of a post-closing intervention should be a backstop that is only likely to be resorted to in very exceptional circumstances.
- (25) We would welcome a practice where the CMA issues a comfort letter to the merger parties in circumstances where it considers that the remedies in other jurisdictions would address UK competition concerns. We accept that such a letter would likely be subject to conditions, but it would assist in reducing the uncertainty during the four-month period during which the CMA could still exercise its powers to investigate.
- (26) Again, this is an area where an update of the Current Guidance would be helpful, once the CMA has gathered sufficient post-Brexit experience.

**2.4 Fast track decision to refer resulting in UIL or referral**

- (27) The Draft Revised Guidance provides some helpful clarification on the steps involved in a fast track process and situations where the CMA considers a fast track would not be appropriate. Nonetheless, there is room for further clarification on the process.

*Alignment with foreign merger control processes*

- (28) The CMA outlines that one of the circumstances in which it may reject a fast track application is where it would hinder the CMA's ability to align its proceedings with those in other jurisdictions. We would expect such a scenario to be extremely rare, given that merger

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<sup>12</sup> The extraordinary public interest in the Sainsbury's/Asda case that led the CMA to start the Phase 1 clock on an anticipated merger despite the parties' objections (see *Sainsbury's v CMA* [2019] CAT 1) should be confined to the one-off circumstances of that case and should not be applied in multi-jurisdictional cases.

<sup>13</sup> Paragraph 8.3 CMA2con.

parties' and the CMA's interests will be largely aligned regarding review timetables. In addition, as the timelines for merger reviews tend to be longer in the UK than in other jurisdictions, including notably the EU, the ability to align is likely to be a factor in favour of granting a fast-track request in most cases.

*Excessive third-party consultation window reduces the efficiency value of fast-track*

- (29) More generally, in circumstances where parties request a fast-track referral to either Phase 1 UILs or Phase 2, the CMA explains that it will “*generally reduce the time provided for third-party consultation*” prior to reference. We consider that the 15+ working day average is already long for a fast-track where the clock has only started with the agreement of the CMA and the parties and the CMA has had time to line up Phase 2 resources in advance, as is appropriate. This is particularly so if the process has been paused before starting the clock to align with other regimes, and where a 5 or 10 working day period may be more in the CMA's and the parties' interests to expedite to Phase 2. Third party objections have never caused a fast-track request to be rejected.
- (30) Moreover, it is unclear to us what valid objections third parties could raise to the prospect of an in-depth inquiry: the duty to consult arises where a decision is likely to be adverse to the interests of a party (s 104 EA02). Realistically, the only adversely affected parties by removing the rights of defence (Issues Meeting etc.) in the Phase 1 process are the merger parties, who have made the request. The CMA should commit to aiming for a range of 5-10 working days or explain the possible adverse consequences a third party could suffer when Phase 2 is commenced somewhat earlier, relative to a full Phase 1 inquiry occurring first. Third parties have ample opportunity to comment during the Phase 2 process in due course and so while in a normal Phase 1 followed by Phase 2 they may be consulted twice, it is unrealistic to proceed on the basis that their interests could be adversely affected.
- (31) This would not preclude the CMA taking longer than 5 (or 10) working days in exceptional circumstances but 15+ days should not be the norm for the post-Brexit era, especially if the CMA does not take on board the “stop the clock” or “pull and refile” options set out below. This is because absent such options to inject some flexibility into the statutory process, the safest multi-jurisdictional alignment course for parties is to wait and use the non-statutory pre-notification period where the clock is not ticking and flexibility exists. That in turn means that it may well be in the public interest for the CMA to “fast forward” as much as possible to catch up with other regimes in appropriate cases and reach the UIL or Phase 2 stage as soon as practicable.
- (32) Nor, when the parties have conceded a Phase 1 SLC but the case is destined for Phase 2, rather than UIL, should the CMA consider it needs to publish a detailed decision that takes time to draft but becomes immediately redundant on Phase 2. This time could be spent preparing a draft Issues Statement that is published earlier in Phase 2 than is the current norm.

*Procedural fairness in fast-track requests*

- (33) The ability to fast-track to UILs or Phase 2, or concede an SLC at Phase 2, requires the parties to accept in writing that certain standards are met. The Draft Revised Guidance should clearly set out how these acceptances will be received and treated by the CMA case team and decision makers during the remainder of the investigation and in any published documents. Since the CMA may reject the parties' request or concession, the CMA should explain how the parties' procedural rights will be protected and confirm that the acceptance will not be used against them during the rest of the investigation.

## **2.5 Conceding an SLC at Phase 2**

- (34) The flexibility for parties to concede an SLC in Phase 2 is a helpful development and may lead to the more efficient running of a case. It would be helpful if the CMA would allow parties to offer remedies at an early stage in the process, including to align with remedies offered to other regulators. We would also hope that, in such circumstances, the CMA would seek to fast-track its own conduct of the case, potentially accelerating the 24-week timetable.

## **2.6 Need for guidance on the ‘reasonable chance’ standard**

- (35) The Draft Revised Guidance refers in multiple places to the CMA considering whether there is a ‘reasonable chance’ that the test for reference is met. There is currently no guidance on how the CMA interprets this standard. The CMA should provide further guidance on how it interprets a ‘reasonable chance’ and how this compares to other standards.

## **2.7 Need for greater clarity on procedural rights Section 109 requests and interviews**

- (36) It is widely acknowledged that UK merger control has become increasingly burdensome in recent years. One particular feature that has changed since the Current Guidance was last updated is the increasing use of Section 109 requests for information gathering purposes. As the consultation acknowledges (CMA2Con 9.8a), these have now become standard for document requests in Phase 1. In fact, the use of Section 109 requests is broader than that because: (i) they are commonly used in pre-notification; (ii) they now almost routinely extend to emails which was not the previous practice for Phase 1; and (iii) members’ experience is that they often include questions going beyond document requests, as the consultation also recognises.

- (37) We understand the CMA’s need to see the full picture, and that parties’ documents are one important factor in the overall analysis. However, a degree of proportionality is also called for. It needs to be recognised that these requests effectively constitute a requirement to conduct litigation-style disclosure at substantial cost to the parties, with results that may be disproportionate to the seriousness of the issues in the case. It would be helpful if there were some greater acknowledgement of the need to strike a balance on these issues.

- (38) The JWP fully agrees with the CMA that early discussion between the parties and the CMA on receipt of a questionnaire is helpful (CMA2Con 9.5). Co-operation and proportionality should be reciprocal.

- (39) The CMA already has guidance on requests for internal documents in merger investigations (CMA100). The additional guidance on the use of a notice under Section 109 to conduct interviews is helpful, but it should also clarify how the procedural rights of the parties and the individuals being interviewed will be protected, including the right to legal representation, and how legal professional privilege and the privilege against self-incrimination will be protected during such interviews. Further guidance on whether the CMA has a view on when formal interviews will be appropriate and the process for the conduct of these interviews would also be helpful.

## **2.8 Briefing notes and informal advice**

- (40) The briefing note process outlined in the Draft Revised Guidance is useful but could benefit from greater flexibility. For example, five pages may not be sufficient to outline the key points in call cases and the requirement for a signed agreement before submitting a briefing note will also be limiting. The Draft Revised Guidance should be amended, or at least build in some flexibility on both requirements, to allow longer briefing notes to be submitted, and for

briefing notes to be submitted in circumstances where there is sufficient evidence of a good faith intention to proceed with the transaction (e.g. heads of terms have been concluded).

- (41) We do not have concerns with removal of the “informal advice” procedure when it concerns SLC analysis, given it is rarely utilised – but see our comments on jurisdiction where there is scope for the procedure to play a new role if the CMA is unwilling to provide any more certainty in its guidance or in FNTQ cases.
- (42) We welcome the CMA’s stated openness to discussing aspects of merger control and cases.

## **2.9 Ancillary restraints guidance**

- (43) We welcome that the Draft Revised Guidance on ancillary restraints reflects the existing guidance in the European Commission’s Notice. Annex C should specify in paragraph C.5 that, just as similar timing is not sufficient for an agreement to be considered directly related to a merger, an agreement can still be considered directly related even if it has not been entered into at the same time as the agreement carrying out the main object of the merger. Annex C should also include the example from paragraph 23 in the Commission’s Notice that, in relation to non-competition clauses, the relevant products can include products or services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed.

## **3 The road not travelled: other improvements**

- (44) There are other issues that could, and in our view should, be addressed by the CMA in order to improve the efficiency of merger reviews. The changes we have outlined below would not require legislative change and we have not elaborated on any amendments that would require legislative change in this Response.

### **3.1 Greater flexibility on timing**

- (45) Given the risk to merger parties of not notifying a deal to the CMA which is also being notified with regulators in other jurisdictions, it is likely that many multi-jurisdictional deals will be notified to the CMA regardless of whether they are likely to give rise to competition concerns in the UK, meaning the CMA will see a substantial uptick in the number of deals it investigates.
- (46) However, the CMA cannot “press pause” on its merger review, for example in order to clear a transaction subject to remedies agreed with other agencies that may emerge in due course or otherwise to synchronise substantive review and/or remedial action. This is likely to result in more deals being referred to Phase 2 which could have been cleared with remedies at Phase 1 in parallel with other jurisdictions.
- (47) Other peer jurisdictions have two main tools to manage this issue: (i) “stop the clock” and (ii) “pull and refile”. Legislative change could partially solve the CMA’s time crunch issues, such as the Christmas/New Year issue highlighted by the Competition Appeal Tribunal<sup>14</sup> and which does not burden, for example, the European Commission – as the CMA is aware, the EU system also allows timetable extension at the behest of the merger parties.

*Use of s 109 to stop the clock with reasonable excuse to align processes*

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<sup>14</sup> See *Sainsbury’s v CMA* [2019] CAT 1.



- (48) However, in the interim, there is no good reason why the CMA could not in appropriately sparing circumstances -- due to the agreed need to align with other processes -- agree with the parties to use s 109 requests to pause the timetable.
- (49) To address the issue that the CMA has fined various parties for failure to provide information (in a timely manner) in response to s 109 RFIs, in circumstances where the parties agree and the CMA considers it to be in the public interest to pause the timetable, the CMA could (i) ask for information in relation to a pending process in another jurisdiction (such as the substantive concerns and/or remedies proposals offered) and (ii) provide comfort that it considers the failure to provide such information by the original deadline -- because the parties are in good faith waiting for developments in that other jurisdiction -- to be a "reasonable excuse". This could be applied both at Phase 1 and Phase 2.

*Pull and refile option at Phase 1*

- (50) The Draft Revised Guidance should make clear that the CMA is open to the merger parties withdrawing their Merger Notice and re-submitting it, at their option, as occurs in appropriate circumstances in the US and to a lesser extent in other jurisdictions. This could give the CMA and parties valuable extra time to align timetables and should be a complementary tool to the agreed use of s 109 to stop the clock at Phase 1.

*Flex on Phase 1 timing*

- (51) One of the key benefits of the UK Phase 1 process is the ability to engage meaningfully with the CMA through the Issues Meeting. This provides an invaluable opportunity for the CMA to identify and test theories of harm and businesses to be afforded the right to be heard.
- (52) However, we note that issues letters have recently evolved far beyond the "core arguments" and can routinely run in excess of 100 pages, with only 48 hours for the merger parties to respond. We do not consider that providing such voluminous documents with such a tight deadline for responding is in either the CMA's or the merger parties' best interests. It would therefore be more constructive if the CMA aimed to send a more condensed document (based on CMA's own internal materials prepared for the internal/external State of Play) with a more reasonable timeline for response (for example, an extra two to four working days). This should not unduly affect the CMA's internal timeline or compromise the CMA's decision making process. If additional time is required for the CMA's investigation, this can be allowed for in pre-notification, such as commencing the market test earlier, as has been the case for many investigations since Covid-19.

**3.2 More meaningful engagement in Phase 2**

- (53) The Draft Revised Guidance appears to limit the merger parties' ability to engage on the substance of the case in Phase 2 by suggesting that there will be limited opportunities for the CMA to provide information on its thinking to the merger parties and for the merger parties to make submissions prior to provisional findings. We have serious concerns with this approach, as this would (i) limit the merger parties' rights of defence, and consequently (ii) weaken the robustness of CMA decisions

*Insufficient scope for interactive engagement on theories of harm at the appropriate stage.*

- (54) No system that makes judgments on important and complex issues such as SLC and whether to block a merger should skip the "day in court" for the merger parties. This is missing in the standard CMA Phase 2 process. By "day in court" we mean a session in which the theories of harm are ventilated and the parties have a direct chance to respond, in

interactive fashion, to put across their views before a decision is effectively reached. Such a forum does exist at Phase 1: the Issues Meeting. It is an unfortunate irony that this exists at Phase 1 but not at Phase 2.

- (55) At Phase 2, the site visit and main party hearing are generally too early in the Phase 2 process to meaningfully engage on the substance of the case, as they constitute a general fact-finding opportunity and an inquisitorial Q&A session, respectively, neither of which is a Phase 2 equivalent of an Issues Meeting with the opportunity to rebut the theories of harm by means of interactive engagement. As the Draft Revised Guidance notes, at the hearing “the merger party is given the opportunity to make *brief opening and/or closing statements*” (12.6). This is less than what the parties are given at an Issues Meeting, when the stakes are merely provisional (Phase 1 or Phase 2 outcome) and not final (Phase 2 clearance, remedies or prohibition).
- (56) Conversely, the Response hearing after the Provisional Findings is too late because the view of the CMA has crystallised, and it is common antitrust bar knowledge that, despite their formal title, the PFs are in substance a draft decision, not the equivalent of an EU Statement of Objections or the Phase 2 equivalent of an Issues Paper. As the Draft Revised Guidance correctly codifies practice: “the *hearing will focus on remedies*” (where there is a provisional SLC), “[p]arties will be given the opportunity at the beginning to *briefly comment orally* on the provisional findings”.

*Creating an equivalent to an Issues Meeting at Phase 2*

- (57) The effect of the above is that not only are opportunities for merger parties to comment officially to be “brief” but they occur either too far in advance of the CMA’s decision meeting that decides on the gist of the PFs, or too much after it, once the PFs are public and the momentum and incentives of the CMA are not to depart in a material way from the PFs.
- (58) In order to inject the fairness and robustness benefits of a Phase 1 Issues Meeting at Phase 2, there would need to be an Issues Meeting-type forum after the CMA’s decision meeting, which instead should be provisional and akin to the Phase 1 Case Review Meeting. Then the merger parties should have, say, 2 hours to present their case without being told to limit their comments to 10-20 minutes and then the Phase 2 panel could hold the equivalent to a Phase 1 Decision Meeting which is when the definitive decision on the gist of the PFs is reached.

*Reducing scope for engagement in written form*

- (59) In addition, it appears that the CMA is moving away from providing working papers to the merger parties in the Draft Revised Guidance. Again, given the lack of any “state of play” meeting, working papers currently provide the merger parties with an important opportunity to comment on the CMA’s developing thinking on key issues, before such thinking becomes settled. Dispensing with working papers would reduce the parties’ opportunities to meaningfully engage on substance even in written form, and further compromise their rights of defence.
- (60) The opportunity for the merger parties to respond to the CMA’s provisional findings comes too late in the process and does not afford the parties an opportunity to engage in a genuine discussion on the substance of the case, including the theories of harm. As discussed above, unlike the EU process where the parties have a meaningful opportunity to respond to the statement of objections and engage on the substance at an earlier stage, the provisional findings are effectively a draft decision and there are very limited examples of the CMA

changing its findings between the provisional findings and final report. By the time that it publishes its provisional findings, the CMA's thinking on the relevant theories of harm and the existence of an SLC is effectively settled and the CMA's focus is on remedies (where required).

### **3.3 The lack of access to file puts the CMA well behind peer authorities on procedural fairness**

- (61) In Phase 2, the CMA is more transparent than most peer regimes in terms of a published Phase 1 referral decision, an Issues Statement, PFs and various responses to these CMA documents. These steps are time-consuming and involve substantial administrative effort. However, these various steps are not required by legislation (either the Enterprise Act or Schedule 4 of the ERRRA) or the CMA rules of procedure (CMA17), which can in any event be amended without statutory change. This transparency is weighted heavily towards giving interested third parties and the public progress on CMA inputs and thinking but skewed against the ability to engage and challenge, prior to final judgments being made, by those most adversely affected by an adverse decision, the merger parties.
- (62) The CMA should reduce the administrative burden of some of these steps and replace it with access to the file, which whilst also an administrative burden, has the great merit of providing procedural fairness and a tool by which to achieve more robust decisions and bring the CMA in line with peer authorities. The fact that the CMA is under no legal obligation to disclose “exculpatory” material does not mean that, as a world-class authority gearing up for Brexit, it should rest on this justification.
- (63) Merger parties should be granted the fullest possible access to the evidence relied upon by the CMA to substantiate its findings. This is consistent with principles of procedural fairness and recognised as an important procedural guarantee in other merger control processes, including at EU level. However, even where the CMA discloses information to the merger parties through a confidentiality ring, it generally only does so after provisional findings, which is too late, and also only deems it necessary to provide information necessary to provide the “gist” of a case, which is not sufficient.

**JWP**

**4 December 2020**