The Law Society response to the updated merger guidance consultation issued by Competition and Markets Authority (CMA)

December 2020

About the Law Society

The Law Society is the independent professional body for solicitors in England and Wales. We are run by and for our members. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

On behalf of the profession, we influence the legislative and regulatory environment in the public interest. At home we promote the profession and the vital role legal services play in our economy. Around the world we promote England and Wales as a global legal centre, open new markets for our members and defend human rights.

The profession we represent

Solicitors earn their title through dedication and commitment to legal education, training and development. They meet high professional and ethical standards, hold comprehensive insurance and a practising certificate which allows them to provide a wide range of advice and services to their clients. The Law Society represents the interests of over 180,000 registered legal practitioners to government and regulatory bodies and has a public interest in the reform of the law.

Solicitors play an essential role helping people throughout their lives. Whether clients are buying a house or writing a will, recovering compensation for an injury or defending an allegation of wrongdoing, solicitors offer support, guidance and expert advice. Solicitors also support and advise businesses, from start-ups to major international companies, and from central and local government to charities. Solicitors deliver legal services through law firms or by working as a trusted employee within an organisation.

1. Introduction and summary

We welcome the opportunity to submit comments on the following Competition and Markets Authority (CMA) consultation documents, following input provided by the Law Society's Competition Law Section:

a. "Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers" (the "**Draft Revised CMA2**")

b. "Guidance on the CMA's mergers intelligence function" (the "**Draft Revised CMA56**")

Our specific comments are below. Subject to those comments and requests for additional clarification, we consider that the revised draft Guidance represents helpful clarification of the CMA's existing and future practice.

We would be happy to discuss further our comments on any aspects of the consultation, as the CMA develops its proposals in this area.

2. Specific Responses to CMA2

Topic (para. ref)	Proposed Amendment	Response
Jurisdiction (Relevant Enterprise)		
Para. 4.4 (**relevant enterprise**)	**4.4**. "The CMA proposes to expand the definition of a "***relevant enterprise***" to include: a. the development or production of items for military or military and civilian use; b. the design and maintenance of aspects of computing hardware; c. the development and production of quantum technology; **d. artificial intelligence;** **e. cryptographic authentication; and** **f. advanced materials."** **4.5. "**For mergers in which the enterprise being taken over (or part of it) is a relevant enterprise, the criteria at paragraph 4.3 apply. However, in addition, the turnover and share of supply tests can be met in the following ways: a) the turnover test is met if the relevant enterprise's annual UK turnover exceeds £1 million; b) the share of supply test is met if before the merger, the relevant enterprise being acquired or merged has a	We would appreciate the CMA confirming whether paragraphs 4.4 to 4.8 of the Consultation remain applicable given the introduction of the National Security and Investment Bill. (the "**NSIB**"). We note that the amendments proposed in the NSIB to sections 23(1) and (2) of the Enterprise Act remove the £1 million threshold for "relevant enterprise". We would be grateful to know whether the wording proposed in paragraph 4.5 of CMA2 will survive. It would also be useful to receive further guidance on the CMA's duty to share information with the SoS pursuant to section 56 of the NSIB and whether it will request a waiver from the merging parties.

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	share of supply or purchase of 25% or more of relevant goods or services in the UK or in a substantial part of it." **4.6**. "In other words, the test is met even if the share of supply does not increase as a result of the merger so long as the relevant enterprise has a 25% share of supply. The relevant goods or services for the purposes of deciding whether the share of supply test is met are those by virtue of which the target enterprise qualifies as a relevant enterprise. This provision adds to, rather than replaces, the 'share of supply' test discussed at paragraph 4.3." **4.7**. "These thresholds are intended to enable the Secretary of State to be able to intervene on public interest national security grounds in transactions involving changes of control over relevant enterprises. They also enable the CMA to review a merger involving changes of control of relevant enterprises on competition grounds."	
Paras. 4.13 (**assets and employees**)	The CMA proposes that the transfer of assets or employees alone may be sufficient to constitute an enterprise, and incorporates the Supreme Court judgement in Seafrance/Eurotunnel defining "bare	We would be grateful for further guidance from the CMA on situations where the transfer of employees alone would constitute an enterprise, e.g., whether the transferring employees would need to occupy specific positions, or have certain competence or expertise, or

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	assets": "**[i]n some cases, the transfer of assets or employees alone may be sufficient to constitute an enterprise**... A collection of '**bare assets**' is unlikely to amount to an enterprise for the purposes of the Act. **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.** There is, however, no requirement for the business being transferred to include physical assets, or any particular category of asset, in order to constitute an enterprise under the Act.*"*	industry experience. We also note that CMA guidance does not address whether the acquisition of an option, patent portfolio, or warrant to acquire shares constitutes an enterprise.
Material Influence		
Paras. 4.32 - 34 (**board representation**)	The CMA clarifies that "board representation **alone** may confer material influence**"** (para. 4.32).[1] The CMA will review "the **corporate/industry expertise, other relevant experience or incentives of the various members of the board"** (para. 4.33), and "where a party acquires the right or ability to obtain board representation, the CMA considers it appropriate to	The proposal gives rise to an asymmetry between options to purchase shares or voting rights (which are not to be taken into account where there is uncertainty that they will be exercised) and the proposal on possible appointments to a board. It would resolve the asymmetry if the CMA were to clarify that a conditional board right could only qualify as material influence

[1] "Board representation need not involve board 'control' or even confer specific veto rights at board level in order to be relevant to the CMA's material influence assessment" (para. 4.55 of the final Amazon/Deliveroo Report).

Topic (para. ref)	Proposed Amendment	Response
	have regard to this possibility in relation to its jurisdictional assessment (and potentially also in its substantive assessment), **even where there remains some uncertainty around whether, or when, this right or ability might be exercised**" (para. 4.34).	once there is a reasonable likelihood that such condition would be exercised (similar to the law on options).
Publication		
Para. 4.53 (**make public**)	The CMA clarified that the interpretation of "**make public**" under s.24(3) means "publicised in the **national, or relevant trade press in the UK** and where the acquiring party had itself taken steps to publicise the transaction at large, normally by publishing and prominently displaying on its own website a press release about the transaction".	It would be helpful if the CMA could confirm whether trade publication includes social media.
Fast Track Procedure		
Paras. 7.4 - 7.20	The CMA proposes new sections to clarify fast-track cases at Phase 1. Parties are offered the opportunity to: i. proceed more quickly to offering UILs with the objective of reaching a Phase 1 clearance with remedies, and ii. proceed more quickly to an in-depth Phase 2	We welcome the procedural efficiency of moving to Phase II or a UiL decision quickly. However, we would invite the CMA to reconsider whether a waiver, granted for the purpose of proceeding more quickly to UILs, should continue in effect during Phase II. Conceding the SLC at Phase I can, from the parties' perspective, be tolerable for reasons of procedural efficiency and purely as a commercial matter. If those efficiencies are not forthcoming (from the perspective of the parties), then parties should be entitled to

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	investigation (where the parties concede to an SLC). Parties "are required to accept in writing that an SLC arises within a specified market or markets for goods or services in the UK and **that they agree to waive their right to challenge that position during a phase 2 investigation**." (para. 7.13)	discuss the merits with "new" decision makers in the ordinary course. For the same reasons, any offer to waive an SLC at Phase I should be confidential to the case team and decision maker and not included in the reference decision.
Information Gathering (Scope of s.109)		
Para. 9.4 - 9.9	The CMA will use a section 109 notice as standard (stated in para. 16 of the CMA's Guidance on requests for internal documents in merger investigations (CMA100) when formally requesting a person to provide information or documents, or to give evidence as a witness (para. 9.8(a)).	We consider that the CMA should routinely circulate draft s.109 requests for review and comment by the parties before issuing them (and not limit this important procedural efficiency for subjectively complex or extensive requests) (para. 27 of the CMA's Guidance on requests for internal documents in merger investigations). We would invite the CMA to introduce that rule.
Para. 9.8(c)	The CMA specifically clarifies its power to issue a section 109 to require an individual to give evidence in person (or by telephone or videoconference) in a formal interview with the CMA).	We would invite the CMA to outline the circumstances in which an individual would be compelled to give evidence in person/by telephone/by videoconference.

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Phase 2 Procedure		
Para. 11.18 (**confidentiality of submissions**)	The CMA consultation document suggests the CMA has removed the requirement on merger parties to submit a 'non-confidential version' of any merger notice submitted at phase 1" (para. 2.16(b)).	As is now practice, please could the CMA clarify also in paragraph 11.18 that there is no longer an obligation on the parties to provide a non-confidential version of the merger notice at Phase I (as explained in the consultation document).
Para. 13.21 (**definition of "gist"**)	Although Chapters 11, 12 and 13 primarily address administrative changes, the CMA clarifies "where the CMA changes its provisional decisions on the statutory questions (**or, exceptionally, where the 'gist' of the CMA's case fundamentally evolves**), as a result of evidence received following publication of its provisional findings...the CMA will in particular have regard to its statutory duties to consult where it proposes to make a relevant decision that is likely to be adverse to the interests of the merger parties." (Para. 13.21)	Please could the CMA clarify its proposal to disclose the "gist" of the case and what type of information this is likely to include.
NSI Bill Review and PIIN		
Para.s 3.9 and Para 4.4(d-f)	The CMA clarifies the Secretary of State's role in reviewing public interest factors of a case, and additional sectors that constitute a relevant enterprise (now also including artificial intelligence; cryptographic authentication; and advanced materials.)	As discussed above, it would be helpful to understand the interaction between the procedure under the Enterprise Act 2002 and the National Security Investment provisions.

3. Specific Responses to CMA56

Topic (para. ref)	Proposed Amendment	Response
Para. 4.3	The CMA proposes to include the following paragraph: "One circumstance in which the CMA might decide not to open an investigation immediately 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. This could be the case, for example, where all of the markets that are relevant to the transaction are broader than national in scope. In this circumstance, merger parties are encouraged to engage with the CMA at an early stage, and may be invited to update the CMA on the progress of proceedings in other jurisdictions and to provide waivers to the CMA to discuss these proceedings with other competition authorities. The CMA may consider whether to open a formal investigation at any point before expiry of the four-month statutory period, and merger parties run the risk that, where remedies in other jurisdictions do not fully eliminate any competition concerns relating to the UK, the CMA opens a formal investigation at a later stage."	We welcome the proposal not to add cost and complexity to mergers that are being reviewed outside the UK and where the remedies proposed or agreed would address competition concerns in the UK. However, we are concerned by the proposal to reopen an inquiry (prior to the expiry of the four-month statutory period) where the remedies are subjectively not deemed to be sufficient. We would propose that the CMA welcome ongoing informal dialogue and engagement during the process of agreeing remedies so that any comments can be considered in real time and that processes are not unnecessarily reopened later (with associated cost and time implications).

Contact details and next steps

To discuss any of the points raised in this response further, please contact James Marshall, Competition Section Chair [redacted]; Competition Section members Keith Jones [redacted] and Ruchit Patel [redacted]; or Catrin Lewis, Head of Commercial and Technology Law [redacted]