

# SLAUGHTER AND MAY

## Slaughter and May Response to CMA consultation: Updated guidance on CMA2 and CMA56

### 1. Overview

- 1.1 Slaughter and May welcomes the opportunity to comment on the CMA's draft revised guidance on jurisdiction and procedure (the "**Draft Guidance**").<sup>1</sup>
- 1.2 We appreciate that there is a need to update the current guidance (in particular CMA2) given the impetus of Brexit. However, we have serious concerns relating to the overall consultation process and some of the specific changes being proposed in the Draft Guidance.
- 1.3 Our response is split into three sections: (i) general comments regarding the scope and timing of the CMA's consultation; (ii) specific comments on certain proposed changes in the Draft Guidance; and (iii) omissions which we suggest the CMA considers addressing in the Draft Guidance.

### 2. General comments on scope and timing

#### Scope of proposed changes

- 2.1 The Draft Guidance implies a material expansion in the CMA's jurisdiction in several important respects, for example in relation to the definition of material influence and the application of the share of supply test – see further paragraphs 3.2 to 3.9 below.
- 2.2 However, there have been no changes to the legislation underpinning the UK merger control regime to support such an expansion and, with very limited exception, the expansions are also without judicial support. Any attempted widening of the CMA's jurisdiction through this consultation would therefore be inappropriate.
- 2.3 Changes in the CMA's own decisional practice do not constitute support for a widening of the CMA's jurisdiction in circumstances where the underlying legislation has not changed. Moreover, some of the cases cited by the CMA in the Draft Guidance in support of this widening are Phase 1 cases (and should be given due weight, in particular as the CMA in these cases has not itself definitively concluded on jurisdiction),<sup>2</sup> Article 22

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<sup>1</sup> The focus of our response is on the proposed changes to CMA2. However, for completeness, we also note that the proposed changes to CMA56 place a strong emphasis on parties to submit either a briefing paper or full merger notice should they wish to engage with the CMA. In the interests of encouraging earlier and more *ad hoc* engagement, we would recommend that the CMA continue to refer to the possibility of parties seeking 'informal advice' outside of a formal briefing paper or merger notice.

<sup>2</sup> At Phase 1 there only needs to be a "realistic prospect" that the CMA has jurisdiction to review the transaction. The Draft Guidance cites Phase 1 cases in a number of places, including paragraph 4.30 which cites ME.6800/19 – *RWE/E.ON* (5 April 2019), whilst paragraph 4.63 cites ME.6886/20 – *Visa International Service Association/Plaid Inc* (24 August 2020), ME.6831/19 – *Roche Holdings/Spark Therapeutics* (10 February 2020), ME.6888/20 – *ION Investment Group/Broadway Technology Holdings Limited* (7 July 2020) and ME.6839/19 – *Google/Looker Data Sciences* (13 February 2020).

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referrals (where establishing jurisdiction is not a prerequisite)<sup>3</sup> and/or have involved the CMA taking an approach to jurisdiction which was strongly resisted by the parties and viewed by many commentators as controversial, but have not been subject to any judicial scrutiny.<sup>4</sup> Indeed, as explained below, there is a pending appeal on an important matter of jurisdiction which should be concluded before any changes are made.<sup>5</sup>

### Timing

- 2.4 Given the scope of the CMA's proposed changes, it is unfortunate that the CMA has only provided a one month consultation period. Whilst we appreciate that there is an impetus to implement certain changes ahead of Brexit, we consider there to be material benefits in postponing any revisions until after Brexit has occurred, in particular given that the CMA's current approach (with its standalone Brexit-related guidance)<sup>6</sup> is more than sufficient to deal with the changes brought about by Brexit. There are also broader timing considerations which we would urge the CMA to take into account.
- 2.5 **First**, there continues to be uncertainty over whether a deal will be reached with the EU prior to the expiry of the transition period. If a deal is reached, there is a material risk that any agreement will overlap with certain areas of the Draft Guidance e.g. cooperation between the CMA and EU competition authorities, meaning that some of the CMA's proposed updates could become out of date almost immediately.
- 2.6 **Second**, the Draft Guidance will have to be updated once the new National Security and Investment Bill is implemented, in particular the sections relating to public interest interventions and the turnover and share of supply intervention thresholds. In the interests of avoiding piecemeal amendments to the Draft Guidance, there would be merit in postponing any updates until this new regime is in place (expected in Spring 2021).
- 2.7 **Third**, the current expectation is that the final report for the Penrose review will be delivered by the end of the year. This report may prompt changes to the UK competition regime, some of which would, if implemented, undoubtedly cut across the changes proposed in the Draft Guidance. By making significant changes to the CMA's existing guidance in circumstances where more wholesale changes may be on the horizon, the CMA risks generating additional uncertainty for merging parties which can otherwise be avoided by delaying the proposed updates.
- 2.8 **Finally**, there is currently an outstanding appeal in *Sabre/Farelogix*<sup>7</sup> which concerns, amongst other things, the proper application of the CMA's share of supply test. Final

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<sup>3</sup> The CMA references ME.50824-19 – *Mastercard/Nets* (16 March 2020) in paragraphs 4.64(c) and 4.70 of the Draft Guidance.

<sup>4</sup> See, for example, ME.6836/19 – *Amazon/Deliveroo* (4 August 2020).

<sup>5</sup> See Case 1345/4/12/20 – *Sabre Corporation v Competition and Markets Authority*.

<sup>6</sup> See CMA Guidance on the functions of the CMA after the Transition Period (1 December 2020).

<sup>7</sup> See Case 1345/4/12/20 – *Sabre Corporation v Competition and Markets Authority*.

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judgment in this case will likely be of great significance to the CMA's practice, and it would be prudent to wait until this case has been resolved before any updates are made.

- 2.9 Overall, in light of the significant changes being proposed by the CMA, we see no compelling justification for the CMA seeking to update its guidance now, and would strongly recommend the CMA to postpone its consultation to early in 2021, when there will be significantly improved visibility on these important points.

### 3. Specific comments on certain of the CMA's proposed changes

- 3.1 Given the limited time available to submit a response to the CMA's consultation, we have focused our response on three areas where the CMA has proposed updates: (i) the material influence test; (ii) the share of supply test; and (iii) the Phase 2 process.

#### Chapter 4: The material influence test

- 3.2 In the Draft Guidance the CMA has revised its statement on whether shareholdings below 25% might give rise to material influence. The Draft Guidance provides that "[s]hareholdings of below 25% will typically be less likely to confer material influence" (as compared to the language used in the current CMA2 guidance: "there is no presumption of material influence below 25%"). The Draft Guidance also states that the CMA may examine "any shareholding" to determine whether the holder might have material influence (as compared to "any shareholding of 15% or more" in the current CMA2 guidance). Finally, the Draft Guidance states that "even shareholdings of less than 15% might attract scrutiny", removing the qualifier of "exceptionally" from the current CMA2 guidance.<sup>8</sup>
- 3.3 We are concerned that these changes will be used to justify an extension to the CMA's jurisdiction (given the CMA's practice of supporting its approach by referring back to its guidance). The CMA has not provided any legitimate justification to warrant this extension, and it is not supported by any changes to the underlying legislative regime or jurisprudence.
- 3.4 Instead, the CMA seeks to justify these changes by relying on its recent decisions in this area. Beyond the obvious circularity of this approach, the decisions relied on have very limited precedential value. For example, the CMA relies on its Phase 1 Decision in *RWE/E.ON*,<sup>9</sup> and its (controversial) Phase 2 final report in *Amazon/Deliveroo*<sup>10</sup> – a case where the parties argued strongly throughout the administrative proceedings that the transaction did not give rise to material influence on a proper application of the test. By "baking in" this case to the Draft Guidance, without at least acknowledging that the merging parties strongly disagreed with the CMA's approach, the CMA will (in effect) broaden its jurisdiction to review acquisitions of minority interests.

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<sup>8</sup> See paragraph 4.27 of the Draft Guidance and paragraph 4.20 of the current CMA2 guidance.

<sup>9</sup> See paragraphs 4.28, 4.30 and 4.33 of the Draft Guidance.

<sup>10</sup> See paragraphs 4.30, 4.32 and 4.33 of the Draft Guidance.

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- 3.5 This extension is particularly troubling when we consider that the CMA can already intervene in a significantly broader range of transactions than most (if not all) other global competition authorities. The proposed changes would put the CMA even further adrift of global competition enforcement.

### Chapter 4: The share of supply test

- 3.6 Whilst we acknowledge that the CMA is conferred with some discretion for the purposes of applying the share of supply test, what would provide most benefit to merging parties is greater clarity on its application. In particular, there remains inherent uncertainty regarding what constitutes the supply or acquisition of goods or services in the UK as well as what metrics should be used to calculate the relevant 'share' of this supply. This uncertainty is notably at odds with the intention of Parliament when drafting the underlying legislation; during a Parliamentary debate on the Enterprise Act 2002, the then Under-Secretary of State for Trade and Industry (Miss Melanie Johnson) stated that the share of supply thresholds "*have to be simple and easy to determine quickly*".<sup>11</sup>
- 3.7 However, the Draft Guidance provides little by way of additional practical guidance on how to apply the test, and instead attempts to broaden its application by relying on certain Phase 1 cases which were controversial and not subject to judicial scrutiny.
- 3.8 For example, the Draft Guidance notes that "*competitive interactions between firms may arise not only as a result of overlaps in directly-marketed products or services, but that they may also result from overlaps involving pipeline products or services, or where the merger parties' activities share sufficient elements of common functionality, among other factors*",<sup>12</sup> and in doing so relies on two Phase 1 cases (*Roche Holdings/Spark Therapeutics* and *Visa/Plaid*).
- 3.9 For the reasons explained above, we consider it would be inappropriate to seek to widen the CMA's jurisdiction to review mergers absent changes to the underlying legislative regime, in particular in circumstances where there is a pending appeal which will address important matters relevant to the proper application of the test.<sup>13</sup> We would therefore suggest the CMA postpones any changes until (at least) there has been final judgment in *Sabre v CMA*.

### Chapter 11: Submissions and information gathering during the Phase 2 process

- 3.10 In the Draft Guidance, the CMA notes that a Phase 2 investigation is "*not well suited to accommodating unsolicited submissions*" outside of the key stages in the process.<sup>14</sup> It goes on to list these key stages as the publication of the issues statement, the annotated issues statement (and any working papers), the provisional findings and, where an SLC

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<sup>11</sup> House of Commons Standing Committee B, Tuesday 30 April 2002, Hansard Record at Column 328.

<sup>12</sup> See paragraph 4.63(b) of the Draft Guidance.

<sup>13</sup> Case 1345/4/12/20 – *Sabre Corporation v Competition and Markets Authority*.

<sup>14</sup> See paragraph 11.13 of the Draft Guidance.

has been provisionally found and remedies are envisaged, the notice of possible remedies and the remedies working paper.<sup>15</sup>

- 3.11 The suggestion that submissions from the parties might not be taken into account if they have been made outside these specific stages is concerning, given that significant periods of time can often elapse between these key stages. As per the CMA's indicative timetable, the period between publication of the issues statement and the CMA providing its annotated issues statement and working papers can be over two months.<sup>16</sup> The ability to make submissions throughout the Phase 2 process (and especially during the initial phase of the process) represents a key avenue for the parties to submit evidence and arguments to the CMA, and any attempt to curtail this ability risks unfairly limiting the parties' rights of defence and raises broader issues of procedural fairness. Against this backdrop, and in the context of an administrative merger control regime, the CMA should be encouraging the notion of maintaining an ongoing dialogue with the parties, rather than deterring it.<sup>17</sup>

#### **4. Omissions from the Draft Guidance**

- 4.1 There are certain aspects of the CMA's practice which can give rise to significant issues for merging parties which we would urge the CMA to address in its Draft Guidance. We have not sought to provide a comprehensive list of such aspects below but would welcome an opportunity to do so in the context of a full review of the CMA's guidance. Instead, we have highlighted certain key topics which, at a minimum, we think a proper review of the CMA's current guidance would consider. In this regard, we see this consultation as a missed opportunity by the CMA not to ask a more open question about what other changes should be made to its guidance.

##### Access to third party submissions

- 4.2 We would recommend the CMA reconsiders its practice to provide very limited information on third party complaints and/or third party responses to its market investigation (and/or to make this information available very late in the process).<sup>18</sup> This practice makes it very difficult for merging parties to properly defend themselves. Whilst we acknowledge that there is no general right of "access to file" within CMA merger control proceedings, in the interests of good public administration – and given what can be at stake for merging parties – we consider the CMA is under a duty to provide better and more timely access to the inculpatory and exculpatory evidence on its file.

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<sup>15</sup> See paragraph 11.12 of the Draft Guidance.

<sup>16</sup> See paragraph 10.10 of the Draft Guidance.

<sup>17</sup> In this regard, it is odd for the CMA to stress that the evidence gathering process for the notifying parties is so 'formal', whilst simultaneously changing the emphasis on its evidence gathering from third parties to be more 'informal'. See paragraph 11.11 and 11.13 of the Draft Guidance.

<sup>18</sup> See paragraphs 13.10 – 13.15 of the Draft Guidance.

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- 4.3 More specifically, we consider the CMA's current approach in a Phase 2 review of providing the "gist" of third party submissions in its provisional findings to be inadequate for two reasons:
- (i) First, the CMA takes the view that in providing the "gist" of third party submissions made in response to the CMA's market investigation questionnaire, it is not required to disclose the underlying questions. This approach is at odds with that taken by the European Commission and also the openness of the CMA in disclosing merging parties' submissions to third parties (but not *vice versa*). As a matter of good public administration, we would therefore urge the CMA to adopt a more purposive interpretation to what it counts as the "gist" of a case, and – at a minimum – allow the parties to see the questions asked of third parties.
  - (ii) Second, by providing this information only with its provisional findings, the CMA severely curtails the ability of the merging parties to respond properly to the claims being made by third parties. The CMA should not be reaching its provisional conclusions on a case without allowing the merging parties to respond to important issues raised by third parties, in particular in circumstances where the CMA very rarely alters its conclusions on substance in its final report as compared to its provisional findings.<sup>19</sup>

### Responding to the issues letter at Phase 1 (and working papers at Phase 2)

- 4.4 The issues meeting/issues letter stage of the CMA's Phase 1 process is unnecessarily burdensome on the parties due to the limited time they are given to digest and respond to the CMA's concerns.
- 4.5 We welcome the CMA's recent practice of providing a recording or script of the state of play call to assist the parties in preparing for a possible issues letter and issues meeting, and would recommend that the CMA codify this practice in its Draft Guidance.
- 4.6 However we would also recommend that the Phase 1 process allow more time between the issues letter and the issues meeting, in particular for complex cases. The issues meeting is a crucial point in the Phase 1 process for the parties to address any concerns the CMA might have with the transaction, and as a matter of good administration the parties should be given more time to prepare for the meeting than currently tends to be the case.
- 4.7 These concerns also arise at the working papers stage of the CMA's Phase 2 process. Again this is often an extremely demanding period for the parties, in particular because this stage of the proceedings often coincides with the main party hearings, and the CMA tends to provide parties with an unreasonably short period of time to respond to working papers (that can sometimes run to thousands of pages in length). We recommend that the CMA updates its practice in this regard, for example by issuing its working papers

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<sup>19</sup> We are only aware of 3 cases since 2008 where the CMA has overturned its provisional findings on substance in its final report.

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slightly earlier in the process (with more time for the parties to respond), or on a staggered basis.

### Internal documents referred to during the CMA's formal hearings

- 4.8 Given the large number of documents provided to the CMA during the course of an investigation, it is unreasonable and procedurally unfair to expect individuals representing the parties to be able to answer questions on the spot in relation to internal documents which they may have never seen before. We would therefore recommend that the CMA codify in its Draft Guidance its recent practice of providing the parties with a comprehensive list of documents that it plans to refer to in its questioning during formal hearings. Providing a list of reference documents in advance will give the individuals an opportunity to familiarise themselves with the documents prior to the hearing.

### Briefing papers

- 4.9 Generally speaking, the CMA's openness to briefing papers and the speed with which it considers briefing papers appears to be working well.
- 4.10 The CMA will be aware that parties often place significant reliance on decisions taken by the CMA following receipt of a briefing paper not to investigate a merger. Where the CMA decides to investigate a merger having initially indicated in response to a briefing paper that it is not minded to do so, we consider that as a matter of good administration it should be obliged to provide the parties with a reasoned justification for doing so. Such an obligation should be set out in the Draft Guidance.

## **5. Contact details**

- 5.1 If you would like to discuss this submission, please feel free to contact:

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