

## CMA Consultation on Guidance on Jurisdiction & Procedure

1. We welcome the opportunity to comment on the CMA's consultation on its revised guidance on jurisdiction and procedure in relation to mergers (CMA2con), and in relation to its mergers intelligence function (CMA56con), (the "Revised Guidance"), published on 6 November 2020.
2. These comments represent the views of White & Case LLP, and nothing in this submission should be taken as representing the views of any of our clients.
3. The draft Revised Guidance is welcome and timely, not having been updated for many years. We therefore support the revisions to reflect practice and jurisprudence, as well as the end of the transition period following the UK's exit from the European Union.
4. Overall, the draft Revised Guidance is helpful and clear. However, we have a few comments as follows:

### Comments on CMA2con

- 4.1 Following publication of the Government's proposals for a new regime to deal with national security issues – the National Security and Investment Bill ("NSIB") – certain parts of the Draft Revised Guidance (e.g. paras. 4.4 to 4.7) will no longer be accurate once the new national security legislation comes into force. As the NSIB is currently going through Parliament, we suggest that the Revised Guidance only be finalised and published once the new legislation has been passed. This will allow the CMA to accurately reflect the new legislation and, importantly, how it will interact with the CMA's merger control functions.
- 4.2 We understand that a memorandum of understanding ("MoU") between the Department for Business, Energy and Industrial Strategy ("BEIS") and the CMA will be concluded once the new legislation has been passed. Chapter 16 of the Revised Guidance should also reflect the terms of the MoU so business and practitioners can understand how the CMA's merger functions will be used and operate alongside the new national security regime. Whether or not intended to be covered by the MoU, it would be helpful if the Revised Guidance were to set out the extent to which the CMA envisages information sharing between itself and BEIS on mergers that may potentially raise national security concerns. As merger control remains voluntary, businesses may have concerns about engaging in confidential discussions with BEIS about a transaction that may be subject to mandatory notification under the NSIB (when enacted), but which they may decide not to voluntarily notify to the CMA. If BEIS intends, and/or the CMA expects BEIS, to share details of such discussions with the CMA that may result in less upfront engagement with BEIS on national security issues, which would be detrimental. Therefore, clarification on the extent to which the CMA and BEIS intend to work on such matters would be welcome.
- 4.3 In addition, judgements are awaited in two cases which are likely to have a significant impact on the practical application of the principles set out in the Revised Guidance. The first relates to the scope of the "share of supply" test and the CMA's discretion in applying it, in which judgment of the CAT in *Sabre Corporation v Competition and Markets Authority* is expected shortly. The second relates to the judgement of the CAT in *JD Sports Fashion plc v Competition and Markets Authority*, one aspect of which the CMA has very recently sought permission to appeal.
- 4.4 We therefore consider that it would be beneficial for these important issues, once finally resolved, to be addressed in the Revised Guidance. Whilst this would mean delaying publication of the Revised Guidance until after the end of the transition period, it seems likely that the Revised Guidance would not in any event have been available from 2 January 2021 given the consultation only closes on 4 December 2020 and the CMA will need to digest responses received.
- 4.5 In relation to para. 6.17 et seq., whilst the section on informal advice has been removed, it would be useful to either retain the existing guidance on this topic noting the comment in the consultation document that informal advice is "rarely requested", or otherwise state that, as also noted in the

consultation document that “it is always open for merger parties to contact the CMA’s mergers function to discuss any aspect of merger control”.

- 4.6 In para. 7.17 et seq. it would be helpful to further explain the implications of conceding that an SLC arises. For example, this should be without prejudice for the merger parties appealing the scope of remedies that may be imposed if the merger parties consider the remedies go too far or are disproportionate. In practice, merger parties are only likely to concede an SLC if a remedy proposal is being considered that would address the SLC such that, in most cases, the concession of an SLC will result in an outcome that the merger parties are willing to accept. If, however, following conceding an SLC, a remedy cannot be agreed and the CMA, for example, prohibits the merger, this should not prevent the merger parties being able to appeal such a decision including the existence of an SLC.
- 4.7 As merger parties would only concede an SLC for administrative purposes, unless such a position is without prejudice to the merger parties’ rights of appeal, it may be invoked very rarely in practice. If a remedy were successfully appealed (on the basis, say, that the remedy were disproportionate in light of the SLC as conceded) then the matter could be remitted to the CMA when the SLC could be fully investigated.
- 4.8 In relation to paras. 8.3 and 8.4 (and Chapter 18), we note and support the CMA’s position on whether it may open an investigation if remedies likely to be agreed in proceedings in other jurisdictions depending on whether such remedies could be expected to address any competition concerns that might arise in the UK. We also note that merger parties may be invited to update the CMA on the progress of proceedings in other jurisdictions, which we consider is sensible and appropriate. We would however suggest that if, after engaging with regulators in other jurisdictions, the CMA is unsure as to whether likely remedies in those jurisdictions would address any potential concerns in the UK, that the CMA inform the merger parties so that they can, if so advised, submit a formal notification in the UK sooner rather than later. It would, therefore, be helpful if the Revised Guidance were to state that, in cases where merger parties have provided the requested waivers, the CMA will inform the merger parties if it considers that remedies in other jurisdictions may not be sufficient to allay any potential concerns in the UK. These points should also be reflected in Chapter 18.
- 4.9 So far as compelling individuals to give evidence in a formal interview (para. 9.8(c)), it would be helpful if the Revised Guidance were to explain the circumstances, and provide some hypothetical examples, in which it might seek to do so.
- 4.10 Para. 9.33 states that “[t]hird parties will not normally be informed as to whether an issues meeting has been held (or will be held) in a particular case”. So far as we are aware, this never happens so do not understand the inclusion of the word “normally”. If it is to remain, it would be helpful to explain circumstances in which the fact that an issues meeting is taking (or has taken) place will be transmitted to third parties.
- 4.11 In para. 11.22 we consider it would be more appropriate to replace the words “within 24 hours” to “within one business day”.
- 4.12 In relation to third party evidence (para. 11.8), footnote 176 rightly notes that “[i]n cases where third parties have a significant role in the industry affected by the merger, third party input may be more substantial”. However, para. 11.8 only refers to third parties engaging with the CMA through responses to information requests and oral interviews. Where a third party does play an important role in the market it may be appropriate for third party evidence to be given in person. We submit this possibility should be explicitly mentioned in the Revised Guidance (cf. para. 11.23).
- 4.13 As for para. 11.23, the Revised Guidance states that Inquiry Group members may participate in calls (or meetings) with third parties. Whilst this may not be feasible in many cases (especially where there are many third parties providing evidence), to the extent there are limited third parties involved in a case we consider it would be helpful if the Revised Guidance were to state that at least one Inquiry Group member will seek where possible to attend such hearings.
- 4.14 As noted above, Chapter 16 should be updated to reflect the position once the NSIB comes into force. Similarly, amendments will need to be made to Chapter 17 to reflect the new national security regime.

Comments on CMA56con

- 4.15 We only have one comment on CMA56con. In para. 4.1, we consider it would be helpful to note that, if a merger is anticipated, the merging parties are able to close the transaction (subject to any initial enforcement order (“IEO”) preventing such action), and that an IEO preventing integration and other action would be likely to be imposed on or shortly after closing.
5. If you have any queries about these comments or would like to discuss any matters arising please contact Marc Israel [REDACTED] [REDACTED] [REDACTED] [REDACTED] or Kate Kelliher [REDACTED].

White & Case LLP  
4 December 2020