

Revised guidance on the CMA's jurisdiction and procedure in relation to mergers (including the CMA's merger intelligence functions)

Summary of responses to the consultation

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1. Introduction and summary

Background and summary

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
- 1.2 The CMA has responsibility for the review of mergers under the Enterprise Act 2002 (the Act). It has previously published *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), which sets out the CMA's procedures in operating the merger control regime set out in the Act and includes guidance on when it will have jurisdiction to review mergers. CMA2 took effect from January 2014 and superseded previous guidance issued by the CMA's predecessor organisations. The CMA has also previously published *Guidance on the CMA's mergers intelligence function* (CMA56). This guidance explains how the CMA's mergers intelligence function operates and took effect from June 2016 and was updated in September 2017.
- 1.3 Since the publication of these guidance documents (collectively, the Current Guidance), the CMA's merger control procedures have developed and the UK Courts have clarified various aspects of the legal framework. This includes developments concerning 'public interest mergers', clarifications of the approach applied in various aspects of UK merger control proceedings, and the prospect of mergers being reviewed by both the CMA and the European Commission after the Transition Period ends on 31 December 2020.¹ The CMA's practice has also evolved with the publication of guidance on several aspects of the UK merger control regime,² and has seen increasing cooperation with other competition agencies in relation to multijurisdictional mergers.
- 1.4 Following a consultation from 6 November 2020 to 4 December 2020 on proposed changes to the Current Guidance, the CMA is publishing updated versions of the Current Guidance to reflect recent developments and current practice.

¹ See *UK exit from the EU, Guidance on the functions of the CMA under the Withdrawal Agreement* (CMA113).

² Including in relation to merger remedies (CMA87), interim measures (CMA108), and requests for internal documents (CMA100).

Purpose of this document

- 1.5 The consultation document that accompanied the updated versions of the Current Guidance (collectively, the Draft Revised Guidance) set out a series of topics on which respondents' views were sought. This document summarises the key issues raised by the responses, the CMA's views on these issues, and the changes the CMA has made to the Draft Revised Guidance as a result. This consultation document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all individual views. Non-confidential versions of all responses to the consultation are available on the consultation web-page.³
- 1.6 This document should be read in conjunction with the consultation document, which contains further background on the intentions behind the CMA's updated guidance. It should also be read in conjunction with final revised versions of the Current Guidance (collectively, the Final Revised Guidance), which was published on 23 December 2020 and took effect on that date.
- 1.7 The CMA would like to thank all those who responded to the consultation.

³ The consultation web-page can be found at <https://www.gov.uk/government/consultations/updates-to-the-cmas-mergers-procedural-guidelines-cma2-and-cma56>.

2. Issues raised by the consultation and our response

- 2.1 The CMA received sixteen responses to the consultation. Responses were mostly from legal advisers or associations of legal advisers. A full list of respondents can be found in Section 3.
- 2.2 Overall, the majority of respondents welcomed the updates to the Current Guidance and recognised the importance of the CMA making these in conjunction with the end of the Transition Period. Respondents generally welcomed the inclusion of changes reflecting developments in its decisional practice, case law, and of its ongoing evolving practice.
- 2.3 With respect to the proposed revisions to CMA2, respondents found particularly useful the additional guidance on the procedures available to the CMA and merger parties in order to maximise the efficiency of merger investigations, such as fast-track procedures. Many respondents also welcomed the introduction of further guidance on how the CMA will engage with other authorities in the context of multi-jurisdictional investigations.
- 2.4 Several respondents suggested that the CMA should delay publishing revised guidance until it knows the outcome of certain ongoing developments, such as the outstanding appeal in *Sabre*⁴ or the passing of the National Security and Investment Bill.⁵ The CMA considers, however, that it is important to update the Current Guidance before the end of the Transition Period to reflect the circumstances (in particular, the increased volume of mergers that the CMA will have jurisdiction to review and the higher incidence of multi-jurisdictional mergers) brought about by the end of the Transition Period. The CMA's practice would, of course, take full account of any relevant developments in future and the CMA would expect, where appropriate, to update the guidance in light of changes to its decisional practice and the applicable legal framework.
- 2.5 The feedback on the proposed revisions to CMA56 was more limited. Several respondents welcomed the CMA's indication that it might not start a merger 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 potential UK competition concerns. Some respondents commented that the CMA could adopt a more flexible approach in relation to the threshold for submitting a briefing note, the length of briefing notes that can be reviewed by the CMA's mergers intelligence function,

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

⁵ See <https://www.gov.uk/government/collections/national-security-and-investment-bill>

or the period within which a merger notice has to be submitted after a transaction has been called in for review.

2.6 Across both CMA2 and CMA56, a number of respondents submitted suggestions that fall outside the scope of updating the Current Guidance.⁶ For example, several respondents suggested changes to the UK merger regime that would require the amendment of primary legislation.⁷ A number of respondents also requested further detailed guidance to be provided on certain aspects of the CMA's practice. In this regard, it is important to note that the Final Revised Guidance is intended to set out principles that can be applied on a case-by-case basis, and it is not possible (and would not be appropriate, given that the process followed can vary depending on the particular facts and circumstances of each case) to provide an exhaustive description of the approach that the CMA will apply to all aspects of its work. The CMA has, for similar reasons, sought to avoid terms like 'exceptionally' when describing its practice in the Final Revised Guidance, given that it is ultimately not possible for the CMA to predict the frequency with which a particular set of circumstances might arise in future as trends evolve. For the avoidance of doubt, the removal of this wording should not be taken to signal any change in the CMA's approach in relation to these aspects of the guidance.

2.7 Further detail on respondents' views is set out below.

CMA2

Chapter 4: Jurisdiction and relevant merger situations

Summary of responses

2.8 Several respondents suggested that certain aspects of the proposed revisions to CMA2 could be supplemented.

2.9 First, with respect to the question of when a firm will have 'material influence' under the Act, some respondents suggested that the possibility of such influence being found in respect of a shareholding below 15% should continue to be described as 'exceptional' and should be comprehensively described. One respondent also suggested that a finding of material influence based on

⁶ For instance, certain respondents raised issues falling outside of the scope of the CMA56 guidance, such as the use of interim measures and the alignment of review timelines across competition authorities. As CMA56 is intended to address only the operation of the CMA's mergers intelligence function, it has not been amended to address other aspects of the CMA's work.

⁷ Since the CMA is not able to make legislative changes through its guidance, these suggested changes are not discussed further in this document.

the ability to exercise a right to obtain board representation was inconsistent with the position on a party acquiring an option to purchase shares or voting rights.

2.10 Second, with respect to the application of the share of supply test:

(a) Some respondents suggested that the guidance should further specify when products and services will qualify as a ‘reasonable description’ of goods or services for the purposes of the share of supply test. A few respondents also suggested that the CMA should state that it will rely on recognised industry standards (or standard business approaches) when describing such goods or services. Several respondents further suggested that the CMA should specify when overlaps will be found based on pipeline products/services and some expressed concerns that the extension of the share of supply test to cover pipeline products was an overly broad interpretation of ‘supply’ under the Act.

(b) Several respondents queried to what specific factors the CMA will have regard when assessing whether a merger has sufficient UK nexus. One respondent queried, in particular, how a UK nexus will be found in situations where the merger parties do not have a contractual relationship with their customers, such that the merger will result in the creation or enhancement of at least a 25% share of supply or acquisition of goods or services in the UK or in a substantial part of the UK.

2.11 In addition, a number of respondents requested further specificity around what will comprise an enterprise under the Act and, more generally, on when a relevant merger situation is *not* created. Some respondents suggested that the guidance should more closely mirror the wording of the Supreme Court’s *Eurotunnel* decision,⁸ and that the judgment does not cover the situation where an entity has not yet commenced trading activities (as opposed to having ceased trading).

2.12 Several respondents also noted that the CMA’s guidance should acknowledge forthcoming changes expected to be implemented under the National Security and Investment Bill.

The CMA’s views

2.13 As noted above, the guidance is intended to set out principles that can be applied on a case-by-case basis. In this context, it is not possible or appropriate

⁸ *Société Coopérative de Production SeaFrance SA v Competition and Markets Authority* [2015] UKSC 75.

to attempt to prescribe the approach that the CMA will take in all future cases. The CMA is not in a position to set out all potential circumstances in which it will make a finding of material influence, decide that the share of supply test has been met, or find that two enterprises have ceased to be distinct.

- 2.14 The CMA has carefully considered the comments that it received and has sought to provide additional information in relation to the following areas.
- 2.15 First, as noted above, the CMA remains of the view that it is not possible to provide exhaustive examples of when the CMA will or will *not* find an enterprise (as such assessments are fact-specific). The CMA has, however, provided some clarification on how it applies the *Eurotunnel* judgment in response to queries raised by a small number of respondents.⁹
- 2.16 Second, with respect to the points raised on the application of the material influence test:
- (a) The wording of the Final Revised Guidance has been revised to make clear that the CMA will take the right or ability to obtain board representation into account in the assessment of material influence. While that approach may differ, in principle, to that in relation to a party acquiring an option to purchase shares or voting rights, the CMA considers that the two circumstances are not necessarily analogous, given the differences in the nature of these two sets of rights.
 - (b) In addition, the CMA has clarified, in response to a query raised by one respondent, that it does not consider that material influence is likely to arise in situations where a shareholder has no more than the rights normally accorded to minority shareholders, such as rights in the context of a liquidation.
 - (c) The CMA has not included the term ‘exceptionally’ where describing when shareholdings of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present. As noted above, as a general matter, it is not possible for the CMA to predict the frequency with which a particular set of circumstances might arise in future (ie the CMA cannot predict how future mergers will be

⁹ Specifically, the decisions in *Société Coopérative de Production SeaFrance SA v Competition and Markets Authority* [2015] UKSC 75 at paragraph 37 ff, *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30, and *Groupe Eurotunnel SA v Competition and Markets Authority* [2015] CAT 1. The CMA notes in the final revised CMA2 that, although these judgments considered the acquisition of assets from an entity that was no longer actively trading, the CMA considers that the principles are of broader application, including to cases in which the target business has not yet started actively trading. More generally, the CMA does not consider its guidance is inconsistent with these judgments.

structured so it would therefore be speculative to state that findings of material influence in these cases will be exceptional). The removal of the word 'exceptionally' does not signal a change in the CMA's approach to reviewing acquisitions of shareholdings below 15%, and the CMA's approach to date is likely to provide a reliable guide to future practice in this regard. The Final Revised Guidance, however, now includes a footnote explaining that, in its past decisional practice, the CMA has only rarely found shareholdings of less than 15% to confer material influence on the acquirer.

- 2.17 Third, the CMA has not materially revised wording of the Final Revised Guidance in relation to the share of supply test to reflect the comments received in consultation. In keeping with the general approach set out above, the Final Revised Guidance is intended to set out principles that can be applied on a case-by-case basis (with previous cases cited as examples of the CMA's approach), and it is not possible or appropriate to provide an exhaustive description of the approach that the CMA will apply in all possible future circumstances. The CMA is therefore not able to provide meaningful further guidance on which products and services would qualify as a 'reasonable description' of goods or services in future cases. In particular, in relation to suggestions that the CMA should commit to applying recognised industry standards when describing goods or services, the CMA notes that it is often impossible to identify consistent industry standards and, moreover, there is no guarantee that any such descriptions for goods or services will be meaningful indications of how competition operates.
- 2.18 Fourth, in relation to overlaps involving pipeline products and services, given the highly fact-specific nature of pipeline products and the competitive significance they may have in a particular case (including, but not exclusively, across different pharmaceutical applications), the CMA has made some minor clarifications but considers that it is not currently in a position to provide more detailed guidance on the circumstances in which a pipeline product may form part of an overlap for the purposes of the share of supply test. As the CMA's decisional practice continues to develop, it will consider whether it is appropriate to provide more guidance in this area.
- 2.19 Finally, the CMA is aware of the potential implications of the National Security and Investment Bill and will seek to update its revised guidance promptly for the new national security regime coming into full effect.

Chapter 6: Notification of mergers to the CMA

Summary of responses

- 2.20 There were a few comments in relation to this section of the guidance, which is aimed at helping businesses to decide whether to notify a merger to the CMA, as well as providing an indication on the nature and timing of the pre-notification period.
- 2.21 Although most respondents welcomed the decision to remove detailed guidance on the informal advice procedure (given that it is rarely used) some respondents requested that it be reintroduced.
- 2.22 Some respondents suggested that the CMA should clarify that merger parties will not be adversely affected if they decide not to notify a merger.
- 2.23 One respondent noted that the guidance should not state that completing a merger before obtaining merger control clearance could result in a completed transaction being ‘unwound’, since this suggests that the business in question would be restored to the seller, whereas what the CMA might actually require is the divestment of the business to a suitable third party.
- 2.24 One respondent suggested that the content of Initial Enforcement Orders (IEOs) should be determined on a case-by-case basis, rather than the CMA imposing standard IEOs from which the merger parties can request derogations.
- 2.25 In relation to the timing of the pre-notification period, several respondents noted that the guidance should explain that the pre-notification period can be long and require a lot of information.
- 2.26 Finally, some respondents requested that the CMA reintroduce the wording in the current CMA2 stating that the CMA wishes to obtain information to carry out its responsibilities ‘without placing undue burdens on the parties’.¹⁰

The CMA’s views

- 2.27 The CMA has made several changes to the Draft Revised Guidance in response to the comments it received in relation to this chapter.

(a) First, the Final Revised Guidance now includes a new footnote explaining that, if merger parties choose not to notify a completed merger, the initial

¹⁰ CMA2, at paragraph 6.55.

period for the CMA's phase 1 investigation may be reduced to fewer than 40 working days by virtue of the four-month statutory deadline.

- (b) Second, the summary table in Chapter 5 setting out the key stages of the phase 1 review process has been amended to avoid any impression that the pre-notification period typically lasts two weeks (since it is longer in most cases).
- (c) Third, the wording of paragraph 6.8(b) has also been changed, and it no longer makes reference to the risk that a completed transaction may be 'unwound', and clarifies that the CMA may order the disposal of the acquired business (or other businesses or assets).

2.28 The CMA has not amended the approach taken in the Final Revised Guidance in relation to the informal advice procedure. As explained in the consultation document, this process is rarely used, and it is always open to the merger parties to contact the CMA informally (or through the Mergers Intelligence function) to discuss any aspects of a transaction without having to follow a prescribed procedure.

2.29 The CMA has not revised the wording of the Final Revised Guidance to state that merger parties will not be adversely affected if they decide not to notify a merger. Although the CMA's substantive assessment of a merger will not be affected if merger parties decide not to notify a merger, completed mergers must sometimes be reviewed under a compressed timeline (due to the CMA's four-month statutory deadline for making a reference), which can increase the risk of a phase 2 reference by virtue of the CMA having insufficient time to carry out a more detailed assessment of the transaction in phase 1. As set out in the CMA's Interim Measures guidance, if the CMA investigates a completed merger which has not been notified to it, it is likely to impose an IEO and may also issue an order to reverse or mitigate the effect of any pre-emptive action.¹¹ Complying with these interim measures may be costly for merger parties.

2.30 As concerns the suggestion that the content of IEOs should be determined on a case-by-case basis, this is not the CMA's practice.¹² As the CAT has recently set out, there are important reasons of procedural efficiency for using a standard IEO and allowing the parties to make derogation requests.¹³

¹¹ *Interim Measures in Merger Investigations* (CMA108), at paragraphs 2.2 and 2.13.

¹² See *Interim Measures in Merger Investigations* (CMA108).

¹³ See *Facebook v. Competition and Markets Authority* [2020] CAT 23, at paragraph 27 'Discussions over the scope of an IEO in completed mergers will almost always concern derogations from, rather than amendments to,

2.31 Finally, the CMA has not reintroduced the language in relation to ‘undue burdens’ on merger parties. In practice, the CMA has found that this wording has given rise to confusion in individual cases as, while the CMA operates under a broader duty to act reasonably and proportionately in all of its merger investigations,¹⁴ the CMA and merger parties may have different views in relation to the appropriate amount of information-gathering that is necessary for the CMA to be able to execute its statutory duties appropriately.

Chapter 7: Fast track processes and ‘conceding’ an SLC

Summary of responses

- 2.32 Respondents generally welcomed the additional guidance on how merger parties may make use of the fast-track / SLC concession processes. Many respondents also recognised the potential for these processes to increase the efficiency of merger investigations.
- 2.33 Several respondents indicated that the length of the CMA’s review period (and of the decision itself) should be significantly shortened at phase 1 in fast-track cases.¹⁵ Some respondents also stated that fast-track cases should only be rejected in exceptional circumstances.
- 2.34 Others noted that, given that the CMA may decide to reject fast-track requests, it should be possible for merger parties to make these requests on a ‘without prejudice’ basis. Some respondents went further, noting that merger parties should be able to qualify any fast-track request as being made for the purpose of a faster administrative process, without having to accept that the phase 1 test for reference is met.
- 2.35 Finally, some respondents requested further guidance on the situations in which the CMA will deem the relevant thresholds for it to accept a fast-track request to be met at both phase 1 and phase 2.

the template IEO. This approach is intended to ensure that effective IEOs can be put in place as quickly as possible and to provide greater factual and legal certainty around the initial scope of an IEO. The power to grant derogations is an important and necessary safeguard against what may transpire on fuller information than is immediately available at the time of issue to be unnecessarily wide and burdensome restrictions on businesses, which are the subject of the IEO’.

¹⁴ See *Facebook v. Competition and Markets Authority* [2020] CAT 23.

¹⁵ The former, so as to simply note that the merger parties accept that the test for reference is met, and that the CMA’s duty to refer applies – so as to not prejudice any phase 2 investigation.

The CMA's views

- 2.36 The CMA has clarified certain aspects of the fast track procedure in response to these suggestions.
- 2.37 The CMA has clarified that it expects any investigation following the fast-track procedure to progress substantially more quickly than it would under the ordinary statutory timetable.
- 2.38 With respect to the length of its phase 1 fast-track decisions, the CMA notes that it has a statutory duty to explain why it believes that the test for a reference to phase 2 is met. While the CMA expects fast-track decisions to be shorter than a typical phase 1 SLC decision conducted under ordinary investigation timelines, the length of these decisions will depend on the circumstances of each case, given the need to meet this statutory duty.
- 2.39 The CMA recognises that merger parties may be concerned that requests for a fast-track procedure could prejudice their procedural rights, and has therefore amended the guidance to make clear that such requests are made on a 'without prejudice' basis. The CMA has also added wording clarifying that it will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that a request for a fast-track process (or to 'concede' an SLC in a phase 2 investigation) does not, in the event that it is declined, prejudice the CMA's SLC decision at phase 1 or phase 2.
- 2.40 Finally, the CMA considers that it would be not be appropriate to suggest that merger parties can request a fast-track procedure for purely administrative reasons (ie without having to accept that the phase 1 test for reference is met or that an SLC arises at phase 2). In practice, the CMA considers it is not possible to achieve the aims of a fast-track procedure (ie to reduce the length of merger investigations and/or to ensure that the CMA and merger parties are able to focus on the most significant issues raised by the case) without a common understanding that the merger parties will not contest that the test for a reference is met (at phase 1) or that an SLC arises in a given market or markets (at phase 2).

Chapter 9: The phase 1 assessment process

Summary of responses

- 2.41 Most respondents provided comments on this section of the guidance, which sets out the phase 1 assessment process. Respondents suggested that this chapter could be further updated in the following ways:

- (a) First, the guidance should commit to the CMA routinely circulating draft s.109 requests for review and comment by the merger parties before issuing them.
- (b) Second, the guidance should clarify the circumstances in which the CMA will issue s.109(1) notices requiring an individual to give evidence in person, as well as the procedures that are followed during these interviews. One respondent suggested that individuals should have the choice of attending in Edinburgh or London.
- (c) Third, the guidance should state that case teams will give merger parties at least 48 hours after receiving the issues letter to prepare for the issues meeting. A few respondents also noted that, given the compressed timeline of this process, the state of play meeting should provide the merger parties with more detailed information about theories of harm and third-party feedback.
- (d) Fourth, the guidance should state that the parties should have the choice whether the decision maker participates in UIL discussions.
- (e) Fifth, the guidance should explain that, during a phase 1 investigation, merger parties will be informed (in an anonymised form) of the nature of concerns expressed by third parties.
- (f) Finally, one respondent noted that the CMA could include the UK devolved entities (the Scottish Government, Welsh Government and the Northern Ireland administration) and Consumer Scotland in the list of entities which the CMA would contemplate seeking views from.

The CMA's views

2.42 The CMA added some clarifications to the Final Revised Guidance in response to the comments it received in relation to this chapter.

- (a) First, the guidance now clarifies that the CMA will provide the merger parties with a short interval of two working days (at least 48 hours, not counting weekends or public holidays) between receipt of the issues letter and the issues meeting to allow them time to prepare. It also clarifies that the merger parties will usually have longer than two working days to submit their written response to an issues letter.
- (b) Second, the guidance explicitly confirms that, where the CMA intends to rely on third-party submissions as part of the case for reference in a phase 1 investigation, it will inform the merger parties of the nature of the

concerns expressed by the third-parties (but not of their identity) in sufficient detail to enable the merger parties to respond to those concerns.

- 2.43 The CMA did not amend the guidance to state that it will routinely circulate draft s.109 requests to the merger parties for review and comment. The CMA agrees that it is typically likely to be mutually beneficial to discuss a draft with parties before issuing a notice under section 109. The CMA notes, however, that it is unable to provide a blanket commitment to engaging in draft on s.109 requests as the circumstances of certain cases may mean that it is not practical or appropriate to do so.
- 2.44 The CMA has not provided more guidance on the format and procedure of s.109(1) interviews. The CMA expects that these will vary on a case-by-case basis, and that it is more appropriate to provide individual guidance to the relevant parties in the course of the merger investigation procedure (as has been the case where these interviews have taken place in previous investigations).
- 2.45 Likewise, the CMA considers that the level of detail that case teams are able to provide during state-of-play calls varies between cases and is based on the evidence available at the time of the call. The CMA is therefore unable to provide more detailed guidance on the level of detail that the merger parties can expect during these calls.
- 2.46 The CMA has declined to change the guidance in relation to the decision maker's choice to be present in UIL discussions. This is consistent with the CMA's *Merger Remedies* guidance (CMA87), which already provides that, in exceptional circumstances or when requested by the merger parties, the decision maker may choose to be involved in discussions concerning UILs prior to taking the SLC decision.¹⁶ In those cases, the parties are not obliged to engage with the decision maker. The CMA will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early consideration of remedies does not prejudice the SLC decision in phase 1 or the provisional SLC decision in phase 2.
- 2.47 Finally, the CMA will contact any relevant stakeholder, including in the devolved nations where relevant. It has made a small amendment to paragraph 9.21 to make clear that all government bodies are included.

¹⁶ CMA87, at paragraph 4.6.

Chapters 11, 12 and 13: The phase 2 process

Summary of responses

- 2.48 Respondents suggested that the proposed revisions to CMA2 could be further updated in the following ways:
- a) First, the guidance should clearly emphasise that the CMA is open to engagement with merger parties and their advisers at the outset of phase 2 inquiries.
 - b) Second, several respondents submitted that the guidance restricted submissions to the CMA outside of key stages of the inquiry. One respondent also stated that the guidance would prevent parties making a submission at the start of phase 2 to the inquiry group.
 - c) Third, several respondents provided comments around the CMA's disclosure of key working papers and other evidence ahead of the main party hearings.
 - d) Fourth, several respondents requested greater disclosure of the evidence underpinning the CMA's analysis and provisional findings / final reports as well as concerns as to the proposed approach to 'put back'.
 - e) Fifth, respondents raised a number of discrete points concerning: disclosure of the outside interests of inquiry members; how the CMA's information-gathering approach should apply in practice (for example, at least one inquiry group member should participate in third-party calls); and various drafting changes.

The CMA's views

- 2.49 The CMA welcomes engagement with merger parties and their advisers at the outset of phase 2 inquiries. This can be helpful to identify key information which the CMA may need for its inquiry and to understand the merger parties' views on potential lines of analysis. Given that the existing text already makes this clear, the CMA does not consider that any additional wording is required to reflect this approach.
- 2.50 The CMA has considered the comments regarding submissions by merger parties outside of the key stages of an inquiry. As the Draft Revised Guidance makes clear, making submissions at the key stages of an inquiry 'is the optimal means of engaging with the Inquiry Group.' This helps the CMA to run an efficient process, in order to make best use of public resources, and reduces the risk of delay and/or disruption to inquiries, consistent with the CMA's

statutory duty of expedition. Further, the administrative timetable, which is published at the beginning of a phase 2 inquiry, provides transparency as to the deadline by which the CMA will consider submissions. Ultimately, it is a matter for parties to phase 2 inquiries to decide whether to make submissions outside of these key stages.¹⁷ The CMA has revised the wording of the guidance to make clear that parties are generally encouraged to bring new information or new circumstances to the attention of the CMA as soon as possible. The Final Revised Guidance continues to make clear that the CMA will seek to take other submissions (ie submissions that do not relate to new information or new circumstances) provided outside these stages into account, to the extent possible within the applicable statutory timescales, but may not do so where this would risk undermining the effective functioning of the CMA's investigation.

- 2.51 In relation to the comments around the CMA's disclosure of key working papers and other evidence ahead of the main party hearings, the CMA discloses an annotated version of the issues statement and, where appropriate, certain working papers to the merger parties for the purposes of facilitating effective main party hearings. This practice – which is not set out in the Act – is unchanged by the Draft Revised Guidance. The CMA will always consider on a case-by-case basis any disclosure of evidence and/or analysis which may be necessary for the purposes of facilitating an effective main party hearing. Ultimately, the main means for disclosing the CMA's provisional thinking is its provisional findings report.¹⁸
- 2.52 The CMA does not accept that its proposed approach to 'put back' risks undermining merger parties' rights of defence, as some respondents suggested. This approach applies where draft text is taken directly from an agreed call note or from written documents provided by parties, and therefore the accuracy of this information would have been verified once already (and therefore does not require to be verified again).
- 2.53 As concerns the request for greater disclosure of the evidence underpinning the CMA's analysis and provisional findings, the CMA notes that the approach set out in the Draft Revised Guidance follows settled caselaw.¹⁹ The CMA does not consider it necessary or appropriate to clarify further the extent of its obligation to disclose the 'gist' of a case, given the ample guidance already provided by UK courts (which makes clear that this is a case-by-case assessment).

¹⁷ And, for the avoidance of doubt, parties are not prevented from making submissions at the start of the phase 2 process.

¹⁸ This includes disclosing the 'gist' of third party oral evidence.

¹⁹ *Tobii AB (Pulb) v CMA* [2020] CAT 1; *Ryanair v Competition Commission* [2014] CAT 3; *BMI Healthcare Limited v Competition Commission* [2013] CAT 24.

- 2.54 In relation to various other discrete points raised by respondents:
- (a) The CMA has clarified that its practice is not to appoint a member to an Inquiry Group where a conflict of interest is likely to arise and that, in limited cases, it may contact the merger parties to disclose an outside interest ahead of appointing a member, even though the CMA believes that the potential conflict of interest would not affect, nor be seen to affect, the Group's impartiality. Where appropriate, the CMA may also publish particular interests on the relevant case page.
 - (b) The CMA has not added further detail as to how it will approach information-gathering, as this is liable to be determined on a case-by-case basis.
- 2.55 Finally, the CMA made a few minor clarificatory changes to reflect its practice in relation to surveys.

Chapter 18: Multi-jurisdictional mergers

Summary of responses

- 2.56 Respondents generally agreed that it would be beneficial for the CMA to communicate and coordinate extensively with other authorities undertaking parallel merger investigations.
- 2.57 The Draft Revised Guidance explains that, in some multi-jurisdictional cases, the CMA may decide not to open an investigation if any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK. Several respondents submitted that the lingering possibility of the CMA opening an investigation could cause uncertainty and delay, with some indicating that the CMA should mitigate this by engaging in ongoing dialogue with the merger parties on its intentions.
- 2.58 Some respondents requested that the Draft Revised Guidance be clarified to indicate that waivers to speak with other competition authorities will be limited to the competition authorities approved by the merger parties (rather than to all competition authorities investigating the merger). Others requested that the CMA coordinate the scope and timing of requests for information with other relevant authorities.

The CMA's views

- 2.59 As a general principle, the CMA encourages merger parties to proactively update the CMA regarding the status of ongoing investigations with other

authorities (including in scenarios where the CMA considers that remedies offered in the context of merger investigations in other jurisdictions may address any potential UK competition concerns). The CMA notes that such engagement and ongoing cooperation may, in some cases, help the CMA to decide at an early stage whether it should open its own investigation. However, the CMA cannot provide any definitive assurances that it will not investigate a merger which it has jurisdiction to investigate on the basis that the merger is being investigated by authorities in other jurisdictions. This would undermine the CMA's ability to carry out its statutory duty to promote competition for the benefit of consumers.

- 2.60 With regard to respondents' comments on waivers, the CMA has provided additional wording clarifying that it would expect the scope of such waivers to be limited to exchanging information with the authorities identified in the waivers. The CMA has also made the necessary changes to its confidentiality waiver template.²⁰
- 2.61 With regard to some respondents' requests that the CMA align its information requests with those of other authorities, the CMA notes that alignment is not always possible in practice. While the CMA aims to work closely with other competition authorities (including in relation to the coordination of information-gathering), competition authorities are ultimately subject to different statutory obligations and must carry out their merger investigations as they see fit.
- 2.62 Finally, the CMA notes that its practice on multi-jurisdictional mergers may evolve over time as it gains more experience, and the CMA will, if appropriate, update its guidance to reflect its practice in future.

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Chapter 2: Information requests to the parties to the merger or to third parties

Summary of responses

- 2.63 Most respondents did not express views on the issue of information requests at the mergers intelligence stage. However, one respondent commented that the CMA should reinstate previous language describing requests for information to third parties as being 'exceptional' and in particular, recognise that third parties (specifically competitors) often adopt a strategy of complaining to the CMA in cases where mergers are in fact pro-competitive.

²⁰ <https://www.gov.uk/government/publications/confidentiality-waiver-template>.

The CMA's views

2.64 As noted above, the Draft Revised Guidance is intended to set out principles that can be applied on a case-by-case basis. The removal of the word 'exceptional' reflects the fact that it is not possible for the CMA to predict the frequency with which a particular set of circumstances might arise in future. It should not be taken to signal any change in the CMA's approach to liaising with third parties at mergers intelligence stage. Moreover, the CMA fully recognises that, in some cases, third parties may have commercial incentives to raise concerns in relation to a merger. The CMA will therefore always scrutinise any views submitted by third parties carefully and consider the available evidence to support these views.

Chapter 3: How the CMA will respond to parties contacting the CMA

Summary of responses

2.65 A number of respondents made the following comments in relation to the use of briefing notes at the mergers intelligence stage:

- (a) One respondent commented that the CMA's proposed approach to only consider a briefing note after there is a signed merger agreement (as a general rule) should be aligned with the threshold it applies for submission of a Case Team Allocation Form (ie evidence of a good faith intention to proceed).
- (b) Some respondents suggested that the proposed maximum five page limit on briefing notes should be increased, particularly for mergers that are being reviewed in other jurisdictions outside the UK, or for mergers where the merger parties have sought prior permission to submit a longer briefing note.
- (c) One respondent suggested that the CMA should clarify that it would accept briefing papers in circumstances where, in the context of a UK public bid, the potential acquirer has made an announcement pursuant to Rule 2.4 and/or 2.7 of the UK Takeover Code.

The CMA's views

2.66 The CMA does not agree that the threshold for submitting a briefing note at mergers intelligence stage should be aligned with the threshold for submitting a Case Team Allocation Form. The CMA considers the difference is appropriate, as filing a Case Team Allocation Form and proceeding with a review already requires a degree of commitment from the merger parties that is not required

when submitting a briefing note at the mergers intelligence stage. As set out by both the Current and Draft Revised Guidance, the CMA does not wish its willingness to review a briefing note to change the duty on parties to self-assess, which is a key feature of a voluntary merger regime.

- 2.67 With respect to the length of briefing notes, the page limit applies to an initial briefing note submitted by the merger parties. Where the CMA requires additional information in order to make a determination at the mergers intelligence stage (for example in relation to the appropriate approach in relation to a multi-jurisdictional merger), the CMA may invite merger parties to submit additional information on particular points. The CMA has amended footnote 5 in the Final Revised Guidance to make this clear. The page limit for briefing notes reflects the fact that the mergers intelligence function is a screening function and the CMA does not carry out investigations at mergers intelligence stage.
- 2.68 In response to the comment regarding briefing notes in the context of a public bid under the UK Takeover Code, the CMA has updated its guidance to reflect that it will accept a briefing paper where an announcement has been made pursuant to rule 2.7 of the UK Takeover Code. Announcements made pursuant to Rule 2.4 are not binding on the offeror and, as such, are not a basis on which the mergers intelligence team would review a briefing note.

Chapter 4: What the CMA will do following engagement with the merger parties

Summary of responses

- 2.69 Overall, respondents welcomed the CMA's flexibility in considering which transactions to call in for review and the emphasis on cooperation and coordination with other competition authorities.
- 2.70 One respondent commented that 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, the CMA should be obliged to provide the parties with a reasoned justification for doing so.
- 2.71 One respondent commented that where a transaction is subject to merger review elsewhere in the world and the CMA is not minded to immediately open an investigation, parties should be informed of that decision and told that the decision is subject to the outcome of the parallel proceedings. Some respondents also noted that it would be helpful if the CMA provided further guidance on when remedies proposed in other jurisdictions would be considered by the CMA as being likely to address concerns in the UK (such that it might decide not to open an investigation immediately).

2.72 Some respondents also questioned the period within which a draft merger notice must be submitted after a transaction has been called in for review, with one noting in particular that the 10 working day deadline to submit a draft merger notice is short.

The CMA's views

2.73 The CMA notes that in most cases in which it decides to open an investigation after previously indicating that it was not minded to do so, it is unlikely to be able to provide the merger parties with a reasoned justification. In practice, the decision to open an investigation in such circumstances is often the result of additional information coming to the attention of the CMA from third parties. In keeping with the CMA's duties to protect confidential information, and in order to encourage engagement from third parties (which is an important element of a voluntary merger control regime), the CMA is, in practice, likely to be unable to provide the specific reasons that a case is being called in for investigation.

2.74 As concerns the CMA's position where it is not minded to immediately open an investigation because of parallel proceedings, the CMA has updated its guidance to clarify that, where the CMA has received a briefing note and/or engaged in discussions with parties to such a transaction, the CMA would anticipate advising the parties that it has decided not to immediately open an investigation for this reason.

2.75 As concerns further guidance on when remedies proposed in other jurisdictions would be considered by the CMA as being likely to address concerns in the UK, the CMA notes that its general approach to assessing the substance of a case and potential remedies is reflected in the CMA's guidance in those areas. The CMA would also anticipate engaging with merger parties on a case-by-case basis in order to consider (in a case that has not been called in for investigation) whether remedies being proposed in other jurisdictions would be considered by the CMA as being likely to address concerns in the UK. The CMA has included footnote 6 in the Final Revised Guidance to encourage the merger parties to contact the mergers intelligence team at an early stage to discuss the transaction and their proposed approach.

2.76 With respect to the period within which merger parties will be expected to submit a draft merger notice following the opening of an investigation, the CMA has clarified in its final guidance that while it will typically expect parties to commit to submitting a draft merger notice to the CMA within 10 working days, it may agree to a longer timeline following discussion with the merging parties.

3. List of Respondents

- Addleshaw Goddard and AlixPartners (joint response)
- Allen & Overy LLP
- Baker & McKenzie LLP
- Cleary Gottlieb Steen & Hamilton LLP
- CMS Cameron McKenna Nabarro Olswang LLP
- Competition Law Committee of the City of London Law Society
- Dentons UK and Middle East LLP
- Dickson Minto
- Eversheds Sutherland (International) LLP
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Joint Working Party of the Bars and Law Societies of the UK in Competition Law
- The Law Society
- The Law Society of Scotland
- Slaughter and May
- White & Case LLP