

**CMA CONSULTATION DOCUMENT: DRAFT REVISED GUIDANCE ON THE CMA'S
JURISDICTION AND PROCEDURE IN RELATION TO MERGERS**

RESPONSE ON THE DRAFT REVISED CMA2 GUIDANCE (JURISDICTION AND PROCEDURE)

3 December 2020

This document sets out the views of Dickson Minto, a boutique law firm with offices in London and Edinburgh specialising in corporate and commercial law matters, on the Competition and Markets Authority's ("CMA") draft revised *Guidance on the CMA's jurisdiction and procedure* (the "Draft Revised CMA2 Guidance"), as published for consultation on 6 November 2020. The views expressed herein do not necessarily reflect those of our clients.

General

1. We welcome the opportunity to comment on the consultation. We have no comments on most of the revisions made by the CMA. We consider that the Draft Revised CMA2 Guidance, especially when read alongside other existing CMA guidance, generally functions as a helpful and comprehensive reference document for practitioners and businesses.
2. Having said this, there are a few specific points which we would like to bring to the CMA's attention, and which we hope the CMA will take into consideration when producing a final version of the Draft Revised CMA2 Guidance. Where appropriate, we comment on changes which are proposed to be made against the current *Guidance on the CMA's jurisdiction and procedure* (the "Current CMA2 Guidance").

Specific points

3. *Paragraph 4.27 of the Draft Revised CMA2 Guidance (material influence)*: We note that, in light of recent CMA investigations of acquisitions of relatively small minority stakes, the Draft Revised CMA2 Guidance no longer refers to there being "no presumption of material influence below 25%" (paragraph 4.20 of the Current CMA2 Guidance).

We believe that the removal of the word "exceptionally" from the last sentence in the same paragraph (which discusses shareholdings of less than 15%) is unhelpful. More specifically, while the Current CMA2 Guidance states that acquisitions of shareholdings of less than 15% might attract CMA scrutiny in *exceptional* situations, the Draft Revised CMA2 Guidance seems to imply that there is an equal likelihood of the CMA scrutinising acquisitions of shareholdings below 15%, as there is of the CMA scrutinising acquisitions of shareholdings above 15%.

As presumably merger investigations into acquisitions of shareholdings below 15% will, in fact, continue to be the exception rather than the norm, we would welcome the CMA's clarification of this point in the Draft Revised CMA2 Guidance.

4. Deleted third bullet point of paragraph 6.21 of the Current CMA2 Guidance (risks of not notifying): In our view this (proposed to be deleted) bullet point set out a relevant consideration for practitioners and businesses with regards to the pros and cons of making a voluntary notification to the CMA. For ease of reference, a shortened version of the deleted point has been reproduced below:

"[I]f parties choose not to notify a completed merger, the initial period for the CMA's Phase 1 investigation may be reduced to less than 40 working days by virtue of the four month statutory deadline for a reference [...]. This would therefore reduce the time available for the CMA's Phase 1 review [...]."

It would be helpful to understand the reasoning behind the CMA's proposal to omit this point from the Draft Revised CMA2 Guidance.

5. Deleted paragraphs 6.24 to 6.38 of the Current CMA2 Guidance (informal advice): While we are aware that the option of requesting informal advice from the CMA has only been used sporadically by practitioners over the past few years, we believe that there is continuing value in the informal advice facility in a limited set of scenarios, in particular:

- where the parties' question is purely jurisdictional (e.g. whether the acquisition of a minority shareholding might qualify as an acquisition of material influence and the question has not previously been addressed in the CMA's decisional practice); and
- where the parties' question relates to a substantive issue that would require a certain degree of market testing to resolve, but for the purposes of the informal advice procedure some base assumptions can be made by, and agreed between, the CMA and the parties (e.g. whether the 'de minimis' exception would be likely to apply to a particular transaction on the assumption that market testing confirms the market value put forward by the parties).

It would therefore be helpful if the CMA could re-insert a brief section in the Draft Revised CMA2 Guidance setting out the parameters for informal advice from the CMA.

6. Paragraph 18.4 of the Draft Revised CMA2 Guidance (confidentiality waiver): The introduction of a confidentiality waiver for merger parties to sign as a matter of practice is recent (with the waiver template having been published on 4 November 2020). For this reason, we believe it would be helpful if the CMA could articulate the benefits to merger parties of signing such a waiver and the consequences of not signing it.
7. Footnote 294 of the Draft Revised CMA2 Guidance (guidance regarding ancillary restraints): We are disappointed by the proposed statement that "the CMA will not be able to express a view as to whether the restrictions are ancillary if the merger parties consider that the arrangements are confidential". We make two remarks in this regard:

- Ancillary restraints to mergers are, by their very nature, often commercially sensitive and confidential to the merger parties. It therefore follows from the proposed wording in the Draft Revised CMA2 Guidance that the CMA does not intend to develop a body of decisional practice with regards to ancillary restraints, since the majority of cases will be automatically 'disqualified' under the strict wording of footnote 294. We do not consider this to be a productive way forward, especially in light of the fact that it is unclear whether, and if so to what extent, from January 2021 the CMA continues in its interpretation of these rules to be guided by the extensive case law referenced in the EU Commission's *Commission Notice on restrictions directly related and necessary to concentrations* (the "Commission Ancillary Restraints Notice"), thus creating some legal uncertainty.
- On a practical level, we also do not see why the CMA would not be able to redact from its published decisions any strictly confidential information regarding the parties' ancillary restraints. Redactions are of course a common solution for all other types of confidential information in CMA decisions, and there is no obvious reason why the relevant parts of regarding ancillary restraints should be treated differently.

For the above reasons, we would welcome a reconsideration of the CMA's proposed position.

8. Paragraph C.16 of the Draft Revised CMA2 Guidance (ancillary restraints): While we welcome the new Annex C largely mirroring the Commission Ancillary Restraints Notice, we note that there is an unexpected omission from paragraph C.16 of Annex C.

The Commission Ancillary Restraints Notice provides in paragraph 23 that non-competition clauses must remain limited to products and services forming the economic activity of the undertaking transferred. It then goes on to clarify that "[t]his can include products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed."

We consider the clarification to be key to the wider point made in paragraph 23, and therefore find its omission from the CMA's mirroring paragraph C.16 unhelpful. Can the CMA re-introduce the above sentence to paragraph C.16, or alternatively, can the CMA clarify why the sentence has been omitted?

Dickson Minto
3 December 2020

**CMA CONSULTATION DOCUMENT: DRAFT REVISED GUIDANCE ON THE CMA'S
JURISDICTION AND PROCEDURE IN RELATION TO MERGERS
RESPONSE ON THE DRAFT REVISED CMA56 GUIDANCE (MERGERS INTELLIGENCE)**

3 December 2020

This document sets out the views of Dickson Minto, a boutique law firm with offices in London and Edinburgh specialising in corporate and commercial law matters, on the Competition and Markets Authority's ("CMA") draft revised *Guidance on the CMA's mergers intelligence function* (the "Draft Revised CMA56 Guidance"), as published for consultation on 6 November 2020. The views expressed herein do not necessarily reflect those of our clients.

General

1. We welcome opportunity to comment on the consultation. We have no comments on most of the revisions made by the CMA. We consider that the Draft Revised CMA56 Guidance, especially when read alongside other existing CMA guidance, generally functions as a helpful reference document for practitioners.
2. Having said this, there are a few specific points which we would like to bring to the CMA's attention, and which we hope the CMA will take into consideration when producing a final version of the Draft Revised CMA56 Guidance.

Specific points

3. Paragraph 3.3 and footnote 5 of the Draft Revised CMA56 Guidance (earliest point for consideration of a briefing note): We note the point made by this paragraph and footnote that, other than in exceptional circumstances (such as in the case of *some* public offers), the CMA will not accept a briefing note if the parties do not have a signed merger agreement in place. However, we previously understood the Merger Intelligence Committee's practice to be to accept briefing notes before a merger agreement was signed, in particular where the parties have an intention to merge which is evidenced by signed heads of terms or a letter of intent. Indeed, this practice was confirmed by senior CMA staff during a Law Society webinar in June 2020. In our experience, this was a much appreciated feature of the briefing note system.

In light of the discrepancy with the proposed wording, we would like to understand whether there has been a change of policy since June. If so, we would ask the CMA to reconsider its position in this regard. In practice, it is very helpful for merger parties to have the option of submitting a briefing note on the basis of signed heads of terms or a letter of intent.

4. Footnote 7 of the Draft Revised CMA56 Guidance: We note that, in the event the CMA decides to open an investigation into an anticipated merger, the CMA will provide the merger parties the option to notify the transaction by committing to submit a draft merger notice, typically within 10 working days. We make two remarks in this regard:

- We consider a 10 working day deadline to be unreasonably short, taking into account that often the preparation of a considered draft will take longer.
- Building upon our first point, there does not appear to be an overriding need for the parties to commit to a deadline for the submission of a draft merger notice. Prior to completion, the risk of pre-emptive action is limited. If the parties proceed to completion prior to CMA clearance, the CMA would have the option of imposing an Initial Enforcement Order on the parties, in which case a tighter timeline for producing a draft Merger Notice is probably generally sensible. As long as the merger remains anticipated, the four-month intervention period in s.24 of the Enterprise Act 2002 does not start to run, thus removing another potential time constraint on the CMA.

In light of the above, we would suggest that footnote 7 be removed from the Draft Revised CMA56 Guidance.

Dickson Minto
3 December 2020