Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers, draft revised merger notice and draft revised template waiver

Consultation document

20 November 2023

Contents

Page

1. Introduction

Introduction

1.1 The Competition and Markets Authority (**CMA**)[1] has set out in published guidance general information for the business and legal communities and other interested parties on its practices and processes in connection with its powers under the Enterprise Act 2002 (as amended) (the **Act**) to investigate mergers.[2]

1.2 Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised) (the **Current Guidance**) sets out the CMA's procedures in operating the merger control regime set out in the Act.[3] It originally took effect from January 2014[4] and was updated in December 2020 and in January 2022.

1.3 As set out more fully below, the CMA is now proposing a number of amendments to the Current Guidance and other associated documents.

1.4 The draft revised text of the Current Guidance issued alongside this consultation document is referred to as 'the **Draft Revised Guidance**'.

1.5 The amendments discussed in this consultation document will not require any new or amended legislation. The amendments cover updates to the phase 2 merger process, updates to other aspects of the merger processes (revisions to the phase 1 Merger Notice and the CMA's Template Waiver), amendments to the Current Guidance to reflect the new special energy network merger regime and other general amendments as highlighted in this consultation document.

Updates to the phase 2 merger process

1.6 On 29 June 2023, the CMA issued a call for information (**Call for Information**) inviting interested parties to provide their views on whether there are aspects of the phase 2 merger process that could work better for all parties who may be interested in, or affected by, the merger – including consumers and small businesses. Following an extensive consultation exercise, the CMA has identified a number of ways in which the quality of

---

[1] The CMA is the UK's economy-wide competition and consumer authority and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses and the economy as a whole.
[2] This guidance forms part of the advice and information published by the CMA under section 106 of the Act.
[3] Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised) (as amended on 4 January 2022).
[4] Having superseded the Office of Fair Trading's Mergers: Jurisdictional and procedural guidance (OFT527), the Competition Commission (CC's) Merger Procedural Guidelines (CC18) and Appendix A to the CC's Merger Remedies: Competition Commission Guidelines (CC8).

engagement between the CMA and the businesses involved in phase 2 merger investigations, including merger parties, third parties and customers, could be enhanced. The nature of and the reasons for these proposed amendments are set out in Sections 2 and 3 of this consultation document. Section 4 of this consultation document outlines other proposed amendments to the Current Guidance.

Updates to other merger processes

1.7 The CMA is also proposing to make a number of other changes to the Current Guidance and associated documents to reflect changes to the CMA's practice (across both phase 1 and phase 2), recent judgments of the Competition Appeal Tribunal (**CAT**) and certain legislative changes.

1.8 These amendments relate parts of the Current Guidance unconnected to the phase 2 process, the current Merger Notice and the current Template Waiver. For the purposes of this document, the draft revised text of the current Merger Notice is referred to as 'the **Draft Revised Merger Notice**'. The draft revised text of the current Template Waiver is referred to as 'the **Draft Revised Template Waiver**'.

1.9 This consultation document explains in Sections 4 to 7 the nature of and the reasons for the CMA's proposed amendments to the Current Guidance, the current Merger Notice and the current Template Waiver.

Other consequential updates

1.10 The changes set out in this document will require consequential updates to other associated guidance. These will be made at the earliest opportunity following the finalisation of the Revised Guidance (and before the Revised Guidance comes into effect). Specifically, the CMA intends to update and consult on amendments to the CMA Rules in light of its proposed changes to the Current Guidance.[5] All changes will be made at the earliest opportunity following the finalisation of the Revised Guidance (and before the Revised Guidance comes into effect).

1.11 The updates proposed to the Current Guidance do not capture any changes that will be required in the event that the proposed legislation which is currently before Parliament passes into law.[6]

---

[5] CMA rules of procedure for merger, market and special reference groups (CMA17).
[6] The Digital Markets, Competition and Consumers Bill.

Scope of the consultation

1.12 This consultation seeks the views of interested parties on the:

(a) proposed amendments contained in the Draft Revised Guidance;

(b) draft Phase 2 Remedies Form;

(c) proposed amendments contained in the Draft Revised Merger Notice; and

(d) proposed amendments contained in the Draft Revised Template Waiver.

1.13 The specific questions on which we are seeking respondents' views are provided in Section 8 of this consultation document.

1.14 This consultation is aimed at those who have an interest in the CMA's merger processes. In particular, it may be of interest to businesses and their legal and other advisers.

2. Phase 2 merger process review

Background and rationale

2.1 The CMA has a statutory duty to review merger control activity in the UK. The CMA aims to ensure that the interests of all parties affected by a merger, including customers, small businesses and consumers, are adequately protected.

2.2 Where the CMA believes that it is or may be the case that a merger has resulted, or may be expected to result, in a substantial lessening of competition (**SLC**) within any market(s) in the UK it is under a duty to refer it to an in-depth phase 2 investigation.[7] Where a case is referred to phase 2, an Inquiry Group is selected from a panel of independent members to make a final determination on whether: (i) there is a relevant merger situation falling within the UK merger control regime; (ii) that relevant merger situation has resulted, or may be expected to result, in an SLC; and (iii) it should take action to remedy any SLC identified.[8]

2.3 The Inquiry Group acts as a 'fresh pair of eyes' for the phase 2 investigation and is required by law to act independently of the CMA Board.[9] The Inquiry Group is assisted by a team of CMA staff to manage the conduct of the case throughout the investigation.

2.4 The phase 2 merger process is intended to deliver robust decisions that deliver on the CMA's commitment to protect competition for the benefit of consumers in the UK. It is important that decisions are reached transparently, and that all parties involved – including not only the merger businesses but also customers, consumers and other interested third parties – are able to engage with the CMA decision makers. Moreover, in light of the cost and uncertainty brought about by merger investigations, it is also important that decisions are reached as quickly and efficiently as possible (recognising that the CMA, as a public authority, is not able to devote unlimited resources to its merger investigations).

2.5 While the CMA's practices have progressively developed over time, the core phase 2 process, as set out in the Current Guidance has not changed

---

[7] Sections 22(1) and 33(1) of the Act. The duty to refer does not arise in some circumstances, including where the CMA accepts undertakings in lieu of reference to remedy, mitigate or prevent the SLC. See paragraphs 3.2 to 3.4 of the Current Guidance for further information.
[8] Sections 35 and 36 of the Act.
[9] Paragraph 49(1) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (**ERRA13**).

significantly since the foundation of the CMA in 2014. Since then, there have been some significant developments that have led the CMA to take stock of how it investigates mergers in phase 2. In particular, the UK's exit from the European Union (**EU**) has resulted in the CMA investigating an increased number of multi-jurisdictional cases, which involve the CMA reviewing cases in parallel alongside competition agencies in other jurisdictions. Moreover, in keeping with the increased complexity of competitive assessments, the CMA's investigatory practices have also evolved over time (eg with greater volumes of internal documents being gathered from the merging businesses and a greater amount of third-party market outreach now taking place).

2.6 On 29 June 2023, to help the CMA consider what improvements it might be appropriate to make to the phase 2 process, the CMA launched a Call for Information. Respondents were given until 25 August 2023 to submit views. The CMA sought views on the following questions:

(a) How can parties engage more effectively with Inquiry Groups on assessment and remedies?

(b) Can opportunities to make written submissions be improved?

(c) Can opportunities for direct in-person engagement with the Inquiry Group be improved?

(d) What are the perceived barriers to engaging on remedies prior to the CMA's provisional findings?

(e) What aspects of other jurisdictions might work well within the UK regime?

2.7 In addition to seeking written submissions (which are published at Call for information: Phase 2 merger investigations), the CMA also engaged with a wide range of interested parties with experience of the phase 2 process. These included law firms and economic consultancies who frequently advise merger parties and third parties in connection with the UK merger control, business that have recently participated in the phase 2 process (either as a merger party or as an interested third party), other competition agencies, and consumer organisations and small business representatives. The proposed reforms reflect the valuable feedback that was obtained through this process.

2.8 The proposed reforms will put in place an enhanced phase 2 process which makes improvements to its agility, transparency and efficiency. In particular, the proposed reforms have the potential to improve the quality of engagement between the Inquiry Group and the businesses involved in the investigation (including customers, consumers and other interested third parties). The

proposed reforms should also help the CMA to focus on the issues that are key to the investigation more quickly. The proposed reforms introduce increased flexibility into the remedies process, opening up the opportunity to engage on potential remedies (without prejudice to whether a merger raises competition concerns) at an earlier stage than is currently the case.

2.9 However, the full realisation of the potential benefits offered by the proposed reforms will also require merger parties and their advisers to engage constructively with the revised process (eg to ensure the Inquiry Group has sufficient access to relevant business personnel, and that advocacy is appropriately underpinned by supporting, probative evidence). In relation to remedies, the potential benefits offered by the proposed reforms rely on merging parties engaging with the CMA in good faith and with credible remedies offers.

2.10 The CMA also considers that, the revised process will increase the CMA's capacity for earlier engagement with other competition authorities internationally. The Inquiry Groups overseeing phase 2 investigations will be able to identify key areas of concern in the UK more quickly and, through engagement, recognise similarities and differences in market conditions in other jurisdictions. Merger parties will benefit from the greater transparency, including where necessary, in preparing multi-jurisdictional remedies.

3. Proposed changes to the Current Guidance: phase 2 merger process review

3.1 The section includes (i) a high-level outline of the CMA's current practice; (ii) the main themes of the feedback received in response to the Call for Information; and (iii) the CMA's proposed changes to the Current Guidance.

3.2 Currently, the phase 2 process up to the Final Report (that is, excluding the implementation of remedies) can be broadly characterised in three stages, although these stages are not distinct and often overlap in time:

- The first stage is largely focused on evidence gathering. Early in the investigation, the CMA publishes an issues statement outlining the theories of harm being considered by the Inquiry Group and invites comments on it from interested parties. In addition to considering the evidence and submissions received during the CMA's phase 1 investigation, information gathering steps typically include attending site visits, issuing information and document requests to the merger parties and third parties, and holding calls with the merger parties and third parties. In some cases, the CMA commissions a survey of customers.

- The second stage is largely focused on analysing the evidence and developing the Inquiry Group's assessment of the theories of harm. During this stage, the merger parties will usually be provided with an annotated issues statement and, in many cases, with key working papers addressing areas of analysis, followed by main party hearings. At the end of this stage, the Inquiry Group considers the evidence before it and publishes its provisional findings along with a notice of possible remedies (in cases where the Inquiry Group has provisionally found one or more SLCs).

- Following the provisional findings, the investigation focuses on refining the Inquiry Group's substantive assessment, alongside the remedies process (if applicable). The Inquiry Group will consider the merger parties' and third-party responses to the provisional findings and, where necessary, publish supplementary provisional findings (or otherwise make additional disclosure of its reasoning to the merger parties). The Inquiry Group will publish its final report by week 24, subject to any extensions of the statutory deadline.

3.3 The CMA proposes to revise its phase 2 process to:

(a) Facilitate increased engagement between the CMA and the merger parties on the key issues in the phase 2 process, including by providing additional opportunities for merger parties to engage directly with the

Inquiry Group early in the process. Interested third parties, including customers and consumers, will also be able to present their views on the impact of the merger for the Inquiry Group's consideration.

(b) Publish an interim report for consultation with merger parties and third parties earlier in the process than is typically the case currently with provisional findings. This will refocus the main party hearings, giving the merger parties the chance to engage on the substantive case with the Inquiry Group having seen the full version of the 'case against' them where an SLC has been provisionally identified. These hearings will also provide a fuller opportunity for the merger parties to set out their position, in addition to responding to questions from the Inquiry Group.

(c) Encourage earlier *without prejudice* remedy discussions between the CMA and merger parties and, wherever practicable, base those discussions on detailed remedy proposals.

Increased engagement between the CMA and the merger parties

Main themes from the Call for Information

3.4 The CMA received a range of views on the effectiveness of discrete parts of the phase 2 process as well as on how the process works as a whole. Feedback on the pre-provisional findings stage of the current process focused on opportunities for early interaction with the Inquiry Group and case team, and the utility of the issues statement, annotated issues statement and working papers.

3.5 Merger parties from recent phase 2 investigations and law firms widely expressed a desire for more opportunities to engage directly with the Inquiry Group throughout the process and especially in the early stages of the inquiry. Site visits are viewed positively, although respondents suggested that merger parties should also be able to address the Inquiry Group on the substantive assessment of the merger, for example by responding to the phase 1 decision, either as part of the site visit or separately at a similar time.

3.6 Similarly, 'teach-in' sessions are generally viewed positively. Respondents suggested that merger parties should be offered an opportunity to host teach-in sessions as standard in order to assist the Inquiry Group and case team gain a thorough understanding of the merger parties' relevant business activities.

3.7 Many respondents identified the issues statement as being of minimal practical value given that in almost all cases Inquiry Groups focus on the

theories of harm identified as giving rise to a realistic prospect of an SLC in the CMA's phase 1 decision. Several respondents suggested abolishing the issues statement and instead inviting initial submissions in response to the phase 1 decision.

3.8 Some respondents to the Call for Information also expressed views that the annotated issues statement and working papers do not provide merger parties with sufficient insight into the Inquiry Group's possible concerns about the merger to be of real use. While they provide an outline of the evidence and analysis being considered by the Inquiry Group, respondents noted that it would be more instructive to receive an indication of the Inquiry Group's emerging thinking based on that evidence and analysis.

Proposed changes to the Current Guidance

3.9 The CMA's proposed changes to increase engagement between the CMA and merger parties are set out in chapter 11 of the Draft Revised Guidance.

3.10 While the purpose of the merger control regime is to deliver robust decisions, the CMA recognises that it is also important that merger parties and interested third parties have confidence that their views are being properly heard throughout the inquiry.

3.11 The CMA therefore proposes to revise the phase 2 process to facilitate enhanced engagement between the CMA and merger parties. The CMA's proposed revisions also aim to provide merger parties with greater visibility of the Inquiry Group's possible concerns at an earlier stage of the inquiry. Specifically, the CMA proposes to:

- Streamline the starting point for the phase 2 investigation by abolishing the issues statement and instead using the phase 1 decision as the starting point to identify the key issues that the phase 2 inquiry will consider. The phase 1 decision provides a sound basis for identifying the key issues, given it reflects the substantial evidence gathering and analysis undertaken throughout pre-notification and the phase 1 investigation, and in practice the issues statement typically closely reflects the phase 1 decision. Instead of inviting comments on the issues statement, the CMA will invite the merger parties and interested third parties to provide written submissions in response to the phase 1 decision. In all cases the Inquiry Group will retain discretion to discard theories of harm, or consider additional ones, at any stage of the inquiry based on the evidence that it receives. This change will therefore provide additional clarity on the issues that the Inquiry Group is considering at the outset of the phase 2 investigation.

- Provide merger parties with additional early-stage opportunities to engage directly with the Inquiry Group. In particular:
    - The revised guidance formalises the process of holding a ‘teach-in’ session (which may include a site visit, where appropriate) at the outset of the phase 2 investigation. The teach-in/site visit would focus on explaining how the businesses work and the relevant products or services, helping to inform the Inquiry Group about the markets at issue.
    - The revised guidance introduces a new ‘initial substantive meeting’, which would typically follow the submission of the merger parties’ response to the phase 1 decision. This provides the merger parties (and, in some cases, key third parties) with an early opportunity to present their case, in person, to the Inquiry Group on basis for the reference and the issues that the Group should be considering in the phase 2 investigation.
- Make increased use of informal update calls throughout the inquiry. These calls will seek to give the merger parties greater visibility on the CMA’s process. The case team may use this engagement to indicate, at a high level, areas where it considers the Inquiry Group would benefit from particular evidence; areas where further requests for information or documents are likely; and areas where there is conflicting evidence, for example between the merger parties’ submissions and internal documents or third-party evidence. While the update calls will not represent findings (provisional or otherwise) of the Inquiry Group, the CMA considers that this greater engagement will enable improved focus on the key areas, provide more transparency over emerging thinking, and facilitate more targeted submissions and, where relevant, improved preparation of remedy proposals (see below). Merger parties and their advisers may wish to use any indications provided on update calls as a basis on which to engage on a without prejudice basis with the CMA’s case team and/or the Inquiry Group on possible remedies (if they have not already done so).
- Make provision for direct engagement with the merger parties’ economic advisers on particular evidence or aspects of the CMA’s analysis where appropriate. This might be particularly relevant if the theories of harm being considered are novel or complex, if the CMA is considering undertaking complex quantitative analysis (such as econometric analysis), or if parties’ submissions are technical in nature, and where the CMA wishes to understand in greater detail, for example, the methodology or assumptions proposed by the merger parties’ economic advisers.

3.12 The CMA's proposed revised phase 2 process does not include sending to the merger parties an 'annotated issues statement' or 'working papers'. However, the CMA will retain flexibility throughout the investigation to disclose key evidence and analysis to the merger parties and their advisers and to invite representations where it considers it is appropriate to do so. Removing the 'working papers' stage will enable the CMA to publish its assessment of the key substantive questions earlier, and with a more comprehensive level of reasoning than would typically be found in existing working papers. As described further below, this is intended to ensure the refocused main party hearing is as effective as possible.

Interim report and redesigned main party hearings

Main themes from the Call for Information

3.13 The main party hearings were identified by a number of respondents as an aspect of the current phase 2 process that could be improved. Respondents told us that they are currently akin to a deposition, with a focus on the Inquiry Group asking factual questions and with limited meaningful dialogue between the Inquiry Group and the merging parties. Respondents recommended that the main party hearings should instead be an opportunity for the merger parties to discuss and address the Inquiry Group's core substantive concerns, as well as be given a more material opportunity to advocate their position.

3.14 Some respondents outlined a desire by merger parties to have an opportunity to respond to the Inquiry Group's provisional findings before they are made public.

3.15 Respondents also suggested that under the current phase 2 process the provisional findings come too late in the statutory timetable to allow for the merger parties to engage meaningfully with the Inquiry Group on the substance of its assessment. A number of those respondents suggested that the main party hearings could be redesigned to provide merger parties with a better opportunity to do so.

3.16 Similarly, in relation to the response hearings that follow provisional findings under the current phase 2 process, respondents suggested that, with the focus of these hearings being on possible remedies, merger parties are not afforded sufficient time at the response hearings to engage meaningfully with the Inquiry Group on its substantive assessment of the merger as set out in the provisional findings report and must instead rely on a written submission. Respondents proposed that more time should be allotted for the merger

parties to respond orally and that the format should be changed to facilitate more dialogue with the Inquiry Group.

Proposed changes to the Current Guidance

3.17 The CMA's proposed changes relevant to the interim report and redesigned main party hearings are set out in chapter 11 of the Draft Revised Guidance.

3.18 The CMA considers that providing merger parties with an opportunity to respond fully to the interim report orally at the main party hearing (in addition to making written submissions) offers merger parties the best possible opportunity to present their substantive case – orally and in-person – to the Inquiry Group. Moreover, the CMA considers that the main party hearing itself can be redesigned to improve its effectiveness.

3.19 In particular, the CMA proposes that:

- The CMA will generally publish its interim report at an earlier stage than provisional findings are currently typically published.[10] The interim report will provide a clear and detailed articulation of the Inquiry Group's provisional assessment on first, whether or not a relevant merger situation has been (or will be) created and second, if so, whether or not the relevant merger situation has resulted, or may be expected to result, in an SLC, and a description of the evidence upon which the CMA's position is based. As is currently the case with the provisional findings, the provisional assessment set out in the interim report will be sufficiently developed to satisfy the CMA's statutory duty to consult on its proposed decision.[11] However, the fact that the interim report is issued at an earlier stage should address concerns that the merger parties only hear the case 'against' them too late in the statutory timetable to allow them to engage meaningfully with the Inquiry Group on the substance of its assessment.

- Merger parties and third parties will be invited to make written submissions in response to the substantive assessment contained in the interim report. The deadline for submissions will be a period of at least 21 calendar days.

- An unredacted version of the interim report will be provided to the merger parties' external advisers in a confidentiality ring at this stage.

---

[10] The CMA expects that in some exceptional cases, for example where consumer surveys have been commissioned, the interim report may be published later than this indicative timing.
[11] Section 104 of the Act.

- Following submission of the merger parties' written response, the CMA will host the merger parties for a substantive, main party hearing which will be the centrepiece of the phase 2 inquiry. The main party hearing will provide merger parties with the opportunity to directly respond to the Inquiry Group's provisional decision as set out in the interim report. The merger parties will be allocated a significant portion of the hearing to make oral submissions. These hearings will be less focused on information-gathering and more interactive in nature than is currently the case, although the Inquiry Group may adapt the format to reflect the particular circumstances of the case. The CMA expects that the merger parties, rather than their external advisers, will take the lead on presenting and responding to questions. The Inquiry Group and CMA case team will likely ask questions throughout the presentation and will reserve a portion of the hearing for any additional questions they have.

3.20 The CMA recognises the benefits of consulting on its proposed decision at an earlier stage, and anticipates that it will be more likely, under the revised regime, that new evidence and/or submissions on existing evidence provided after the interim report will result in changes to the provisional decisions reached by the Inquiry Group on the statutory questions (and/or changes to the 'gist' of the Inquiry Group's reasoning). In practice, this means that supplementary interim reports (or disclosure of additional evidence to merger parties) may be required more frequently than is currently the case. While this may result in more frequent changes in the 'direction of travel' in a case, this is a function of earlier and more fulsome engagement at the main party hearing, which the CMA considers will, overall, provide the Inquiry Group with the best possible basis to be able to test and refine its understanding and weighting of the evidence.

3.21 The CMA's proposed revised phase 2 process does not involve the merging parties being given an opportunity to respond to the interim report before it is made public, as was suggested by some respondents to the Call for Information. The CMA considers that such an approach would undermine the transparency of its inquiry.

Changes to the phase 2 remedies process

3.22 The CMA's existing procedure for considering remedies in its phase 2 merger investigations is set out in its Merger Remedies guidance.[12] Under the current

[12] Merger Remedies (CMA87).

approach, where the Inquiry Group reaches a provisional finding of an SLC, the main steps in the consideration of remedies are:

(a) at the same time as publishing its provisional findings, the CMA publishes its notice of possible remedies which offers a starting point for discussion with the merger parties and other parties on possible remedies to address the SLC;[13]

(b) a response hearing will be held with the merger parties. The hearing is led by the Inquiry Group and much of the focus of the hearing is on possible remedies;[14]

(c) following the response hearing, the merger parties or other parties may submit further, or amended, proposals for remedies;[15]

(d) a remedies working paper, containing a detailed assessment of the different remedies options and setting out the CMA's provisional decision on remedies, will be sent to the merger parties for comment following the response hearings;[16] and

(e) following consultation on the remedies working paper and any further discussions and meetings with parties that the CMA considers necessary, the CMA will take its final decision on both the competition issues and any remedies. The CMA then publishes its final report.[17]

Main themes from the Call for Information

3.23 Various respondents told us that merger parties would like to discuss possible remedies with the CMA earlier in the phase 2 process. A number of reasons were offered as to why this is not currently happening including that the CMA's phase 2 process is too rigid (being designed around specific milestones), and that before provisional findings merger parties have little insight into the Inquiry Group's thinking on whether the merger is likely to give rise to an SLC. Some respondents thought that not having access to the Inquiry Group before provisional findings inhibited remedy discussions whereas other respondents thought that there would be a possibility that the decision on SLC would be prejudiced (or at least a perception that it could be)

---

[13] Merger Remedies (CMA87), paragraph 4.56.
[14] Merger Remedies (CMA87), paragraphs 4.58 to 4.61.
[15] Merger Remedies (CMA87), paragraph 4.63.
[16] Merger Remedies (CMA87), paragraph 4.64.
[17] Merger Remedies (CMA87), paragraphs 4.65 and 4.66.

if merger parties were to engage with the Inquiry Group about remedies before provisional findings.

3.24 Some respondents said that the CMA's notice of possible remedies was often too high level and generic to enable meaningful engagement on remedies.

3.25 Some respondents said that if the CMA were to engage in remedy discussions earlier, it would enable the existing response hearing to focus more on the parties' response to the Inquiry Group's provisional SLC findings rather than kick-starting a discussion on remedies.

Proposed changes to the Current Guidance

3.26 The CMA's proposed changes on the remedies process are set out in chapter 12 of the Draft Revised Guidance. Further information on the remedies process following the CMA's final report has also been included in chapter 12 of the Draft Revised Guidance.

3.27 The CMA considers that there are likely to be benefits to commencing discussions on possible remedies as early as practicable in phase 2 investigations. In some cases, doing so might lead to an earlier resolution to the investigation which would be to the benefit of all stakeholders, including the merger parties, their customers, the CMA and the taxpayer. While the CMA is aware that some merger parties have expressed concern about whether such discussions would, in fact, be without prejudice, the CMA considers that merger parties' legal advisers are well placed to communicate to their clients that this is within the capabilities of the Inquiry Group.

3.28 The CMA therefore proposes to:

- Make clear in its guidance that it welcomes discussions on remedies at an early stage. The CMA considers that its increased use of informal update calls throughout its inquiry, including before the publication of its interim report, will further assist this.

- Provide merger parties with an additional, early opportunity to engage with the Inquiry Group where they table a specific, credible remedy proposal at an early stage of the CMA's investigation.

- Introduce a Phase 2 Remedies Form enabling a standard presentation for a detailed remedies proposal which merger parties are requested to submit to the CMA following the Inquiry Group's interim report. Merger parties are therefore encouraged to engage with the CMA on remedies, including by potentially submitting a draft of the Phase 2 Remedies Form prior to the interim report.

- Publish a non-confidential summary of the merger parties' remedies proposal as part of a public invitation to comment on remedies.
- Hold at least one remedy meeting with the merger parties to discuss the merger parties' remedies proposal and provide the Inquiry Group's feedback with the aim of further developing an acceptable remedy proposal.
- Provide the merger parties with the Inquiry Group's interim report on remedies, containing the Inquiry Group's assessment of the different remedies options and setting out the Inquiry Group's provisional decision on remedies.
- Following the merger parties' response to the interim report on remedies, the merger parties will be invited to a final remedies call with the CMA, typically led by the case team (although Inquiry Group members may also participate) to enable the CMA to clarify any aspects of the merger parties' response.
- Provide merger parties with greater clarity on when discussions on remedies must come to an end in order to allow the Inquiry Group sufficient time to take a decision and prepare its final report.
- While the remedies process will become more interactive, the CMA's guidance will make it clear that merger parties will be expected to put forward a credible offer at the outset of their engagement with the CMA, as the practical constraints imposed by the statutory timetable are not consistent with the process becoming an iterative negotiation.

Merger parties' access to third-party evidence

3.29 Generally, the CMA currently provides unredacted versions of the provisional findings, notice of possible remedies and remedies working paper (if relevant), and final report to the merger parties' external advisers via a confidentiality ring, subject to appropriate safeguards. This approach reflects the CAT judgment in *Meta Platforms Inc v CMA* [2022] CAT 26. The CMA also has the discretion to disclose information at an earlier stage where disclosure would assist the CMA's investigation.

3.30 The CMA does not provide the merger parties with access to underlying third-party evidence. This approach has been endorsed by the CAT on numerous occasions.[18]

Main themes from the Call for Information

3.31 Most respondents to the call for information suggested that representatives of the merger parties should be granted full access to the third-party evidence which is being relied on by the Inquiry Group. It was suggested that this would enable merger parties to respond more meaningfully and would make the process fairer. In addition, respondents suggested that merger parties should be able to review and comment on third-party questionnaires prior to those being issued.

3.32 Responses differed with regard to the timing of the access, with some respondents suggesting access should come prior to provisional findings while others suggested it come alongside them. Some respondents also proposed that access should be granted not only to a merger party's external legal advisers but also to select in-house counsel.

3.33 Third parties with experience in the phase 2 process noted that, while the desire for granting access to third-party evidence was understood, doing so could cause third parties to be more reluctant to engage meaningfully in their responses. Other respondents also suggested a balance is needed between transparency for merger parties and dissuading third parties from providing information. Furthermore, some respondents to the Call for Information recommended that the CMA should give more consideration to the burden placed on third parties during phase 2 inquires in general.

Explanation of the CMA's proposed approach

3.34 The CMA's approach to disclosing third party evidence must strike the appropriate balance between (i) transparency for merger parties and safeguarding their rights of defence; (ii) fulfilling the CMA's obligations (under Part 9 of the Act) to balance the public interest in disclosing evidence against protecting relevant information from disclosure; (iii) facilitating third-party participation in merger investigations; and (iv) managing the limited resources of the CMA in a way that meets its statutory duty of expediency and ensures that the CMA is able to conduct a thorough investigation within its statutory timeframes.

---

[18] *Meta Platforms Inc v CMA* [2022] CAT26; *BMI v CC* [2013]; and *Eurotunnel v CC* [2013].

3.35 The CMA understands that the principal concern underpinning calls for merger parties to be provided with access to file is that, as a matter of procedural fairness, merger parties should have the opportunity to assess the underlying evidence and make submissions to refute the Inquiry Group's own assessment of that evidence.

3.36 In this regard, however, the CAT has confirmed that the existing process for the disclosure of evidence (based on the CMA's obligations as set out in Part 9 of the Enterprise Act) is sufficient to ensure procedural fairness. More broadly, the CMA's practice to the disclosure of evidence has, when challenged, consistently been given a 'clean bill of health' in CAT proceedings, and there has been no suggestion in these cases that the CMA is withholding, distorting or otherwise failing to adequately provide the gist of the evidence appropriately, or that merger parties cannot respond sufficiently to the case against them.[19] On this basis, the CMA considers that there is currently no evidence of systemic failings in the existing process.

3.37 The CAT has also highlighted (in *Tobii*) the policy drawbacks of an access to file regime, stating that it is not desirable or appropriate for merger parties to conduct their own analysis and review of the underlying evidence within the 'relatively short time frame' provided for a merger control investigation.[20]

3.38 Extensive access to evidence is already provided to merger parties (and, where appropriate, to interested third parties). Full access to confidential versions of documents produced by the CMA is now provided through a confidentiality ring (in most cases to external advisers only but also to business representatives where necessary in the circumstances of the case). In addition, full access is also provided to key quantitative evidence, such as share data, tender data and analysis of foreclosure incentives. Under the proposed revised phase 2 process, the external advisers of the merger parties will be invited to enter a confidentiality ring at an earlier point in the process, at the time of the interim report. The CMA expects that having the confidentiality ring in place earlier in the statutory timetable – and in advance of the main party hearing – will enable the merger parties to better engage with, and respond to, third-party evidence. Where the Inquiry Group considers it appropriate in a particular case (ie where doing so would assist the investigation), the CMA may disclose third-party information at an earlier stage of the investigation.

---

[19] *Groupe Eurotunnel S.A. v CC* [2013] CAT 30; *Meta Platforms Inc v CMA* [2022] CAT 26; *Tobii AB (publ) v CMA* [2020] CAT 1; and *Cérélia Group Holding SAS v Competition and Markets Authority* [2023] CAT 54.
[20] *Tobii AB (publ) v CMA* [2020] CAT 1 at paragraph 146.

3.39 The CMA has also considered the implications of providing merger parties with access to underlying third-party evidence for its case management and how it may impact on the CMA's engagement with third parties.

3.40 The CMA's current practice provides third parties with a degree of comfort that commercially sensitive information that is relevant for the Inquiry Group's assessment, for example entry or expansion plans, will be handled carefully, and in such a way as to not discourage engagement. While confidentiality rings (and other confidentiality mechanisms) provide some protection, these are not failsafe mechanisms (eg in the short time since the CMA has provided full access to confidential versions of provisional findings there have been several breaches of confidentiality undertakings). The CMA recognises that some of this information is available to merging parties in some other proceedings. This is, however, not always the case and the CMA believes that it is appropriate to apply a consistent approach across all of its cases.

3.41 The CMA is also conscious of the additional burden that managing access to the underlying third-party evidence would create. Consistent with the concerns expressed by the CAT, the CMA is concerned that providing merger parties with access to all underlying third-party evidence would have a detrimental impact on the process, by delaying decision making and causing third parties to be less willing to co-operate.[21] An access to file regime is not contemplated within the existing statutory deadlines and regimes that offer fuller access to file often have more flexible powers to 'stop the clock', resulting in materially longer merger investigations. In light of the existing end-to-end length of phase 2 merger control proceedings in the UK (where final decisions are typically taken over a year after transactions are first announced), the CMA does not believe that there is a case, given the absence of any evidence of systemic failings with existing processes, to prolong the uncertainty brought about by a merger review to accommodate more extensive access to underlying evidence.

3.42 Within the CMA, the right to access to file extends only to parties subject to proceedings in relation to Chapter 1 and Chapter 2 of the Competition Act 1998. Given the quasi-criminal nature of these matters and having regard to the range of penalties that may be enforced, the CMA considers that merger investigations do not give rise to comparable interests.

3.43 On this basis, the CMA does not believe that there are compelling reasons for universal access to file.

---

[21] *Tobii AB (publ) v CMA* [2020] CAT 1 at paragraph 146.

3.44 There may, however, be scope to formalise the disclosure of limited key pieces of evidence pre-PFs (eg, in a vertical case particularly influenced by a third-party complaint, there would be some benefits in sharing that complaint at an early stage with the merging parties).

4. Updates to other merger processes

Further amendments to the Draft Revised Guidance

Rationale for further amendments

4.1 The CMA is proposing further amendments to the Current Guidance to reflect a number of updates in the CMA's decisional practice and recent court judgments that have clarified the approach applied in various aspects of UK merger control proceedings. These include:

(a) *Sabre Corporation v CMA* [2021] CAT 11, including providing further guidance from the CAT's judgment in relation to the share of supply test.

(b) *Meta Platforms Inc v CMA* [2022] CAT 26, including adding text to explain when certain documents will be made available to external advisers via a confidentiality ring.

(a) *Cérélia Group Holding SAS v CMA* [2023] CAT 54, including providing further guidance from the CAT's judgment in relation to the circumstances in which the CMA may extend a phase 2 investigation on the basis of 'special reasons'.

(b) Updates to reflect the CMA's approach to confidentiality waivers for the purpose of sharing information with other authorities and regulators.

(c) Updates to reflect that the CMA no longer has jurisdiction to review certain NHS mergers.

(d) Other minor amendments and additions to provide more up to date examples of CMA practice and to make certain clarifications in the text.

4.2 These are changes that do not require new legislation.

Proposed changes to the Current Guidance: other merger processes

4.3 The principal proposed changes to the Current Guidance are as follows. Chapter references are to the Draft Revised Guidance:

(a) In chapter 3, clarifying the standard of proof required at phase 1 and 2 in relation to the SLC question, including to reflect the CAT's judgement in *Meta Platforms Inc v CMA* [2022] CAT 26.

(b) In chapter 4, updating to reflect further examples of the CMA's decision practice, including with regard to the share of supply test to reflect the CAT's judgment in *Sabre Corporation v CMA* [2021] CAT 11.

(c) In chapter 6, updating with further examples of the CMA's decision practice.

(d) In chapter 7, providing additional guidance on the CMA's procedure for fast track and phase 2 SLC concession cases.

(e) In chapters 8 and 16, providing additional guidance on the use of confidentiality waivers to allow the CMA to exchange confidential information with other authorities or regulators.

(f) In chapter 9 (and chapter 5), updating to clarify and reflect the CMA's current phase 1 process. Chapter 9 also replicates text from Merger Remedies Guidance (CMA87), relating to the submission of UILs.[22]

(g) In chapter 13, clarifying how the CMA approaches anticipated mergers that are abandoned during the phase 1 process (and prior to any reference) to reflect current practice.

(h) In chapter 15, updating to reflect the new special energy network merger regime, pursuant to the Energy Act 2023.

(i) In chapter 17, updating to clarify the CMA's approach to publishing merger decisions and submissions and its use of confidentiality rings for certain phase 2 documents.

4.4 Annex B to the Current Guidance will be updated so that the list of guidance and commentary relating to merger assessments is up to date.

Merger Notice

Rationale for the amendments to the current Merger Notice

4.5 As part of the reforms introduced by the ERRA13, section 96 of the Act was amended to require that a 'merger notice' (ie a notice to the CMA of proposed arrangements which might result in the creation of a relevant merger situation) should be made in a 'prescribed form'.

---

[22] This text has previously been consulted on and was published in CMA87 on 13 December 2018. Text from CMA87 relating to the procedure for remedies in phase 2 has been incorporated into the Draft Revised Guidance and updated as outlined in paragraphs 3.22-3.28.

4.6 The current merger notice, as last updated in September 2017 (**Current Merger Notice**), sets out a series of questions specifying the information that should be provided to meet these requirements. The Current Merger Notice also contains guidance notes intended to explain how merger parties should respond to these questions in the circumstances of a given case.

4.7 The amendments to the Current Merger Notice mainly bring the Current Merger Notice in line the Merger Assessment Guidelines (CMA129), issued in March 2021 (**Merger Assessment Guidelines**). to better reflect the CMA's approach to substantive assessment.

4.8 Some of the amendments to the Current Merger Notice also reflect the fact that the UK is no longer part of the EU and, as such, the UK is no longer covered by the one-stop-shop regime set out in the EU Regulation 139/2004 (**EU Merger Regulation**). For example, the information that was required to determine whether a transaction was under the CMA's jurisdiction or subject the jurisdiction of the European Commission under the one-stop-shop is no longer necessary.

Proposed changes in the Draft Revised Merger Notice: other merger processes

4.9 The main proposed changes in the Draft Revised Merger Notice are:

(a) Updates to bring the Draft Revised Merger Notice in line with the current Merger Assessment Guidelines, including:

(i) Information requested in questions 16 to 18, relating to the CMA's assessment of potential and dynamic competition.[23]

(ii) Information requested in questions 19 and 20, relating to the CMA's assessment of innovation as a non-price parameter of competition.[24]

(iii) Information requested in relation to vertical and conglomerate mergers (if the share of supply of the merger parties in one of the vertically related and adjacent markets exceed 30%).[25]

(iv) Information requested in questions 23 to 25, relating to entry and expansion.[26]

[23] Chapter 5 of the Merger Assessment Guidelines.
[24] Paragraph 2.5 and chapter 5 of the Merger Assessment Guidelines.
[25] Chapter 7 of the Merger Assessment Guidelines.
[26] Paragraph 4.16 of the Merger Assessment Guidelines.

(v) Information requested in question 10, relating to the CMA's the counterfactual assessment.[27]

(b) Removing requests for specific information in relation to the merged entity's buyer power, reflecting the limited number of mergers where buyer power is relevant to the CMA's assessment.

(c) Information requested in questions 8 and 9 (previous questions 9 and 10) relating to the document search methodology.[28]

(d) Information requested in question 7 to reflect the fact that the UK is no longer covered by the one-stop-shop regime set out in the EU Merger Regulation and the increase in multijurisdictional mergers.

Template Waiver

Rationale for the amendments to the current Template Waiver

4.10 On 4 November 2020, the CMA published on its website a confidentiality waiver template to enable the CMA to share confidential information, including documents and data, and discuss merger proceedings with other competition authorities in multi-jurisdictional merger investigations. The confidentiality waiver template was subsequently updated on 23 December 2020 (the **Current Template Waiver**).

4.11 Since the Current Template Waiver was published, the CMA has significantly relied on its use in order to discuss regulatory processes and allow the exchange of confidential information with other authorities (both other UK authorities and international competition agencies). The CMA sees significant benefits for the CMA and merger parties (and third parties where applicable) of being able to rely on such waivers.

4.12 The CMA's practice in recent years (and its intended continued practice) is to use a standard template waiver for these purposes. This not only has clear efficiency benefits, but also ensures that the CMA's waivers reflect the relevant UK legal framework. The wording in the Draft Revised Template Waiver takes into account the applicable UK legal framework (including Part 9 of the Act) and the CMA's own merger processes, which might be different to other jurisdictions. In most cases, wording used in waivers for other

[27] Chapter 3 of the Merger Assessment Guidelines.
[28] CMA's Guidance on requests for internal documents in merger investigations (CMA100).

authorities will not be suitable for UK purposes and the CMA will not generally accept variations to its template.

4.13 The amendments proposed in the Draft Revised Template Waiver seek to take account of certain limited amendments or additions that parties providing waivers have sought to make since the Current Template Waiver was first published, and which the CMA considers are appropriate and ought to be consistently incorporated across all cases. Making these changes to the template should help further avoid case-by-case discussions unduly prolonging proceedings.

4.14 The amendments also include drafting guidance for parties providing waivers, as well as certain adjustments which the CMA considers are appropriate in relation to waivers provided by third parties, or waivers in relation to disclosures to other UK authorities or regulators.

Proposed changes to the Current Template Waiver: other merger processes

4.15 The main proposed changes in the Draft Revised Template Waiver are:

(a) Including a drafting note which provides guidance on who the entity giving consent should be for the purposes of granting a waiver.

(b) Including a drafting note in relation to paragraph 3 to clarify that this paragraph can be deleted for waivers from third parties and in relation to waivers allowing disclosure to other UK government departments or regulators.

(c) Amending paragraph 4 to include additional text for waivers providing consent for disclosures to other UK government departments or regulatory bodies.

(d) Including a new paragraph 6 which deals with the situation where the CMA is notified of inadvertently disclosed UK legally privileged information.

(e) Including a new paragraph [7] which governs disclosure of information where the entity giving consent has asserted a claim of legal privilege under the laws of the receiving authority.

5. Questions for consideration

In responding to these questions, please give your reasons and any relevant supporting information or evidence.

Draft Revised Guidance

5.1 Overall, is the Draft Revised Guidance sufficiently clear and helpful?

5.2 What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

5.3 Are there any other amendments which you consider ought to be made to the Current Guidance?

5.4 Are the requirements of the Phase 2 Remedies Form sufficiently clear? Are there any comments you wish to make on the proposed Phase 2 Remedies Form?

Draft Revised Merger Notice

5.5 Are the proposed amendments to the Current Merger Notice sufficiently clear?

5.6 Are the proposed amendments to the Current Merger Notice appropriate in order to provide the CMA with the necessary information to conduct an initial assessment of a merger in line with the Merger Assessment Guidelines?

5.7 Are there any other amendments you consider ought to be made to the Current Merger Notice to bring it in line with the current Merger Assessment Guidelines?

5.8 Do you have any other suggestions for additional or revised content of the Current Merger Notice you would find helpful?

Draft Revised Template Waiver

5.9 Are the proposed amendments to the Current Template Waiver sufficiently clear?

5.10 Are there any other amendments which ought to be made to the Current Template Waiver?

6. Consultation process

How to respond

6.1 The CMA encourages parties to respond to the consultation in writing (by email or letter) using the contact details provided in paragraph 6.5 below.

6.2 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.

6.3 In pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time (see further paragraphs 9.8 to 9.14 below).

Duration

6.4 The consultation will run from 20 November 2023 to 8 January 2024.

Contact details

6.5 Responses should be submitted (by email or letter) by no later than **5:00pm on Monday 8 January 2024** and should be sent to: Mergers.Consultation.Nov23@cma.gov.uk.

Compliance with government consultation principles

6.6 In preparing this consultation, the CMA has taken into account the published government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

6.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation.

This legislation is the UK General Data Protection Regulation (GDPR)[29] and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

6.8 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the Draft Revised Guidance, before it is finalised and issued.

6.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.

6.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

6.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.

6.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

---

[29] The UK GDPR refers to the EU GDPR ((EU) 2016/679, which has been adopted into UK law by the EU Withdrawal Act 2018, as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

6.13 Further details of the CMA's approach can be found in the Transparency and Disclosure: Statement of the CMA's Policy and Approach (CMA6).[30]

After the consultation

6.14 After the consultation, the CMA will decide whether to make the changes proposed in the Draft Revised Guidance, the Draft Revised Merger Notice and the Draft Revised Template Waiver and whether any further changes are necessary.

6.15 The CMA will publish the final version of the Draft Revised Guidance, the Draft Revised Merger Notice and the Draft Revised Template Waiver on its webpages at http://www.gov.uk/cma. The CMA will also publish a summary of the responses received during the consultation. These documents will be available on CMA webpages.

[30] https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-andapproach