
Response to CMA consultation on draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers – 20 November 2023

- 1 Mills & Reeve LLP welcomes the opportunity to respond to the CMA's consultation on the draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (the **Draft Revised Guidance**), draft revised merger notice and draft revised template waiver.
- 2 Mills & Reeve is a national UK law firm with 156 partners and over 600 lawyers operating from seven offices in Birmingham, Cambridge, Leeds, London, Manchester, Norwich, and Oxford. Mills & Reeve has been named in the Sunday Times 100 Best Companies to Work For list for a record 20 years running and has recently been awarded the highest, platinum status by Investors in People. We are one of the top performing law firms in the UK when it comes to client satisfaction. Our annual survey of almost 700 clients fed-back a recommendation score of 91% (although we are striving for 95% as part of our 2025 strategy).
- 3 Mills & Reeve's competition practice is made up of experts specialising in this field, with the lead partner having over 23 years of experience advising domestic and international clients across a wide range of UK and EU competition law matters, including extensive experience of UK merger control. We act for a range of clients who have varying experience of CMA merger investigation processes. Our comments below are based on the experience of our competition team in advising on all aspects of the CMA merger process, including at phase 2, both at Mills & Reeve and in their previous firms.
- 4 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. We would be happy to discuss our responses more generally, at the CMA's convenience.
- 5 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA website.

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

- 6 We consider that the Draft Revised Guidance is, in the round, clear and helpful and will assist advisors and their clients with navigating through the merger control process.

- 7 In particular, we welcome the changes in the Draft Revised Guidance that are aimed at facilitating increased engagement between the CMA and the merger parties on the key issues in the phase 2 process. We consider that these changes are helpful and support the stated aims of improving the quality of engagement with the Inquiry Group and helping the CMA to focus on the issues that are key to the investigation more quickly:
- (a) The proposal to abolish the issues statement and to invite the merger parties to make written submissions on the phase 1 decision instead is a welcome and helpful change. This will streamline the early stages of a phase 2 investigation and will crystallise at the outset of the process the issues on which the Inquiry Group will focus.
 - (b) The new formalised process for holding a “teach in” session (which may include a site visit), as well as the opportunity for the merger parties to present their views on the substantive competition issues set out in the phase 1 decision, is a welcome and important addition to the phase 2 process. It will provide an early opportunity for the merger parties to assist the CMA with understanding the industry and products / services in question, as well as an early opportunity to present their case, in person, on the basis for the reference and the substantive issues the Inquiry Group should be considering in the phase 2 investigation. The timing of this (within 6 weeks of the start of the phase 2 inquiry as noted in paragraph 11.13 of the Draft Revised Guidance) is particularly welcome and reflects our comments in our submission on the call for information that current opportunities to respond to the Inquiry Group’s thinking come too late.
 - (c) The proposal to make increased use of informal update calls throughout the inquiry are a helpful change and should give the merger parties a better understanding of the progress of the inquiry and facilitate relevant submissions. This proposal corresponds with our comments in our response to the call for information, in which we advocated for more frequent, lower key engagement with the CMA case team and more opportunities to ascertain where the Inquiry Group would benefit from particular evidence, documents, or clarification. We note that the Draft Revised Guidance provides that the CMA may indicate in an update call (a) whether it is minded not to pursue certain concerns; or (b) whether new concerns are being considered (paragraph 11.42 Draft Revised Guidance). This addresses our previous comment that the merger parties are not always aware of the CMA’s current thinking on substantive issues or become aware of their thinking too late in the process, leaving little time or opportunity to influence it.
 - (d) The removal of the working papers stage is a helpful change to the Draft Revised Guidelines. As well as enabling the CMA to publish its assessment of the key issues earlier,

and with more reasoning, we consider that this will streamline materially the phase 2 inquiry process and will provide a more effective and meaningful opportunity for the merger parties to respond to the CMA's thinking on substantive issues.

- (e) We welcome the proposal in the Draft Revised Guidelines that the merger parties' economic advisers may have direct engagement with the CMA's economic advisers where the theories of harm are novel or complex, or if the parties' submission are technical in nature. We consider that this helpful proposal should facilitate more open and interactive engagement on the issues under consideration.
- (f) The proposal to publish the interim report at an earlier stage than is currently the case with the publication of provisional findings is a helpful and welcome change in the Draft Revised Guidelines. We consider that this should be effective in addressing concerns that, under the current process, the merger parties hear the case against them too late to meaningfully engage with the Inquiry Group on the substance of its assessment. The release of an unredacted version of the interim report to the merger parties' external advisers in a confidentiality ring is also a helpful addition to the process and should improve clarity and understanding of the issues under consideration.
- (g) The proposed redesign of the main party hearing is a welcome and significant improvement to the current phase 2 process. In particular, we welcome the proposal that merger parties will have a meaningful opportunity to respond fully to the interim report orally at the main party hearing, as well as an opportunity to focus on issues of the merger parties' choice. We also welcome clarification in the Draft Revised Guidance that the main party hearing will be more interactive. This is a helpful addition which should promote a more collaborative (and less adversarial) approach.

- 8 In addition, we welcome the proposed changes in the Draft Revised Guidance to the remedies aspects of the phase 2 process. We welcome in particular those changes which provide merger parties with a mechanism for discussing remedies which is distinct and separate from the parties' advocacy on the substantive elements of a merger, such as the introduction of a Phase 2 Remedies Form; the acknowledgement (in paragraph 11.63 of the Draft Revised Guidance) that the CMA will not ordinarily ask questions about potential remedies at the main party hearing; and the proposal that the CMA will hold at least one remedy focussed meeting with the parties to discuss parties' remedies proposal and to provide the Inquiry Group with feedback to develop an acceptable remedy proposal.

- 9 We also find helpful the acknowledgement in the Draft Revised Guidelines (paragraph 11.50) that where merger parties have submitted a sufficiently advanced remedy proposal at an early stage of the investigation, members of the Inquiry Group and the case team will be available for a remedies-focused meeting or call with the parties to discuss their draft remedy proposal well in advance of the formal remedies process and before publication of its interim report.

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.

- 10 N/A

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

- 11 N/A

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?

- 12 The Phase 2 Remedies Form closely mirrors the Remedies Form for Offers of Undertakings In Lieu of Reference and therefore the requirements of the Form will already be familiar and clear to advisors.

Draft Revised Merger Notice

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

- 13 The numbering of the questions referred to in the Consultation document at paragraph 4.9(a) is incorrect - we have set out comments below with reference to the question numbering in the Draft Revised Merger Notice.
- 14 We consider that the term “material consideration” in the proposed question 16 is open to interpretation and may not be clear. We suggest it should be clarified to note that the response should be proportional, and that what constitutes “material consideration” to entry and expansion may vary depending on the relevant market(s) and the size of the parties involved. Question 10(b) refers to “plans” to expand or to enter – these plans may have been given consideration which was not “material” and so would not be included in the response to question 16. If the CMA intends the parties to answer question 16 in respect of all the “plans” referred to in question 10(b), then question 16 should be redrafted to state this, rather than introducing a new “material consideration” concept.

- 15 Question 16(d) should also be amended to note that the “commercial strategy being pursued by one of the merger parties” refers only to the publicly known commercial strategy (which may differ in some ways from the confidential commercial strategy described by the relevant party in the merger notice).
- 16 We consider that Question 17 should include a footnote in a similar form to footnote 29, to state that “If notifying parties are unsure what may be responsive, or if, in their case, the question results in a large number of responsive documents, the CMA recommends that notifying parties discuss the process for gathering these documents with the CMA in pre-notification”. We consider that this would be useful to ensure that the provision of documentary evidence remains proportionate and not unduly burdensome on the parties.
- 17 We have no other comments on the information requested in questions 16 and 17 on the CMA’s assessment of innovation as a non-price parameter of competition.
- 18 We have no comments on the information requested in questions 18 and 19 in relation to vertical and conglomerate mergers; or on the information requested in questions 20 – 22 on entry and expansion.
- 19 We have no comments on the clarity of Question 10 on the counterfactual, other than that the list of evidence examples in the Guidance Notes to Question 10 should also include “(i) a timeline of key events”. There are also errors in the lettering in this list – (a) and (b) are repeated.
- 20 We consider that removing the request for specific information in relation to the merged entity’s buyer power is unnecessary. The question should be re-instated, although should be stated to be optional. This would allow the parties to put forward this evidence if they would like it to be considered, notwithstanding that there are only a limited number of mergers where this would be relevant to the CMA’s assessment.
- 21 We consider the amendments to questions 8 and 9 (previous questions 9 and 10) in relation to document search methodology are helpful and reflective of the approach that is likely to be taken in most cases already.
- 22 We have no comments in respect of changes to reflect the fact that the UK is no longer covered by the one stop shop regime.

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?

23 We consider that the proposed amendments are aligned with the theories of harm that the CMA may wish to consider during a phase 1 investigation as set out in the Merger Assessment Guidelines and, subject to our comments in paragraphs 14 – 16 of this response, that the level of information requested is appropriate.

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

24 N/A

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

25 N/A

Draft Revised Template Waiver

26 We confirm that we do not have any comments on the revised template waiver form.