## Mergers

# Updated guidance on the CMA's approach

**Consultation document** 

1 August 2024



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#### 1. Introduction and background

#### **Mergers Guidance**

- 1.1 The Competition and Markets Authority (CMA)<sup>1</sup> 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.
- 1.2 Currently, the CMA's guidance on its approach to the mergers regime is set out across a range of guidance documents published or adopted by the CMA:
  - (a) Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)
  - (b) Energy network mergers (CMA190)
  - (c) Quick guide to UK merger assessment (CMA18)
  - (d) Merger Assessment Guidelines (CMA129)
  - (e) Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (CC7)
  - (f) Guidance on the CMA's mergers intelligence function (CMA56)
  - (g) Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission (CC2com3)
  - (h) Government in markets (OFT1113)
  - (i) Good practice in the design and presentation of customer survey evidence in merger cases (CMA78)
  - (j) Mergers exceptions to the duty to refer and undertakings in lieu (CMA64)
  - (k) Merger remedies (CMA87)

<sup>&</sup>lt;sup>1</sup> 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.

- (I) Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders (CMA11)
- (m) Interim measures in merger investigations (CMA108)
- (n) Guidance on requests for internal documents in merger investigations (CMA100)
- (o) Merger and market remedies: Guidance on reporting, investigation and enforcement of potential breaches
- (p) Transparency and disclosure: Statement of the CMA's policy and approach (CMA6)
- (q) Guidance on the functions of the CMA after the end of the Transition Period (CMA125)
- (r) Administrative penalties: Statement of Policy on the CMA's approach (CMA4)
- (s) Rules of procedure for merger, market and special reference groups (CMA17)
- 1.3 The CMA has reviewed whether the current guidance should be updated both in view of the Digital Markets, Competition and Consumers Act 2024 (DMCC24) and changes in other legislation and CMA practice. The CMA believes that certain existing mergers guidance should be updated to reflect developments in legislation and CMA practice over time.
- 1.4 The CMA has therefore prepared a draft package of new mergers guidance which is the subject of this consultation. The draft package includes:<sup>2</sup>
  - (a) Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)
  - (b) Quick guide to UK merger assessment (CMA18)
  - (c) Mergers exceptions to the duty to refer and undertakings in lieu (CMA64)
  - (d) Interim measures in merger investigations (CMA108)
  - (e) Rules of procedure for merger, market and special reference groups (CMA17)

<sup>&</sup>lt;sup>2</sup> Other mergers guidance (eg CMA6 and CMA4) will be subject to separate consultations.

(f) Energy network mergers guidance (CMA 190)

#### 2. Scope of the consultation

2.1 This consultation seeks views of interested parties on the draft package of guidance for the mergers regime as set out below.

#### General revisions

- 2.2 The updated guidance includes various changes to reflect current practice. In particular:
  - (a) Rules of procedure for merger, market and special reference groups
    (CMA17) has been amended to reflect current practice, namely that (1) groups will no longer be required to consider the need for public hearings in P2 merger investigations; and (2) parties interested in the subject matter of the reference will no longer be afforded the opportunity to cross-examine witnesses. These rules have also been amended to exclude the application of the rules to a special reference group constituted in connection with a reference under section 12 of the Water Industry Act 1991. These special reference groups shall be subject to the procedural rules included in the new water redetermination references Rules and Guide.<sup>3</sup>
  - (b) Interim measures in merger investigations (CMA108) has been amended (1) to reflect current practice on the imposition of interim measures, seeking derogations, defining key staff, and the role of monitoring trustees and hold separate managers; and (2) to reflect changes to the CMA's powers to impose penalties in relation to breaches of interim measures to enable daily penalties and the imposition of penalties on individuals.

#### DMCC24 updates

- 2.3 The DMCC24 will make a number of changes or additions to the mergers regime to enable more efficient and flexible CMA merger inquiries.
- 2.4 In addition to the general guidance updates, the updated guidance includes a range of amendments and additions to outline the CMA's approach in relation to the following DMCC24 merger regime changes:
  - (a) The increase in the jurisdictional turnover threshold from £70m to £100m;

<sup>&</sup>lt;sup>3</sup> The new water redetermination references Rules and Guide is subject to a separate consultation. https://connect.cma.gov.uk/draft-rules-and-guide-for-water-redetermination-references

- (b) The new safe harbour threshold, which will exclude certain mergers from merger control;
- (c) The new 'acquirer focused' hybrid test, which will enable the CMA to find jurisdiction over mergers where one of the enterprises concerned satisfies the share of supply condition and the turnover condition, and the other enterprise concerned satisfies the UK nexus condition;
- (d) The new statutory phase 2 fast-track process, which will enable the referral of a merger to phase 2 (if the parties submit a request and certain conditions are met) without the need to comply with certain existing statutory requirements;
- (e) The CMA's new power to agree an extension to the phase 2 statutory timetable with the merger parties to provide greater flexibility in the phase 2 process (eg in cases where the merger is being reviewed in parallel by other jurisdictions or the parties submit a remedies proposal at an early stage of the phase 2 process); and
- (f) The CMA's enhanced penalty powers for failure to comply with interim measures and information gathering requirements, and the new penalty powers for breaches of undertakings and orders.

#### 3. Consultation process

3.1 We are publishing this consultation on the CMA webpages and sharing it with a range of interested parties to seek views on the draft updated guidance and questions raised in this document.

#### How to respond

- 3.2 The CMA is publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the draft guidance package.
- 3.3 The CMA encourages you to respond to the consultation in writing (by email) using the contact details provided in paragraph 3.6 below. Please provide supporting evidence or examples for your views where possible.
- 3.4 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.
- 3.5 In accordance with the CMA's policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on the CMA's webpages which omits that material and which explains why you regard it as sensitive.

#### **Duration**

3.6 The consultation will run from six weeks. Responses should be submitted by email by 5pm on 12 September 2024 and should be sent to: mergersquidance@cma.gov.uk.

### How the CMA will use information provided in consultation responses

3.7 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)<sup>4</sup> and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 3.8 The CMA is processing this personal data for the purposes of its work. This processing is necessary for the performance of its functions and is carried out in the public interest, in order to take consultation responses into account.
- 3.9 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 the CMA retains personal data, see the CMA's Privacy Notice.
- 3.10 The CMA's use of all information and personal data that it receives is also subject to Part 9 of the Enterprise Act 2002 (EA02). The CMA may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, the CMA 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 the CMA's 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.
- 3.11 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, if you have made any representations about the confidentiality of any information contained in your response, the CMA will take such representations into consideration. The CMA will also be mindful of its responsibilities under the data protection legislation referred to above and under Part 9 of the EA02.
- 3.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

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<sup>&</sup>lt;sup>4</sup> 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.

#### **Compliance with the Cabinet Office Consultation Principles**

3.13 This consultation is compliant with the latest Cabinet Office Consultation Principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. The Cabinet Office Consultation Principles criteria can be found at <a href="http://www.gov.uk/government/publications/consultation-principles-guidance">http://www.gov.uk/government/publications/consultation-principles-guidance</a>.

#### **Next steps**

- 3.14 The CMA will collate and analyse the responses to the consultation and amend the draft guidance as appropriate. The CMA will also publish non-confidential versions of the responses received during the consultation.
- 3.15 The CMA intends to publish the final version of the guidance later in 2024. This will be available on our webpages at <a href="www.gov.uk/cma">www.gov.uk/cma</a> and respondents will be notified when it is available.