

Guidance on the CMA's mergers intelligence function

CMA56

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1. Introduction

- 1.1 This guidance is concerned with the mergers intelligence function of the Competition and Markets Authority (**CMA**). It is intended primarily for merging parties or legal advisers advising on a merger. For more general information on how the CMA deals with mergers, see the *Quick guide to UK merger assessment (CMA18)* and *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*.
- 1.2 In the interests of avoiding an excessive regulatory burden, the Enterprise Act 2002 (the **Act**) does not oblige merger parties to notify the CMA of a merger. However, the CMA has a duty to track merger activity to determine whether any unnotified merger may give rise to a substantial lessening of competition. The CMA therefore has mergers intelligence staff who scan sources of information on mergers¹ and present potential candidates for investigation to the mergers intelligence committee, which meets weekly. The mergers intelligence committee is chaired by a Director of Mergers who also oversees the CMA's mergers intelligence function. The CMA will take a decision to investigate if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met. The threshold for the CMA to open an investigation is therefore lower than the threshold for reference.
- 1.3 The CMA may investigate and take action against mergers that have completed, provided the completed merger has taken place not more than four months before the reference is made.² If the merger took place without having been made public and without the CMA being informed of it, the four-month period starts from the earlier of the time that material facts are made public or the time the CMA is told of material facts. Where the merger parties do not notify the CMA, but 'make public' material facts about the transaction such that they are generally known or reasonably ascertainable, the CMA interprets this as meaning that such information could readily be ascertained by the CMA acting reasonably and diligently in accordance with its statutory functions. In practical terms, the CMA would consider that an acquiring party would normally be said to have 'made public' material facts where those facts had been publicised in the national or relevant trade press in the UK

¹ The CMA also maintains an active dialogue with Governmental departments and other regulatory bodies (including UK regulators and other international competition agencies) to obtain intelligence about merger activity. The mergers intelligence committee also regularly receives submissions on merger activity from merging parties (in the form of briefing papers, as discussed in further detail in section 3 of this guidance) and other interested parties.

² See section 24 of the Act.

and where the acquiring party had itself taken steps to publicise the transaction at large, normally by publishing and prominently displaying on its own website a press release about the transaction. The CMA interprets material facts as being the necessary facts that are relevant to the determination of the CMA's jurisdiction in terms of the four-month time period; which in practice means information on the identity of the merger parties and whether the transaction has completed.³

- 1.4 Under section 105 of the Act, there is a distinction between deciding whether to investigate a matter (which the CMA does through its mergers intelligence function) and deciding whether to make a reference (which the CMA does following a phase 1 investigation). If the CMA decides to investigate, then it must publish an invitation to comment. In addition, once the CMA has decided to investigate, section 107 of the Act generally requires it to publish a reasoned decision setting out why it has decided to make a reference or decided not to make a reference. Neither the duty to publish an invitation to comment nor the duty to publish a reasoned decision applies while the CMA is still deciding whether to investigate.
- 1.5 This guidance explains how the mergers intelligence function operates in the light of the distinction drawn in section 105 of the Act.
- 1.6 The Digital Markets, Competition and Consumers Act⁴ establishes a new digital markets competition regime, giving the CMA additional functions in relation to the regulation of competition in digital markets.⁵ Firms that are designated by the CMA as having strategic market status ('**SMS**') in respect of a digital activity and, where that firm is part of a group, any member of that group will have a duty to report certain acquisitions of shares and/or voting rights in targets that have a UK nexus prior to completion. The process for reporting such acquisitions is not covered in further detail in this guidance but is set out in the CMA's [Guidance on the mergers reporting requirements for SMS firms \(CMA195\)](#).

³ See CMA2, paragraph 4.49; Lebedev Holdings Limited and Another v Secretary of State for Digital, Culture, Media and Sport [2019] CAT 21; OFT Decisions: Completed acquisition by Genus plc of Local Breeders Limited (14 May 2008) and Completed acquisition by Tesco Stores Limited of Brian Ford's Discount Store Limited (22 December 2008). For a discussion of steps which were not considered by the CMA to give rise to material facts being made public, see CMA Final Report: Completed acquisition by Bottomline Technologies (de), Inc. of Experian Limited's Experian Payments Gateway business and related assets (2020), CMA Decision: Completed acquisitions by Independent Vetcare Limited (IVC) of multiple independent veterinary businesses (17 February 2023), and CMA Decision: Completed acquisitions by Medivet Group Limited of multiple independent veterinary businesses (18 May 2023).

⁴ [Digital Markets, Competition and Consumers Act 2024 - Parliamentary Bills - UK Parliament](#).

⁵ For further information on the regime, see [Consultation on digital markets competition regime guidance - GOV.UK \(www.gov.uk\)](#).

2. Information requests to the parties to the merger or to third parties

- 2.1 Where the CMA believes that an investigation is warranted, it has the ability to open an investigation without any prior engagement with either the merger or third parties.
- 2.2 Where the CMA has identified a transaction that may qualify for investigation and raises potential concerns, it may ask parties to provide information to help it determine whether to open an investigation. These requests will usually be to the parties involved in the transaction but can also be to third parties. They are made under section 5 of the Act, which gives the CMA a general power to obtain information about matters relating to the carrying out of its functions. One of these functions is determining whether it should investigate a transaction (so as to enable it to decide whether to make a reference). The CMA will typically send such requests for information to a publicly available email address for the relevant companies in the first instance (but can use specific contact details where these have previously been provided by the company in question).⁶
- 2.3 Requests to merger parties will usually relate to the turnover and share of supply tests set out in section 23 of the Act, whether the target is an enterprise, when the transaction completed, any horizontal and non-horizontal relationships⁷ between the merger parties and preliminary information to explain the businesses of the merger parties or the sectors in which they operate. Where a merger is subject to review by a competition authority outside of the UK, requests may also relate to the current status of those proceedings. If the initial response to these questions is insufficient, the CMA might ask supplementary clarifying questions without opening an investigation, but the CMA will not typically engage in more than two rounds of questions before taking a decision whether or not to investigate.
- 2.4 Requests to third parties will be made rarely. Where requests to third parties occur, they are likely to relate to understanding the nature of the businesses of the merger parties and the sectors in which they operate and any overlap for the purpose of applying the share of supply test. The CMA will only contact third parties in relation to transactions that are in the public domain and have either completed or been signed and announced.

⁶ Recipients who wish to check the veracity of an email purportedly from the CMA can do so by contacting general.enquiries@cma.gov.uk.

⁷ Where firms may not directly compete in relation to a particular product market but operate in related markets.

- 2.5 The CMA may also discuss a transaction with other government departments or regulatory bodies, for example other international competition agencies who are reviewing the transaction, or UK regulators who have sector-specific knowledge. The CMA will typically only discuss a transaction with other agencies if it is in the public domain. However, if the transaction is not yet in the public domain, or if the CMA would like to discuss details of the transaction which may be commercially sensitive, the CMA may ask the merger parties for a confidentiality waiver if waivers have not already been provided.⁸
- 2.6 If the CMA determines that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met after asking these questions, then it will take a decision to investigate so as to enable the CMA to decide whether to make a reference under section 22 or 33 of the Act.

⁸ The CMA's template confidentiality waiver is available at [Confidentiality waiver template - GOV.UK](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612512/Confidentiality_waiver_template.pdf) (www.gov.uk).

3. How the CMA will respond to parties contacting the CMA

- 3.1 The CMA invites parties to provide it with intelligence in relation to merger activity that affects UK markets and welcomes both short briefings from merger parties about their transactions and complaints from concerned third parties.⁹
- 3.2 Merger parties are welcome to submit a short briefing paper to the CMA, explaining why they do not propose to submit or have not submitted a Merger Notice to the CMA.¹⁰ The initial briefing paper should be no longer than 5 pages. The CMA may send back briefing papers which exceed this initial page limit for revision. The CMA may also send back briefing papers which do not adhere to the spirit of the page limit, eg they use a very small font or excessively narrow margins. The briefing paper may address:
- (a) Whether there may be a relevant merger situation;
 - (b) Whether any relevant merger situation may give rise to a substantial lessening of competition;
 - (c) Whether the merger has been or is being investigated by any competition authority outside of the UK and, if so, whether the parties intend to offer (or otherwise expect to be subject to) remedies in those proceedings that the merger parties consider would prevent any substantial lessening of competition in the UK;
 - (d) With respect to completed mergers, the paper should include when the merger was completed, and what steps were taken to make the transaction public. With respect to anticipated mergers, the paper should also include details of the likely completion date and the key remaining steps prior to completion.
- 3.3 As a general rule, the CMA will only consider a briefing paper after there is a signed merger agreement.¹¹ This is to ensure that the CMA's mergers

⁹ To be sent by email to mergers.intelligence@cma.gov.uk.

¹⁰ If the merger parties are planning to submit a briefing paper to the CMA, it can be helpful to let the mergers intelligence team know in advance (for example, at the point in which the merger agreement is signed) and provide an estimated submission date.

¹¹ The CMA does not wish its willingness to review a briefing paper to change the duty on parties to self-assess, which is a key feature of a voluntary merger regime. However, there may be exceptional circumstances in which the CMA will consider a briefing paper prior to a signed merger agreement – eg when the potential acquirer has made an announcement pursuant to Rule 2.7 of the UK Takeover Code in the context of a UK public bid. Where a signed merger agreement has not yet been concluded, the merger parties should set out the evidence which

intelligence function does not commit resources to transactions that may not ultimately be agreed and reviews only those transactions which have not been or are not going to be notified on the basis of the parties' self-assessment.¹² The submission of a briefing paper does not attract a merger fee, although a fee may be payable if the CMA subsequently opens an investigation.

- 3.4 Third parties are welcome to set out their concerns about a merger to the CMA in a short written submission. Complainants should explain clearly why they believe the merger raises competition concerns and, where possible, provide supporting evidence. The written submission should be no longer than 5 pages.
- 3.5 The CMA may then follow up with the person submitting the written submission or complaint to understand the submission better. In these cases, the questions raised by the CMA may relate either to jurisdiction or to the overlaps between the merger parties, but typically remain short as they are still only for the purpose of deciding whether to investigate.
- 3.6 There is no set timeframe within which the CMA will make a decision on whether to investigate; this will depend on various factors, including the number of requests for information sent to the merger parties (and the speed of their response), the status of any discussions with relevant regulators, international authorities or complainants (if relevant), and any research and desktop analysis that the mergers intelligence staff are conducting. In general, the CMA would expect to be able to respond to any briefing paper within a matter of weeks.

demonstrates their binding intention to merge or, in the case of a public offer, the binding nature of the offer. The CMA would typically not review a briefing paper where the merger parties (or at least the offeror, in the case of a public bid) have not yet entered into a binding commitment but merely have a good faith intention to proceed.

¹² For this reason, the appropriate point at which to provide a briefing paper to the mergers intelligence committee is later than the appropriate point at which to submit a case team allocation form (see CMA2, paragraphs 6.12 to 6.19).

4. What the CMA will do following engagement with the merger parties

- 4.1 Where, following engagement with the merger parties, either at the CMA's own initiative or as a result of a briefing paper from the parties, the CMA decides to open an investigation to decide whether to make a reference, it will generally inform the parties of this decision within a week of the last contact. If the merger is anticipated the CMA will typically provide the merger parties with the option to notify the transaction.¹³ Alternatively, the CMA will send the merger parties an enquiry letter under section 109 of the Act.¹⁴ The extent of information requested by the CMA in its enquiry letter will vary depending on the circumstances of the case in question.
- 4.2 Alternatively, the CMA might decide not to open an investigation immediately. In such cases the CMA will contact the merger parties and indicate that it has no further questions at this stage. This does not preclude further questions at a later stage and, if further information comes to light, the CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Act. This period commences when enterprises have ceased to be distinct and that fact becomes public or is drawn to the attention of the CMA.¹⁵
- 4.3 If the parties consider it is important to have complete certainty as to whether their transaction might be the subject of a reference before expiry of the four-month statutory period set out in section 24 of the Act, then they should submit a case team allocation request form and a Merger Notice requesting the CMA to open a formal investigation.

Multi-jurisdictional mergers

- 4.4 Some mergers qualify for merger control review in more than one jurisdiction. In deciding whether to open an investigation on its own initiative, the CMA may take into account any merger control proceedings in other jurisdictions. The impact of multi-jurisdictional mergers on UK consumers can be broadly

¹³ In this circumstance, the merger parties will typically be expected to commit to submitting a draft merger notice to the CMA within 10 working days, although the CMA may agree to a longer timeline following discussion with the merger parties.

¹⁴ The template used as the starting point for the enquiry letter used by the CMA when initiating investigation of a non-notified merger is available on the government publications website:
<https://www.gov.uk/government/publications/merger-enquiry-letter-template>.

¹⁵ Where the mergers intelligence committee has considered a briefing paper submitted by the merger parties and taken no immediate action, this does not exclude that the CMA will open an investigation until the expiry of the four-month statutory period.

categorised into mergers that (i) have a UK-specific impact, and which tend to involve local or national markets and (ii) concern exclusively global (or broader than national) markets.¹⁶ The CMA is more likely to prioritise for investigation those mergers that fall within the first category (provided the CMA considers there is a reasonable chance that the test for a reference to a phase 2 investigation would be met). It is less likely that the CMA will prioritise for investigation a merger that concerns exclusively global (or broader than national) markets and where any remedies imposed or agreed in merger control proceedings in other jurisdictions would be likely to address any competition concerns that could arise in the UK.

- 4.5 Where a merger has not been notified, and the CMA considers that a merger concerns exclusively global (or broader than national) markets and that there is a reasonable chance that the test for a reference to a phase 2 investigation would be met, the CMA's mergers intelligence function may inform the merger parties that it intends to wait and see the progress of proceedings in other jurisdictions before deciding whether an investigation is warranted. It will request that the merger parties update the CMA on the progress of the proceedings and provide the necessary confidentiality waivers for the CMA to discuss the proceedings with other competition authorities (and, where appropriate, waivers to other competition authorities to allow them to discuss the proceedings with the CMA).¹⁷ Merger parties may also be invited to provide confidentiality waivers in respect of other UK authorities or regulators. The CMA may also invite third parties to provide confidentiality waivers to the CMA.
- 4.6 The CMA will ask the merger parties (or third parties) to provide a confidentiality waiver based on the CMA template waiver.¹⁸
- 4.7 Where the CMA has adopted a 'wait and see' approach, it would generally expect to take no action if a deal is cleared unconditionally in other jurisdictions.¹⁹ The CMA may consider whether to open a formal investigation at any point before expiry of the four-month statutory period, where for example, remedies in other jurisdictions do not fully eliminate any competition

¹⁶ When considering the geographic scope of a market, the CMA will have regard to the factors set out in its [Mergers Assessment Guidelines](#) (paragraphs 9.13-9.16), as well as relevant precedent.

¹⁷ For example, the CMA will ask merger parties to keep the CMA updated on significant developments in the reviews of other authorities, as well as any developments that might reasonably be considered to materially affect the suitability of the CMA's 'wait and see' approach.

¹⁸ The CMA's template waiver is available at: [Confidentiality waiver template - GOV.UK \(www.gov.uk\)](#). In order to aid the efficient conduct of merger proceedings, the CMA is unlikely to accept changes to the standard template waiver.

¹⁹ In exceptional circumstances (eg where information comes to light during those investigations that suggests markets are not global (or broader than national)), the CMA may initiate its own investigation.

concerns relating to the UK. This is more likely where the UK is carved out from global (or broader than national) remedies in other jurisdictions, or where the monitoring and enforcement of any remedy does not include the UK.²⁰ Merger parties can minimise the risk of late and unexpected intervention by keeping the CMA updated on significant developments in other jurisdictions, and in particular any developments that might affect the suitability of the CMA's 'wait and see' approach.

- 4.8 Any decision by the CMA to adopt a 'wait and see' approach will apply to the merger as a whole. If the CMA does open a formal investigation, it will consider all relevant theories of harm (ie those relating to both national and broader than national markets).²¹

²⁰ For example, in [IAG/Air Europa](#), the CMA initially adopted a 'wait and see' approach on the understanding that any remedies agreed with the European Commission would cover the UK. The CMA then 'called in' the case at a later stage when it became apparent that any EU remedies would not, in fact, deal with UK concerns.

²¹ As with any formal investigation, the merger parties would have the option available to fast-track the process (eg to proceed more quickly to offering undertakings in lieu of a reference or to a phase 2 investigation).