

**RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW
COMMITTEE TO THE CONSULTATION ON THE CMA'S UPDATES TO ITS
MERGERS PROCEDURAL GUIDANCE**

This response is submitted by the Competition Law Committee of the City of London Law Society (CLLS) in response to the Competition and Markets Authority's (CMA) consultation "Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (including the CMA's mergers intelligence function)" (the **Consultation Paper**) published on 6 November 2020.

The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

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1. OVERVIEW AND SUMMARY

1.1 The CLLS welcomes the opportunity to respond to the Consultation Paper. In particular, we welcome the CMA's proposal to update its mergers guidance relating to jurisdiction and procedure (including its mergers intelligence function) to reflect the UK's departure from the European Union, recent changes to the UK merger control regime and the CMA's practice in recent merger cases.

Timing of the update

1.2 As the CMA notes in the Consultation Paper, the current guidance on its jurisdiction and procedure (**CMA2**) was originally published in January 2014, nearly seven years ago. Up to date guidance is important to enable the business and legal communities to understand the CMA's approach and to identify and assess the regulatory impact on transactions. Given the frequency of recent changes to the CMA's procedures and decisional practice, which may be expected to increase still further following the end of the Transition Period, CMA2 will need to be a "live" document, subject to more regular updates.

- 1.3 In this context, we note that further changes are expected to the UK merger control regime in 2021. In particular, we note that the National Security and Investment Bill was introduced to Parliament on 11 November 2020 and will presumably come into force at some point during 2021. Although the existing public interest regime (as included in the Consultation Paper) will continue to apply in the short term, we would encourage the CMA to update its guidance promptly to reflect the new national security regime, once in force.
- 1.4 Further, in order to provide transparency and clarity to the business and legal communities and given the length of the guidance documents, we encourage the CMA to publish a comparison document showing the proposed changes to the revised guidance on the CMA's jurisdiction and procedure in relation to mergers (**CMA2con**) and the CMA's mergers intelligence function (**CMA56con**).

Summary of key points

- 1.5 In our response below, we have not sought to comment on every proposed change to CMA2con or CMA56con. Instead, we have structured our response according to the issues that in our view are of most importance. In summary, our views are as follows.
- 1.5.1 We have concerns that the excessively broad scope of the CMA's interpretation of both the concept of an enterprise and application of the share of supply test. While we welcome further guidance on these issues, the CMA's adoption of an increasingly expansive and creative approach that appears at times to go beyond the express statutory wording inherently reduces legal certainty and predictability, which has a material impact on deal planning and the associated timescales.
- 1.5.2 We consider that the decision to trigger a fast-track review should primarily be one for the merger parties and the CMA should take this into account when considering fast-track requests. Given that timelines for merger reviews tend to be longer in the UK than in other jurisdictions, it is more likely that this process will help the UK process catch up with others, rather than it being the case that the CMA would have to reject a fast-track request and apply the full Phase 2 timetable to allow other jurisdictions to catch up. While alignment is generally desirable, forcing parties to follow a full Phase 2 timetable, even when they are willing to concede key points, simply to ensure that the CMA review matches the speed of the slowest global jurisdiction would not be justified and would lead to excessively long total review timelines.
- 1.5.3 We consider it essential that the merger parties be given adequate time following receipt of the issues letter to prepare for the issues meeting and to respond to the issues letter in writing, in order to ensure respect for the parties' rights of defence.
- 1.5.4 With respect to the possibility that, in exceptional circumstances, the decision maker may choose to be involved in discussions concerning undertakings in lieu (**UIL**) prior to deciding whether the test for reference for a Phase 2 investigation is met (the **SLC decision**), any such departure from usual practice should be discussed with the merger parties at the earliest opportunity and include appropriate procedural safeguards.

- 1.5.5 The updated guidance in CMA2 effectively prevents the merger parties making a submission at the start of Phase 2 to explain to the Inquiry Group why they disagree with the CMA's Phase 1 decision. This change means that the Inquiry Group will only receive the CMA case team's views at the start of its review, thereby depriving the parties of an important opportunity to put their views to the Inquiry Group early in the Phase 2 process. We do not consider this change to the CMA's consistent practice to be justified.
- 1.5.6 We note that the CMA's approach appears to be moving away from providing working papers to the merger parties during Phase 2. The updated guidance CMA2con suggests that the provisional findings are likely to be the first opportunity for the merger parties to find out the gist of the CMA's case, which removes any possibility for the merger parties to gain insight into the CMA's developing thinking and to address concerns in a timely manner. This raises serious concerns regarding the merger parties' rights of defence.
- 1.5.7 The updated guidance CMA2con indicates that the "put back" process will not typically be used to verify the factual accuracy of the CMA's draft text where this has been "*taken directly from information already provided to the CMA.*" This would effectively mean that the merger parties are unable to correct any errors or misunderstandings that are revealed in the CMA's summaries or interpretation of the merger parties' information. Again, this impacts the merger parties' rights of defence.
- 1.5.8 We welcome the CMA's emphasis on the importance of cooperation and coordination with international competition agencies and flexibility in considering which transactions to call in for review. Where the CMA decides not to open an investigation into a transaction which is subject to review by a competition authority outside the UK, on the basis that any remedies would likely address any competition concerns that could arise in the UK, the CMA should engage in an open dialogue with the merger parties which covers updates to the parallel review process, as well as the CMA's thinking.

1.6 We set out more detailed responses on certain specific points below.

2. **JURISDICTION AND RELEVANT MERGER SITUATIONS**

- 2.1 We welcome the updated guidance on the definitions of an "enterprise" and "material influence" and the application of the share of supply test to reflect developments since the adoption of CMA2. In particular, the inclusion of additional references to the CMA's decisional practice helps users understand how the CMA has applied the relevant principles in practice.
- 2.2 While we understand that the CMA has discretion in applying the share of supply test and wishes to ensure that it has the opportunity to review mergers which it considers potentially to raise competition concerns, it is also important to provide a degree of certainty and predictability to merger parties. At the risk of stating the obvious, the CMA must also stay within the boundaries of its powers that are set by statute.

2.3 We have particular concerns regarding the excessively broad scope of the CMA's interpretation of the concept of an enterprise and the application of the share of supply test in recent cases.

2.3.1 The CMA states that a target business which has not yet started actively trading can constitute an "enterprise" (see paragraph 4.18 CMA2con). However, we do not agree that the Supreme Court judgment cited in footnote 41 supports that proposition. The Supreme Court was clear that that case turned on the question of economic *continuity*¹ (i.e. whether previously existing business activities could be said to have continued, notwithstanding a hiatus in their performance), not the question of whether the statutory definition of business activities in s. 129(1) Enterprise Act 2002 (**EA02**) extends to an entity that has not yet commenced any trading activities and may never do so. In our view, it would be risky for the CMA to rely on such a tenuous interpretation of the Supreme Court's judgment. We therefore consider that a better source of guidance would be the position taken by the Office of Fair Trading in its *Project Canvas* decision,² in which it stated that the question for it to consider was whether any of the parent broadcasters had contributed an *existing* enterprise to the joint venture and that "*whether the Canvas JV could itself develop into an enterprise in due course is not pertinent to the OFT's jurisdictional assessment in this case.*"

2.3.2 The updated guidance CMA2con also refers to *Roche/Spark*³ to support the position that a business or collection of assets can be considered an enterprise even if it has not yet generated a profit or dividends (see paragraph 4.10 CMA2con). However, the CMA has not provided guidance on the scope of such future supply which would qualify as an "enterprise".⁴

2.3.3 In addition, the CMA has also broadened the description of the goods and services which can be used to meet the share of supply test, beyond overlaps in directly-marketed products/services to include "*overlaps involving pipeline products or services, or where there are sufficient elements of common functionality between the merger parties' activities,*" citing *Roche/Spark* (see paragraph 4.63 CMA2con).⁵ There is no judicial support for this position,

¹ *Société Coopérative de Production SeaFrance SA v Competition and Markets Authority* [2015] UKSC 75, para. 39.

² Anticipated joint venture between The BBC, ITV, Channel Four, Channel 5, BT, Talk and Arqiva – Project Canvas, decision of the OFT of 19 May 2010, footnote 16.

³ CMA Decision: Anticipated acquisition by Roche Holdings of Spark Therapeutics (16 December 2019) (**Roche/Spark**), where Spark (the target business) did not have customers or sales in the UK, and its pipeline products were still in clinical development, so there was no current external supply of any good or service. Nevertheless, the CMA considered that a firm engaged in R&D activities which are at a relatively advanced stage "*should be understood to be active in the process of supplying such pharmaceutical treatments in the UK, even in cases where that process has not yet culminated in actual sales of that treatment*" (paragraph 92).

⁴ The CMA merely notes that it will, depending on the facts of the case, consider "*the extent and cost of the actions that would be required in order for the business to start trading*" (see paragraph 4.18(b) CMA2con).

⁵ In *Roche/Spark*, the CMA based the share of supply test on the number of UK-based full-time employees engaged in clinical trial activities (paragraph 106), notwithstanding the fact that such activities do not involve any current supply of goods or services.

which in our view contradicts the clear, natural meaning of the statutory wording, which requires that 25% of the relevant goods or services "are supplied" by the merging parties, to be determined as at the time immediately preceding the reference decision.⁶ The fact that *Roche/Spark* was a clearance decision, and was not subject to any appeal, does mean that it reflects the CMA's decisional practice. We would nevertheless have material concerns over the decision being used as the basis for continued expansive application of the share of supply test, given its questionable legal basis and specific facts.

- 2.4 In addition, the CMA has removed the presumption that no material influence arises from shareholdings of less than 15% (see paragraph 4.27 CMA2con). Taken together, the changes to the definition of an "enterprise", material influence and the share of supply test reflect a significant increasing in the CMA's discretion with respect to its jurisdiction. This also leads to a significant decrease in certainty for merger parties' ability to make an informed decision on whether to file. This lack of legal certainty imposes a cost on the economy, the willingness of merger parties to exist in the UK and on the CMA itself. We encourage the CMA explicitly to address this reduction of legal certainty and its impact on the UK merger control regime.
 - 2.5 If the CMA decides to retain these positions, we would welcome additional guidance to increase the level of certainty and predictability required to support future investment, including in the commercialisation of pipeline products and R&D services, in the UK. Given this context, we are encouraged by the CMA's recent decision in *CLS Behring LLC/uniQure biopharma* that a commercialisation agreement did not qualify as a relevant merger situation and would welcome more guidance on the reasoning behind this decision to help on future cases.
3. **FAST TRACK PROCESSES AND "CONCEDING" AN SLC**
- 3.1 We welcome the CMA's clarifications regarding the requirements of the fast-track process. However, it would be helpful for the CMA's updated guidance (see paragraph 7.5 CMA2con) to reflect the CMA's acknowledgement that there are three different ways in which cases can be fast-tracked, namely:
 - 3.1.1 to proceed more quickly to offering UILs, with the objective of reaching a Phase 1 clearance with remedies;
 - 3.1.2 to proceed more quickly to an in-depth Phase 2 investigation; and
 - 3.1.3 to proceed more quickly to remedies by conceding a substantial lessening of competition (SLC) in Phase 2.
 - 3.2 The flexibility for parties to concede an SLC in Phase 2 is a significant and welcome update to the CMA's approach that should, in particular, help with the alignment of parallel reviews. We would also encourage the CMA to allow parties to offer remedies provided to other agencies to the UK at an early stage in the process. We would welcome confirmation that, in cases where the parties make such a concession and/or

⁶ Sections 23(3) and (9) EA02.

agree to extend remedies in other proceedings to the UK, the CMA will seek to fast-track the Phase 2 process to facilitate alignment, potentially in less than 24 weeks.

- 3.3 While we recognise the CMA's objective of ensuring the efficient conduct of its investigation, the views of the merging parties on the need for a fast-track application should be respected. Observing that the CMA has so far not rejected any requests for a fast-track process, we suggest that the CMA should clarify that it will only refuse such a request in truly exceptional circumstances.
- 3.4 We note that the CMA will take into account its ability to align its proceedings with those in other jurisdictions when considering requests for a fast-track process (see paragraph 7.11 CMA2con) and for conceding an SLC (see paragraph 7.20 CMA2con). As the timelines for merger reviews tend to be longer in the UK than in other jurisdictions, the desirability of aligning parallel reviews is likely to be a factor in favour of *granting* a fast-track request in most cases, rather than *declining* a request. While we accept the principle that it may not be desirable for fast-track treatment to lead to the conclusion of the CMA's review while important international reviews are outstanding, especially if material substantive issues remain unresolved in those proceedings, we would be concerned if the CMA were regularly to refuse fast-track requests to facilitate alignment with the timelines of jurisdictions that may be even slower, particularly if those jurisdictions are peripheral to the transactions.

4. THE PHASE 1 ASSESSMENT PROCESS

- 4.1 We welcome the CMA's statement that it will apply a "reasonable and proportionate" approach to information gathering and the imposition of interim measures in Phase 1 (see paragraph 5.2 CMA2con). As the CMA Phase 1 process is significantly more burdensome on merging parties than comparable merger control processes in the EU and US, a more targeted approach to information gathering in Phase 1 is welcome.
- 4.2 We note however that several of the changes proposed would further extend the pre-notification period and increase the time required to secure Phase 1 clearance. In particular, the CMA suggests that parties should typically contact the CMA a minimum of 2 weeks before starting pre-notification. As the pre-notification period is already comparatively long in the UK, we ask the CMA to reconsider its approach on these matters, which reduces predictability and can lead to material delays even to relatively unproblematic transactions.
- 4.3 In addition, we note that the CMA may issue section 109 notices and/or a public invitation to comment and impose interim orders during pre-notification. However, there does not appear to be any consistency on whether these will take place in pre-notification. We consider that these should more properly occur during Phase 1, unless the merger parties request otherwise. In any event, we ask the CMA to bear in mind the substantial cost and effort involved in document disclosures under section 109 EA02, and consider in each case whether this is proportionate.
- 4.4 We appreciate the CMA's flexibility in conducting meetings remotely by telephone call or video-conference, given the current travel restrictions as a result of COVID-19. We welcome the explicit references in the updated guidance to remotely held meetings, including in the context of the CMA's information gathering and the issues meeting (and the case management meeting and the site visit at Phase 2). Where the CMA

wishes specified individuals or representatives of particular business areas who would be required to travel to attend a meeting, we hope that the CMA will continue to accommodate these individuals joining remotely, even if no travel restrictions are in place.

- 4.5 We note that the CMA's issues letters are increasingly focussed on the key outstanding issues and welcome this approach. That said, it remains crucial for merger parties and their advisers to be afforded *at least* 48 hours (but preferably more, particularly if the relevant time does not include a weekend) between receipt of the issues letter and the issues meeting to allow them sufficient time to prepare (see paragraph 9.31 CMA2con). Similarly, it is also essential that the merger parties be given adequate time after the issues meeting to respond to the issues letter in writing (see paragraph 9.32 CMA2con). This will ensure respect for the parties' rights of defence.
- 4.6 The possibility for the merger parties to provide an agenda for the issues meeting has been removed from the guidance. We understand the purpose of the issues meeting to be for the merger parties to present their case and make their submission in response to the issues letter. However, this change in approach to the agenda, coupled with the CMA's request for specific attendees, effectively means that the merger parties are no longer afforded an adequate opportunity to present their case in order to exercise their rights of defence.
- 4.7 We also note that the updated guidance indicates that the decision maker may choose to be involved in discussions concerning UILs prior to the SLC decision (see paragraph 9.37 CMA2con). This represents a significant departure from the existing practice and we therefore welcome the qualification that this would be limited to exceptional circumstances (such as where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating). We consider that, in order to ensure that this does not prejudice the SLC decision, the CMA would need to discuss such a decision and appropriate procedural safeguards with the merger parties at an early stage.

5. THE PHASE 2 PROCESS

- 5.1 The updated guidance in CMA2con suggests that there will be limited opportunities for the CMA to provide information on its thinking to the merger parties and for the merger parties to make submissions prior to provisional findings. This raises serious concerns regarding the merger parties' rights of defence.
- 5.2 In particular, the updated guidance in CMA2 effectively prohibits the merger parties making a submission at the start of Phase 2 to explain to the Inquiry Group why they disagree with the CMA's Phase 1 decision (see paragraph 11.13 CMA2con). In most cases, merger parties have made an initial submission in Phase 2 (other than in cases where the deal was abandoned).⁷ The updated guidance therefore does not reflect the CMA's existing practice and this change is very unwelcome, as it means that the Inquiry

⁷ Out of the eleven mergers in which the CMA completed its Phase 2 inquiry in 2020, the merger parties' response to the Phase 1 decision or an initial submission was published in 7 cases (*Yorkshire Purchasing Organisation/Findel Education; Amazon/Deliveroo; Sabre/Farelogix; Bauer Media Group acquisitions; Bottomline/Experian; Prosafe/Floatel; Illumina/Pacific Biosciences*). Of the remaining four mergers, three were abandoned (*Taboola/Outbrain; Kingspan Holdings/Building Solutions; McGraw Hill/Cengage*).

Group will only receive the CMA case team's views at the start of its review, thereby depriving the parties of an important opportunity to put their views to the Inquiry Group early in the Phase 2 process. We consider it essential to enable the merger parties to make an initial submission and ask the CMA to reconsider its approach in this respect.

- 5.3 It also appears that the CMA is moving away from providing working papers to the merger parties. This raises serious concerns, as working papers currently provide the merger parties with an important opportunity to comment on the CMA's developing thinking on key issues, before such thinking becomes settled. Working papers are of key importance in the CMA Phase 2 process, given the lack of informal "state of play" meetings between the case team, the merger parties and their advisers.
- 5.4 The provisional findings do not provide the merger parties with an adequate or timely opportunity to engage with the CMA's developing thinking. The fact that provisional findings are issued at a relatively late stage in the proceedings means that the merger parties cannot respond to any emerging concerns or misunderstandings of the CMA until it is too late, by which time the focus of the proceedings has often moved on to remedies. By the time of the publication of the provisional findings, the CMA's thinking on the existence of an SLC is effectively settled and the CMA is seeking to focus on remedies (where required). This is evidenced by the lack of cases where the CMA has changed its conclusion post-provisional findings. Our view is that this weakening of the merger parties' ability to present their case effectively will make the CMA's Phase 2 decisions less robust to appeals.
- 5.5 We are concerned by the proposal to only provide the "gist" of the case in the provisional findings report in most cases (see paragraph 13.8 CMA2con). In cases where the comments of third parties are determinative, it is insufficient for the merger parties to only receive the "gist" of these comments. We would urge the CMA to consider greater use of access to file procedures, including confidentiality rings and data rooms (see paragraphs 13.10-13.15 CMA2con), to provide merger parties with an efficient and effective means of responding to third party comments. It is inappropriate for the CMA to refer in the context of a merger inquiry to "inculpatory or exculpatory" material (see paragraph 13.9 CMA2con), as mergers are not considered to be an offence.
- 5.6 We welcome the CMA's clarifications regarding the "put back" process, which currently places a significant burden on merger parties and third parties, as well as the CMA. The updated guidance CMA2con indicates that the "put back" process will not typically be used to verify the factual accuracy of the CMA's draft text where this has been "*taken directly from information already provided to the CMA*" (see paragraph 12.8 CMA2con). While we accept that it should not be necessary for parties expressly to confirm the accuracy of information that they have previously provided, they should not be prevented from correcting any errors or misunderstandings in the CMA's summaries or interpretation of the merger parties' information, or information provided by third parties. The opportunity to correct errors in the CMA's understanding or portrayal of the information is essential to the merger parties' rights of defence. Given that, in these circumstances, the CMA will in any event be "putting back" the draft text to the merger parties for the purposes of identifying potentially confidential information, allowing the merger parties to flag inaccurate information concurrently would not cause any delay or disruption to the CMA's process. In contrast, choosing to ignore any inaccuracies that are identified by merger parties would create significant potential for subsequent delays and disruption.

6. **MULTIJURISDICTIONAL MERGERS AND INTERACTIONS WITH OTHER PROCEEDINGS**

- 6.1 We welcome the CMA's emphasis on the importance of cooperation and coordination with international competition agencies and flexibility in considering which transactions to call in for review. The CMA deciding not to open an investigation where a transaction is subject to review by a competition authority outside the UK, with the prospect that any remedies would likely address any competition concerns that could arise in the UK, removes duplication and enables the merger parties to focus their efforts elsewhere (see paragraph 4.3 CMA56con and paragraphs 8.3 and 18.7 CMA2con). In this regard, further guidance would be helpful on the types of scenarios and remedies that the CMA considers acceptable in lieu of an own-investigation.
- 6.2 However, where the merger parties submit a Merger Notice requesting the CMA to open a formal investigation (e.g., for the sake of certainty), it would not be appropriate for the CMA to delay or slow the timeline to align with parallel proceedings in other jurisdictions without the merger parties' consent. In the event that the CMA would consider this necessary for the efficient conduct of the case, we would expect the CMA to discuss this with the merger parties and keep them updated on any developments in the CMA's thinking. In particular, if the parties do consent to delaying the timeline in this way, we would expect the CMA to allow them to withdraw the Merger Notice, in such circumstances.
- 6.3 More generally, we note that, given that the CMA may consider whether to open a formal investigation at any point before expiry of the four-month statutory period, the CMA may invite the merger parties to update the CMA on the progress of parallel proceedings. We consider that this ought to be an open, two-way dialogue between the CMA and the merger parties. In other words, the CMA should also share updates on its thinking with the merger parties, to enable them to consider their options at the earliest opportunity. This would avoid a situation where the CMA decides to start a review late in the parallel process, without any prior warning to the merger parties.

7. **OTHER AREAS**

- 7.1 The CMA's treatment of inter-related and inter-conditional transactions and the fee payable in such cases are not covered in CMA2con (or CMA56con), and we would welcome further guidance on the CMA's approach. Unlike the jurisdictional guidance of the European Commission, CMA2 contains no guidance on the circumstances in which different inter-related transactions are to be treated as one and the same relevant merger situation, except for the specific example of temporary merger situations. This can have relevance to the fees payable, the assessment of the jurisdictional thresholds, the identification of relevant SLCs and the scope of the CMA's remedy powers. We therefore suggest that the CMA draw on the (albeit limited) examples from its previous decisions to identify a workable test for distinguishing between independent and inter-dependent transactions.⁸

⁸ Such as the OFT decision in the *Anticipated acquisition by National Milk Records Plc of The Cattle Information Service Limited* and the CMA decision in the *Anticipated acquisition by Tullett Prebon plc of ICAP plc's voice and hybrid broking and information businesses*.

We hope that the comments set out above will be helpful to the CMA in further formulating its approach to the jurisdictional and procedural aspects of merger reviews. In case of any questions, please let us know.

CLLS Competition Law Committee
4 December 2020