CMA CONSULTATION ON CMA2 (MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE) AND CMA108 (INTERIM MEASURES IN MERGER INVESTIGATIONS)

RESPONSE FROM THE CITY OF LONDON LAW SOCIETY

1. INTRODUCTION AND SUMMARY

1.1 The City of London Law Society (**CLLS**) welcomes the opportunity to comment on the Competition and Markets Authority (**CMA**)'s draft revised mergers guidance. We have limited our comments to CMA2 – Mergers: Guidance on the CMA's jurisdiction and procedure (**CMA2**) and, to the extent covered below, CMA108 – Interim Measures in Merger Investigations (**CMA108**).

1.2 The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. The Competition Law Committee (the **Committee**) comprises leading solicitors specialising in 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 government bodies in relation to competition law matters, including merger control proceedings.

1.3 Our comments are based on our members' significant experience and expertise in advising on merger control proceedings before the CMA.

1.4 The Committee members responsible for the preparation of this response are:

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1.5 We welcome the CMA's prompt action to update CMA2 to reflect the passage of the Digital Markets, Competition and Consumers Act 2024 (the **DMCC Act**). We generally agree with the proposed updates but have identified a number of points where greater clarity would be helpful. We also have some concerns about the breadth of the CMA's proposed interpretation of the "UK nexus" aspect of the new "hybrid" jurisdictional test, which is likely to create significant uncertainty for merging parties, and about aspects of the guidance that are likely to discourage merging parties from making use of the statutory fast track process.

1.6 Our comments in relation to CMA2 are set out in sections 2 to 7 below, grouped by subject-matter and with reference to the relevant paragraphs of CMA2. Section 8 briefly comments on one aspect of CMA108.

2. JURISDICTION AND RELEVANT MERGER SITUATIONS

Safe harbour threshold

2.1 Paragraph 4.60(b): the guidance here could usefully refer back to the corresponding sections of paragraphs 4.54 and 4.55 for more detailed explanation of some aspects (e.g. paragraph 4.54(b) as to why the turnover of T1 and T2 should be aggregated in paragraph 4.60(b)).

2.2 Paragraph 4.62: the guidance on turnover calculation here could benefit from additional clarification. For example, at the beginning of the second sentence we suggest that the CMA adds: "However, when calculating turnover for the purposes of the application of the safe harbour...". We also suggest that this exception to the general principles on calculation of turnover is also referenced in Appendix A, e.g., in a footnote to paragraph 16 (note also that the paragraph numbers in Appendix A have changed and this should be reflected in paragraph 4.62).

Hybrid test

2.3 As a general comment, we encourage the CMA to include worked examples of how the hybrid test would apply to different types of transaction, as it does in relation to the application of the turnover test and the safe harbour threshold.

2.4 Paragraph 4.74: for clarity, the guidance should note that both the share of supply and turnover conditions of the hybrid test must be satisfied by one and the same enterprise concerned.

2.5 Paragraph 4.76: the guidance includes the wording "the person(s) that carry on the acquiring enterprise supply or acquire at least 33%…". But what if there is more than one acquiring enterprise? We suggest that the CMA clarifies that in this case, the hybrid test will be satisfied where the person(s) that carry on one of the acquiring enterprises meet the share of supply condition.

2.6 Paragraph 4.77: for clarity, the CMA should explicitly state that the principles listed in the paragraph are relevant when assessing the share of supply condition of the hybrid test. It is not immediately clear as drafted that these are the relevant principles (as opposed to principles that should not be followed).

2.7 Paragraph 4.78: similarly, this paragraph would benefit from additional clarification, e.g., to explicitly state that the principles contained in paragraphs 4.63(e) and 4.70 do not apply when assessing the share of supply condition of the hybrid test.

2.8 Paragraph 4.79: we suggest the CMA clarifies that where there is more than one acquiring enterprise, the turnover condition must be met by the same acquiring enterprise in relation to which the share of supply condition is met.

2.9 Paragraph 4.80: in addition to noting that the U.K. nexus condition will generally apply to the target, we suggest the CMA reiterates here that, for the hybrid test to be satisfied, the U.K. nexus condition must apply to a different enterprise concerned than the enterprise concerned that has met the share of supply and turnover conditions. We also suggest that the CMA explain *why* the nexus condition will generally apply to the target and when it may not.

2.10 Paragraphs 4.87-4.88: the guidance indicates that the CMA will interpret the limb of the UK nexus condition under subsection 4F(b) ("the activities, or part of the activities, of the enterprise would be carried on in the United Kingdom") extremely broadly. In particular, the suggestion that any preparatory step towards potentially supplying goods or services in the U.K. may meet this limb of the condition is, in our view, too wide. Such steps could take place entirely outside the U.K., and, in that case, it is difficult to see how that would amount to part of the enterprise's activities being carried on in the U.K. Similarly, the interpretation that the condition will be met if "consumers in the U.K. have access to the goods or services of the enterprise" is unduly broad. For example, it could potentially

catch U.K. consumers using websites of companies entirely based outside of the U.K. and actively targeting only consumers based outside of the U.K. Again, it is difficult to see how this reading fits with the language of the statute. Further, determining nexus by locations of IP is overbroad given, for example, the automatic global protections for copyright and the pre-emptive nature of patenting activity. It is common to patent inventions in major jurisdictions as a matter of course. However, this is no indication of competitively relevant activity in the U.K. We suggest that the situations in which this limb of the condition are met are limited to the enterprise having an office, branch or facility in the U.K.

3. FAST TRACK PROCESSES

3.1 Paragraphs 7.14-7.17: the CMA should make clear that the merger parties are not required to concede an SLC. This is an important change to the previous (administrative) fast track process and, in our view, should be explicitly set out.

3.2 Footnote 161 could benefit from some minor rewording to aid clarity. It states that "The statutory fast track process is not available for mergers of water enterprises nor mergers of energy networks". The following sentence would be clearer if it read: "In these types of merger, if the parties wish to concede an SLC, the CMA may also consider whether it is appropriate to proceed by way of an administrative fast track process." This of course assumes that the administrative fast track process is only intended to be available for such cases – it would be helpful if the CMA could clarify this point. (A similar clarification to footnote 281 would also be helpful, e.g. referring here to "water mergers or mergers of energy networks which have been fast tracked to phase 2…" if the intention is that the administrative fast track is limited to these.)

3.3 Footnote 161 notes that the considerations that the CMA will take into account when determining whether to accept an administrative fast track are the same as for the statutory route. It could usefully also clarify whether there will there also be similar changes to procedure if an administrative fast track request is accepted (i.e., as set out in paras 7.23-7.25).

3.4 Paragraph 7.21 and footnotes 166/167: we understand the CMA's reasons for stating that it may reject a fast track request in cases involving highly complex markets or assessments or where there is significant uncertainty on key points. However, we do not believe that the CMA should reject a fast track request purely on the basis that it could hinder the CMA's ability to align its proceedings with other jurisdictions – while aligned review periods are often desirable, tracking/matching the review periods in other jurisdictions will often be difficult. Moving swiftly to a phase 2 review where requested by the parties should be prioritised. Indeed, we would suggest the CMA should not see alignment as a one-way street: other jurisdictions with shorter or more flexible processes may be able to align with the CMA's fast track, leading to an overall more efficient process for everyone concerned.

3.5 Paragraph 7.23: presumably the CMA will only reduce the time for third party consultation through the phase 1 invitation to comment where the fast track request is made by the parties during pre-notification? If the request is made during the phase 1 review period, the invitation to comment period will have run as normal.

3.6 Paragraph 7.25: it would be helpful for the CMA to confirm here that, in cases where it considers special reasons exist to justify an extension, it will not necessarily extend by 11 weeks rather than 8 weeks simply because the case has been fast-tracked at phase 1. Use of 11 weeks as the default extension period in such cases would significantly undermine the benefits of the fast track procedure and, therefore, merging parties' willingness to use it.

4. INFORMATION REQUESTS

4.1 Paragraph 9.10: there could be better signposting that further details on the CMA's powers to issue section 109 notice to persons located outside the U.K. can be found at paragraphs 9.20-9.30 below. One option would be to mention this power very briefly here, and then set out the statutory provisions and CMA's interpretation of them in full in the section on extraterritorial application of formal requests for information. This would aid clarity.

4.2 Paragraph 9.11: At the end of this paragraph, the CMA includes the wording "from any UK national, UK registered company or any other person located in the UK". It cites section 109B(1) and (2)(b) as authority for the point. However, neither of these provisions includes this wording. Is the CMA simply intending to explain that, separate to its power to request information from persons outside the U.K. under section 109B(2)(a) (subject to the conditions under subsection 3 being met), section 109B(2)(b) allows it to request information held outside the U.K. from persons who are in the U.K.?

4.3 Paragraphs 9.23-9.30: in general, the guidance on extraterritorial application of formal requests for information is repetitive and could be streamlined and made clearer. There is also no further explanation of how the CMA will use its power under section 190B(2)(b) to require the production of documents, or the supply of information, held outside the U.K. from a company located in the U.K. Some worked examples of different scenarios would also be useful.

4.4 Paragraphs 9.32-9.34: given the significant level of fines that may be imposed for supplying false or misleading information, the guidance should set them out in the body of the text rather than in the footnotes, as it has done in relation to penalties for failure to comply with section 109 notices (paragraph 9.36).

4.5 Paragraph 9.33(a) is missing a reference to Part 3 of the Act.

5. EXTENSIONS TO THE PHASE 2 PROCESS

5.1 Paragraph 11.69: the guidance states that "Where the CMA has accepted a fast track process it may be necessary to extend the phase 2 timetable, especially in cases in which there has been limited evidence gathering and/or analysis in the phase 1 investigation." We would suggest that the CMA state explicitly that the fact a case has been fast-tracked at phase 1 is not of itself a 'special reason' for extension, use of an extension will remain the exception rather than the norm even in such cases, and that the length of any extension will be decided on a case-by-case basis rather than using the full 11 weeks by default. Otherwise, merging parties may reasonably conclude that any timing gains at phase 1 will be outweighed by a substantially increased risk of an extension, and for a materially longer period, than would otherwise be the case. This would undermine the value of the fast track process.

5.2 Paragraph 11.70: the CMA discusses two reasons why it may agree an extension with the parties (to align proceedings with those in other jurisdictions and to facilitate the consideration of remedies). We assume that these are not the only situations in which the CMA envisages it may agree to an extension – the CMA should make this clear (although we appreciate that it would not be possible for the CMA to list all possible reasons in the guidance). It would also be helpful for the CMA to expressly state that there is no limit on the duration of the extension that can be agreed and indicate any considerations that the CMA will take into account when agreeing the appropriate length of an extension.

6. FOREIGN STATE NEWSPAPER MERGER SITUATIONS

6.1 Footnote 373 should refer to Schedule 6A paragraph 1(2)(a) of the Act (introduced by the DMCC Act) as authority for the reduced GBP 2 million turnover test for merger situations involving newspaper enterprises and foreign powers.

6.2 Paragraph 14.22: the statement that "In that situation, there will be no phase 2 process and no possibility of UILs" implies that these procedures are possible where the CMA's report does not say that it believes a FSNMS has been created. It would be clearer if the guidance made a separate, general statement that in merger situations involving newspaper enterprises and foreign powers, there is no possibility of a phase 2 review or UILs.

7. OTHER COMMENTS ON CMA2

7.1 Paragraph 1.3: the final sentence of and accompanying footnote 3 should be deleted, given the new version of the guidance will take account of the DMCC Act.

7.2 Paragraph 2.9, we suggest that the CMA include a reference to its new role under new digital markets regimes in relation to M&A (and relevant guidance).

7.3 Paragraph 2.12 and footnote 9: we suggest updating the ** note to Figure 1 to reflect possible extensions to the phase 2 inquiry period as a result of DMCC Act changes, i.e., the 8 week extension will be 11 weeks if the merger is fast tracked using the statutory fast track process, and/or the investigation can be extended by agreement between the CMA and the parties.

7.4 Footnote 363 erroneously refers to the DMCC Bill rather than the DMCC Act.

7.5 Paragraph 17.3 and footnote 389: it should be made clear that these relate to "statutory" fast track cases.

7.6 Finally, we consider that CMA2 would benefit from more content on the CMA's briefing paper process, or at least greater signposting to that process and the related guidance in CMA56. Use of the briefing paper process has increased significantly in recent years and is an attractive process (both for parties and the CMA) where transactions fall within CMA jurisdiction, there are good reasons why a CMA review is not needed, and parties desire a level of comfort that the CMA is unlikely to call their transaction in for review if not notified. Currently, there are only two very brief references to the briefing paper process in CMA2, at para 6.10(b) and footnote 128, and this feels out of kilter with the number of briefing papers that the CMA now receives each year.

7.7 As an example, uncertainty around which transactions the CMA will actually want to review under the new hybrid threshold risks unnecessary notifications (i.e. submission of unnecessary Merger Notices) and we believe content on how that new threshold will be applied could usefully flag the CMA's briefing paper process. We also note that, as with any guidance, users of CMA2 will not typically read from cover-to-cover, so greater signposting to other relevant content/guidance is generally helpful.

8. CMA108

8.1 We welcome the helpful clarification in the revised CMA108 (at paragraphs 2.15-2.17) that the burden of interim measures may be reduced on a "Fund Management Entity" which manages an investment vehicle that is the acquirer or target in a relevant merger situation if certain conditions are met.

8.2 However, we consider that, in principle, other types of parent entities (e.g. an overseas parent) ought to be able to benefit from a similarly reduced scope of interim measures if they are able to demonstrate that they meet these same conditions. The burden of interim measures can be considerable, and therefore should be reduced wherever parent entities (regardless of their type) can demonstrate that the CMA's ability to impose remedies, should it need to do so, will not be harmed absent those interim measures.

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