COMPETITION AND MARKETS AUTHORITY (THE "CMA")

MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE

1 Introduction and executive summary

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to comment on the draft guidance on the CMA's jurisdiction and procedure in merger cases (the "**Draft Guidance**") published by the CMA Transition Team (the "**Transition Team**"). BLP has considerable experience of representing clients on the basis of the existing Office of Fair Trading ("**OFT**") and Competition Commission ("**CC**") jurisdictional and procedural guidance documents and believes that the Transition Team's proposals are generally clear and welcome. The proposals represent improved guidance in this area. However, there are a number of respects in which we believe that the proposals may be improved.

1.2 The comments set out in this response relate principally to the Transition Team's proposed reforms to the process for negotiation of Undertakings in Lieu ("**UILs**") between merging parties and the CMA, and the draft template Merger Notice. Our principal concerns in relation to these two aspects of the Draft Guidance are summarised at paragraphs 1.4 to 1.5 and 1.6 to 1.7, respectively.

1.3 The views expressed herein do not necessarily reflect the views of any of BLP's clients.

Process for agreement of UILs

1.4 Our principal concern with regard to the proposed revised process for the submission of UILs is that the Draft Guidance provides that merging parties should submit only a single 'best offer' of UILs to the CMA. We consider that dialogue between merging parties and the CMA is essential to ensure that UILs agreed are suitable to address the CMA's concerns while not going beyond what is necessary to preserve the effective functioning of competition.

1.5 The process set out in the Draft Guidance poses a significant risk of leading merging parties to 'over offer' when submitting UILs, in order to minimise the risk of a phase II reference. As a general point of regulatory good order, we consider that enterprises should be able to carry on business in the UK subject only to restrictions indispensable for the preservation of effective competition on the market. The Draft Guidance creates a danger of over-regulation and as such risks stifling business activity in the UK.

Draft template Merger Notice

1.6 The information requested in the draft template Merger Notice is very extensive in scope, and we are concerned that in some cases it will require notifying parties to provide information which is irrelevant to the CMA's investigation. At the outset of a merger investigation (and particularly while the CMA is in its infancy), we are concerned that few case teams will be prepared to grant anything but the most minor derogations from the obligation to complete the template Merger Notice in full, so that the requirement to respond to every item listed in the template Merger Notice will apply in the vast majority of cases.

1.7 Provision of all the information requested in the draft template Merger Notice will both extend the time and significantly increase the resources required to submit a UK merger filing. Such an onerous obligation to supply information is inconsistent with the UK's voluntary merger filing system and the Transition Team's stated aim of reducing the regulatory burden on businesses. As a result, we anticipate that the reforms may have a chilling effect on merger activity in the UK. We therefore consider that there may be merit in setting out clear guidance regarding categories of transaction for which less information may initially be required.

2 **Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?**

2.1 Yes.

3 **What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?**

3.1 We would welcome publication by the CMA on an annual basis of statistics regarding the UK merger control regime, in a format similar to that used by the European Commission (the "**Commission**") for publication of statistics regarding merger notifications submitted under the EU Merger Regulation ("**EUMR**"). Statistics published by the CMA for this purpose might include:

- Number of cases voluntarily notified to the CMA.
- Number of cases notified in response to an enquiry letter from the CMA and/or number of own-initiative investigations opened by the CMA.
- Number of cases reviewed by the CMA following a referral from the Commission under Article 4(4) or Article 9(3) EUMR.
- Number of cases voluntarily notified and found not to qualify for review by the CMA.
- Number of cases cleared unconditionally by the CMA following a phase I investigation.
- Number of cases cleared by the CMA following a phase I investigation on the basis of UILs.
- Number of cases referred for phase II investigation by the CMA.
- Number of cases cleared unconditionally by the CMA following a phase II investigation.
- Number of cases cleared by the CMA following a phase II investigation on the basis of undertakings or an order.
- Number of cases prohibited by the CMA following a phase II investigation.

3.2 We encourage the CMA to publish for consultation a list of the categories of statistics which it proposes to publish annually.

4 **Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?**

4.1 We generally welcome the draft Remedies Form as a useful codification of the information required by the CMA to assess the suitability of UILs proposed by merging parties.

5 **Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?**

5.1 We consider that the provisions of the Draft Guidance regarding the circumstances in which the period for consideration of an offer of UILs will be extended are generally clear and understandable. However, there is a lack of clarity as to which situations are likely to fall within the residual "exceptional circumstances" category referred to in the third bullet point at paragraph 8.24 of the Draft Guidance.

6 **Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?**

6.1 We welcome the proposal that merging parties should have a period of five working days from receipt of the CMA's decision that it believes that a transaction has resulted, or may be expected to result, in a substantial lessening of competition (an "**SLC Decision**") in which to propose UILs. Allowing parties to propose UILs following receipt of an SLC Decision will avoid them having to submit speculative UILs before they have had the opportunity fully to understand the competitive effects which the CMA considers need to be remedied.

6.2 However, in our view the advantages of this proposed change are significantly diminished by the suggestion, set out at paragraph 8.18, that the parties should submit only one proposed remedy to address the CMA's competition concerns. The Draft Guidance appears to rule out the possibility of a meaningful dialogue between the case team and the parties for the purpose of arriving at suitable UILs, which clearly presents a risk of both:

6.2.1 unnecessary phase II references being made in circumstances where it may have been possible to agree remedies acceptable to the CMA; and

6.2.2 overly extensive UILs being agreed by parties who do not wish to risk a referral.

6.3 A related concern stems from the statement, at paragraph 8.20 of the Draft Guidance, that only in "rare" circumstances will the CMA propose modifications to UILs submitted by the parties, in order to avoid the need for a phase II reference. More guidance as to what may amount to such "rare" circumstances for modification of UILs, and with whom at the CMA discussions regarding modifications will be held, would be useful.

6.4 We consider that it should be possible in all cases for the CMA to enter into a dialogue with the parties regarding potential UILs, including with regard to ways in which UILs suggested by the parties may be either:

6.4.1 extended so as to avoid a reference; or

6.4.2 limited in scope to that which is necessary to address the CMA's concerns.

6.5 We note that the Draft Guidance indicates (at paragraph 8.12) that the parties may wish to discuss possible UILs with the case team "at or before the issues meeting". While the issues meeting may serve as a helpful forum for the case team to provide the parties with information regarding their principal areas of concern, we consider that there is limited scope for the parties to engage in meaningful contact with the case team regarding possible UILs before the issues meeting has taken place. An expectation that the parties should discuss UILs at the pre-issues meeting stage of an investigation (or even during the pre-notification phase, as is contemplated at paragraph 8.9 of the Draft Guidance) appears to undermine the aim of enabling the parties to tailor their proposed UILs to the CMA's specific concerns by submitting UILs following receipt of an SLC Decision.

6.6 Further, and in the context of the reference to discussion of UILs at the issues meeting at paragraph 8.12 of the Draft Guidance, we would welcome a greater degree of predictability as to the likely date of the issues meeting than the current 'by day 40' position.

7 **Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?**

7.1 The information requested in the draft template Merger Notice is very broad in scope and, in some cases, will include information which is unlikely to be of relevance to the CMA's investigation. Although the Draft Guidance states that the case team may be willing to grant derogations from the obligation to supply information within all of the categories set out in the draft Merger Notice, any such derogation will be entirely at the case team's discretion. At the outset of a CMA investigation (and particularly while the CMA is in its infancy), we are concerned that case teams will be unwilling to grant all but the most minor derogations from the obligation to complete the template Merger Notice in full.

7.2 Provision of all the information requested in the draft template Merger Notice will both extend the time and significantly increase the resources required to submit a UK merger filing. Such a position is inconsistent with the supposed benefits of the UK's voluntary merger filing regime and the Transition Team's stated aim of reducing the regulatory burden on businesses. Indeed, the increased cost of undertaking a UK merger filing may in some cases be sufficient to result in abandonment of transactions which would otherwise be implemented. We anticipate that approximately six weeks' work will have to be undertaken (including assembling the information required to complete the template Merger Notice (as presently formulated) and participating in pre-notification contact with the CMA) before a merger filing can be submitted, even in cases which are relatively straightforward from a competition law perspective, such as where there is no reasonable prospect of a substantial lessening of competition but where, for reasons of legal certainty or agreed conditionality, a notification is submitted.

7.3 At paragraph 3.20 of its consultation document, the Transition Team states that it has been conscious of the need to ensure that the "use of a prescribed form of Merger Notice for all cases does not impose a disproportionate regulatory burden on merger parties in specific cases (in particular small and medium enterprises (SMEs))." However, the draft template Merger Notice will in fact impose a very onerous regulatory burden on businesses of all sizes, which in turn poses a significant risk of chilling merger activity in the UK. In this regard we consider that the regulatory burden represented by the draft template Merger Notice will be disproportionate in many cases, both those involving SMEs and those involving larger businesses.

7.4 Further, we consider that the Transition Team should bear in mind that the draft template Merger Notice has been prepared during a period of relatively low merger activity in the UK. Once the level of merger activity increases, the CMA may find that it does not have the resources necessary to review the volume of information requested. As such, the template Merger Notice as presently drafted risks placing an excessive regulatory burden both on merging parties and on the CMA itself.

7.5 We urge the Transition Team to reconsider each of the categories of information prescribed in the draft template Merger Notice in the light of the concerns described in the preceding paragraphs. However, our particular concerns in relation to the information requested in the draft template Merger Notice are as follows:

7.5.1 Item 4 of the draft template Merger Notice requests details of "any other transactions" undertaken by either of the merging parties in the past two years. We consider that this item should be reworded to include a materiality threshold or otherwise limit the scope of information to be provided, for example by excluding transactions carried out in the ordinary course of business. As currently worded, item 4 appears to require the merging parties to provide details of what may be a very large number of relatively minor transactions, e.g. purchases of low-value assets and sales made in the course of regular

business activities.

7.5.2 Items 11 to 14 of the draft template Merger Notice request that the parties provide the CMA with copies of "any documents" falling within certain broadly-worded categories. We consider that the scope of these requests is excessive and will place on merging parties a disproportionate burden to supply documents to the CMA. We suggest that these items be reworded to limit the extent of documents to be provided, for example by requesting that the parties supply only final drafts of documents or documents circulated in connection with approval of the notified transaction at board and/or shareholder level.

7.5.3 We recommend that items 20 to 32 of the draft template Merger Notice be expressly limited by reference to the markets (if any) identified in response to item 16.

7.6 In summary, we are strongly of the view that the scope of the information request set out in the template Merger Notice as presently drafted should be significantly reduced in order to avoid stifling or discouraging merger activity in the UK. The Transition Team's proposed draft Merger Notice poses a substantial risk of undermining the benefits to UK business of the current voluntary system of merger filings. The draft Merger Notice may also inadvertently encourage more parties to assume the regulatory risk of proceeding with transactions without first submitting a notification, where under the current regime they may have been minded to do so.

8 **Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?**

8.1 Yes.

9 **Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?**

9.1 We note the emphasis placed by the Draft Guidelines on pre-notification contact between merging parties and the CMA. In this regard, we are concerned that the increased emphasis on pre-notification contact mirrors the introduction of a statutory 40-working day timetable for phase I investigations and that, as such, pre-notification contact will in practice extend the phase I review period to reflect the current position. Such an outcome would vitiate the benefit of a quicker review process intended to arise from the introduction of the statutory deadline.

10 **Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?**

10.1 No.

11 **Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?**

11.1 Yes.

12 **Other comments**

12.1 We note the Transition Team's proposal at footnote 127 of the Draft Guidance (which relates to paragraph 7.10) that, where the customers of merging parties are final consumers, with the result their contact details cannot be provided to the CMA, the merging parties will be expected to make their best efforts to publicise the CMA's invitation to comment and the means by which customers can contact the CMA, for example by displaying signs in their stores or on their websites. We suggest that this requirement be reworded to require only "reasonable" or "reasonable and

proportionate" steps by the parties to publicise the CMA's invitation to comment, to avoid imposing a disproportionate burden on businesses.

12.2 We remain available to discuss any of the issues raised in this submission.

Berwin Leighton Paisner LLP
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