



UK FINANCE

**Consultation document: Draft  
revised guidance on the CMA's  
jurisdiction and procedure in  
relation to mergers**

**UK Finance response**

**8 January 2024**

## Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers

### UK Finance's Response

8 January 2024

#### 1 Introduction

- (1) UK Finance is the collective voice for the banking and finance industry. Representing more than 300 firms across the industry, it seeks to enhance competitiveness, support customers and facilitate innovation.
- (2) We are pleased to respond to the Competition and Markets Authority's ("**CMA**") Consultation on draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers ("**Draft Guidance**"). This Consultation is important to our Corporate Finance Committee members, who advise clients active in mergers and acquisitions ("**M&A**").
- (3) In broad terms, our members are supportive of the package of amendments that the CMA has proposed to make to its Draft Guidance. In combination, these changes have the potential to make the Phase 2 regime more transparent and ensure that merger parties have an opportunity to engage with the Inquiry Group at an earlier stage of the process.
- (4) However, there are a number of clarificatory points or additional changes that we consider the CMA should make to ensure that the Phase 2 process works in as efficient and transparent a way as possible. We set these out below and look forward to engaging constructively with the CMA on these points going forward.

#### 2 Overview of proposed changes in the Draft Guidance

- (5) We are supportive of the following proposed changes in the Draft Guidance, which we think will help to improve the existing Phase 2 regime:
  - (i) **Opportunities to engage with Inquiry Group at an earlier stage of the Phase 2 process:** we welcome the CMA's decision to bifurcate the existing 'Site Visit' set piece into two separate meetings: (i) a 'teach-in' held at the outset of the Phase 2 process, where the parties explain how their business works; and (ii) an initial substantial meeting where the parties respond to the substantive CMA's reference decision. This proposal enables the merger parties to present their story in the first few weeks of an investigation and to meaningfully respond to the substantive case against them at an earlier stage.
  - (ii) **Increased use of informal update calls throughout the Phase 2 process:** we are supportive of proposals that improve transparency and are capable of delivering a more efficient process for merger parties and the CMA. As outlined in more detail below, we would encourage the CMA to materially increase its dialogue with merger parties, particularly when issuing requests for information ("**RFIs**") to ensure that these requests are as targeted as possible.

- (iii) **An earlier interim report which provides the merger parties with an opportunity to respond to any substantive concerns at an earlier stage:** as the CMA's consultation acknowledges, many feel that Provisional Findings currently come too late in the statutory timetable to allow the merger parties to meaningfully engage with the substance of the Inquiry Group's assessment. We therefore welcome the CMA's proposal to publish an interim report at an earlier stage.
- (iv) **A reworked main party hearing that provides the merger parties with the opportunity to address and respond to the CMA's interim report:** linked to the above, we agree with the CMA's proposal to have an enhanced main party hearing that gives the merger parties a greater opportunity to respond to the CMA's interim report at an earlier stage. We anticipate that this change will enable the merger parties to have a more open dialogue with the Inquiry Group and to constructively discuss and resolve potential concerns.

### 3 Clarificatory points and comments on the CMA's Draft Guidance

- (6) Whilst we are generally supportive of the CMA's proposals, there are some areas where we think the CMA can further clarify or adapt its approach to deliver further improvements to the existing Phase 2 regime. We have outlined our key points below.

#### 3.1 Access to file

- (7) Whilst the Draft Guidance makes some accommodations for evidential disclosures to merger parties (e.g. the 'gist' of third-party submission it is relying on as part of its decision), it does not contemplate an "access to file" procedure. We would urge the CMA to reconsider this approach and respectfully request that the CMA introduce some form of "access to file" process.

- (8) In particular, we think that the following points further reinforce the need for some sort of access to file process:

- (i) **The importance of M&A:** engaging in M&A is one of the most consequential decisions that a business can take and the implications of a CMA prohibition at Phase 2 can be comparable to a negative outcome of Competition Act 1998 ("CA98") investigation (where parties are granted access to the CMA's underlying file of evidence and submissions). Therefore, from the perspective of procedural fairness, it makes sense for the access to file process to be broadly comparable across the two regimes.

- (ii) **Robust decision making:** currently there is an imbalance in the evidence available to the CMA compared to that available to the merger parties. This places inherent limits on the merger parties' ability to fully engage with the CMA's decision-making process, which ultimately can have a knock-on impact on the robustness of the CMA's eventual decision and the parties' right of defence. Whilst the parties are provided with the 'gist' of the CMA's underlying decision, they are not provided with all evidence that the CMA has received. For example, there may be evidence that the CMA has not included as part of its decision that the merger parties will not have sight of, and which may be critical to submissions they would like to make. It is vital that merger parties have full access to file and the ability to properly scrutinise third party evidence in order to preserve procedural fairness and protect parties' rights of defence.

- (iii) **International outlier:** other competition regulators provide merger parties with access to the underlying documents that they have received as part of their merger control investigations using “confidentiality rings” or equivalent (which the CMA has experience of in merger control processes). There is no obvious procedural reason for the UK not to do this given that the CMA’s Phase 2 timetable is roughly equivalent to other regulators (who do run an access to file process) and the fact that the CMA has comparable ‘stop-the-clock’ powers (which would give it a further window in which to run an access to file process).
- (iv) **Accelerated access to file:** as noted above, the CMA has institutional experience with running access to file procedures in the context of CA98 investigations, including accelerated access to file when requested by the parties. Therefore, we would expect the CMA to have the institutional capabilities, technology and resources to run an access to file process within the timeline of a Phase 2 process. If the CMA did have concerns with respect to timing, then it could transpose the accelerated access to file process (which is often deployed in CA98 investigation) to the merger control regime which would further limit the impact on the CMA’s overall timeline.
- (v) **Unlikely to have a meaningful impact on third-party submissions:** we would not expect a more extensive access to file process to have an impact on the number or detail of third-party submissions. In this regard, it is worth noting two points in particular: (a) the CMA has statutory evidence powers under the Enterprise Act 2002 (“EA02”) which enable it to require the production of relevant documents or submissions; and (b) the CMA has a long procedural history in operating a “confidentiality ring” which would provide third parties with comfort that sensitive information was being appropriately protected and ensure that the CMA is meeting its obligations under the EA02 (i.e. the need to ensure that sensitive information the CMA has received is sufficiently protected whilst also providing the merger parties with an opportunity to review and respond to the case against them).

### 3.2 Further guidance on the duration of the ‘teach in’ and initial substantive meeting

- (9) As noted above, we welcome the CMA’s decision to split the existing ‘Site Visit’ set piece and provide the merger parties with two opportunities to meet and engage with the Inquiry Group. However, we think the Draft Guidance could go further by outlining the length of the engagement each merger party can expect to have with the Inquiry Group at both the ‘teach in’ and the initial substantive meeting. Whilst we acknowledge that the duration of each of these meetings will inevitably be transaction specific, providing an indication of likely or expected duration provides merger parties with some certainty that they will have sufficient time to put forward the substance of their case.
- (10) We suggest that the CMA should allow each of the merger parties at least one day across both set pieces (e.g. half a day for each set piece) in addition to any other discussions or meetings that the case team and merger parties think are necessary at the outset of the process. A shorter default duration risks undermining the CMA’s intention to “*provide merger parties with greater visibility of the Inquiry Group’s possible concerns at an earlier stage of the inquiry*” and potentially negating the rationale behind the CMA’s changes in the Draft Guidance.<sup>1</sup>

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<sup>1</sup> Consultation document, para. 3.11.

### **3.3 The interim report needs to be sufficiently developed to allow for meaningful engagement**

- (11) The proposal to publish an interim report at an earlier point in the Phase 2 process is one of the key changes in the Draft Guidance. We are supportive of this change and the CMA's intention to use this report as the cornerstone of the revised main party hearing. However, we note that the interim report will need to be sufficiently developed to enable the merger parties to meaningfully engage with it. A part-developed or not yet finalised report risks undermining the rationale for the CMA's change.
- (12) We would recommend that the CMA provides further guidance on the intended content of its interim report and expected approach.

### **3.4 The CMA should take advantage of informal update calls to help to inform its RFIs**

- (13) As the CMA flags in its Draft Guidance, it will typically need to request extensive information from the merger parties at the start of the Phase 2 process to inform its assessment. We acknowledge the need for this "RFI" process and note that it often requires extensive work on the part of the merger parties.
- (14) The CMA has already indicated a willingness to use informal update calls more frequently in its Draft Guidance. We suggest that the Draft Guidance should be revised to make clear that, by default, the CMA will organise an informal update call with the merger parties prior to issuing all material information requests. The purpose of this call would be to discuss the scope and content of the CMA's request, and to ensure that the information requested is pertinent to its investigation. This should help to ensure a more efficient process for both the CMA and the merger parties as the merger parties can point the CMA to the most relevant sources of evidence that they hold.

## **4 Conclusion**

- (15) We welcome the CMA's willingness to engage on improvements to the UK merger control process. The CMA's proposed changes are important and will improve the current process for the benefit of all stakeholders. However, in some areas, we would encourage the CMA to go further in providing greater clarity and/or detail with respect to its intended approach.

## About UK Finance

UK Finance is the collective voice for the banking and finance industry. Representing more than 300 firms across the industry, it seeks to enhance competitiveness, support customers and facilitate innovation. Our primary role is to help our members ensure that the UK retains its position as a global leader in financial services. To do this, we facilitate industry-wide collaboration, provide data and evidence-backed representation with policy makers and regulators, and promote the actions necessary to protect the financial system. UK Finance's operational activity enhances members' own services in situations where collective industry action adds value. Our members include both large and small firms, national and regional, domestic and international, corporate and mutual, retail and wholesale, physical and virtual, banks and non-banks.

The Capital Markets & Wholesale division, led by Conor Lawlor, focuses primarily on policy and regulatory initiatives spanning primary markets, M&A, secondary markets, post trade and liquidity management. Our work in these areas includes bringing technical experts from across our membership together to form new views, drive thought leadership, and develop policy positions relevant to the UK reform agenda.

Further information is available at: [www.ukfinance.org.uk](http://www.ukfinance.org.uk)

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## About Linklaters

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We offer leading individuals and a leading merger control team. Our top-tier team of experts have a market-leading track record of handling the most challenging antitrust issues in M&A, many of whom have spent time on secondment to the CMA's mergers team. Further information is available at [www.linklaters.com](http://www.linklaters.com)

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