

Statement of intent

An agreement on the working arrangements between the CMA and Ofwat for the special water merger regime

Introduction

1. The purpose of this statement of intent is to set out the working arrangements between the Water Services Regulation Authority (Ofwat) and the Competition and Markets Authority (CMA) in relation to the review of mergers involving water and sewerage or water only companies (water enterprises) in England and Wales under the Water Industry Act 1991 (WIA) as amended by the Water Act 2014 (WA14).¹ These mergers are referred to in this document as water mergers.
2. The working arrangements set out in this statement of intent are not legally binding and are reflective of the relevant provisions of the WIA. This statement of intent also takes account of the merger control provisions of the Enterprise Act 2002 (EA02) as amended by the Enterprise and Regulatory Reform Act 2013. This statement of intent is restricted to Ofwat's role in giving an opinion to the CMA in phase 1 assessments of mergers between water enterprises and does not consider any competition issues resulting from these mergers that the CMA may also be investigating under the EA02. The CMA routinely consults with regulators about mergers that they are likely to have sector specific knowledge. This is equally the case during a phase 2 water merger investigation. For further information please see *Mergers: Guidance on the CMA's jurisdiction and procedures* (CMA2).
3. These working arrangements should be considered alongside *Water and sewerage mergers: Guidance on the CMA's procedure and assessment* (CMA49) and the existing memorandum of understanding between the CMA and Ofwat in relation to their concurrent competition law powers in the water and sewerage sector.²

¹ A water enterprise is an enterprise carried on by a company appointed under section 6 of the WIA to be a water and/or sewerage undertaker.

² [CMA and Ofwat memorandum of understanding](#) (2014).

General principles

4. Ofwat and the CMA will observe the following general principles in relation to Ofwat's opinion regarding prejudice to its ability to make comparisons, relevant customer benefits (RCBs) and undertakings in lieu (UILs):
 - (a) The CMA and Ofwat will cooperate with each other in the exercise of their respective functions under Part 3 of the EA02 and sections 32 to 35 of the WIA.
 - (b) The decision as to whether the CMA refers a water merger for a phase 2 investigation is for the CMA alone.
 - (c) The views that Ofwat presents in its opinion will be its own, independent of the CMA.
 - (d) Ofwat's opinion is not binding on the CMA, but the CMA will give significant weight to it when making decisions in relation to prejudice to Ofwat's ability to make comparisons, RCBs and UILs.
 - (e) The CMA and Ofwat will work in close contact throughout the investigation, and will have particular regard to the timing requirements placed on both the CMA and Ofwat in phase 1 of the inquiry.

Pre-notification period

5. Ofwat and the CMA will liaise with each other as to whether they are satisfied that the information submitted by the merger parties is sufficient to start their respective assessments.
6. The CMA will liaise closely with Ofwat as to whether the information received with respect to Ofwat's ability to make comparisons and RCBs will allow it to start its assessment and provide an opinion to the CMA within the CMA's phase 1 timetable. This information is required to be provided in the merger notice form of the CMA.
7. If the merger parties decide not to make submissions in relation to the information required for Ofwat's assessment, or aspects of the required information, and they indicate their decision in writing to Ofwat, then Ofwat will inform the CMA of the merger parties' decision as soon as reasonably practicable.
8. The CMA will not commence a merger review until it considers that the merger parties have provided sufficient information required for the respective assessments of both Ofwat and the CMA.

Assessment period

9. In the special merger regime the CMA has a statutory period of 40 working days for phase 1 of the investigation (after the CMA has confirmed with the merger parties that their merger notice form is complete or, when such a form was not provided, the CMA has sufficient information to begin its investigation). These are the same time periods that apply by statute to the general merger regime.
10. In general the CMA will apply to the special merger regime the same procedures used in the general merger regime except for any differences set out in this statement of intent and CMA49. The CMA starts the assessment stage of its phase 1 investigation by publishing a notice of commencement of the initial period on its webpages. The CMA will also publish an invitation to comment, which is typically open for a period of ten working days. The invitation to comment will make clear that the CMA will provide Ofwat with any comments received regarding prejudice to Ofwat's ability to carry out its regulatory functions and/or RCBs and/or UILs. During this period the CMA and Ofwat continue to progress their respective assessments. Ofwat and the CMA will discuss respective views on an ongoing basis.
11. The CMA will have a 'state of play' discussion with the merger parties around days 15 to 20 of the statutory timetable of a phase 1 investigation. The purpose of this discussion is to give the merger parties information on any comparative regulation concerns, whether or not the CMA is to take the merger to a case review meeting and send the merger parties an issues letter and, if so, the theories of harm that the CMA proposes to include in the issues letter.³ The CMA will invite Ofwat to attend the state of play discussion.
12. To inform the state of play discussion with the merger parties Ofwat will provide the CMA with a draft opinion in writing on the matters listed in paragraphs 2.2 (b) and (c) of CMA49 by no later than working day 15 of the phase 1 investigation.
13. For cases that raise no serious issues, it is possible that the CMA, taking account of Ofwat's opinion, may decide to clear the merger on the grounds that one of the circumstances described in paragraph 2.2 of CMA49 applies. The CMA will then issue its clearance decision within the phase 1 deadline.
14. In cases where the CMA intends to proceed to a case review meeting, and consequently sends an issues letter to the merger parties the CMA will notify

³ This process is described in [CMA2](#), Chapter 7. In the state of play discussion the CMA will also raise any competition concerns arising from the merger of the parties' non-water activities.

Ofwat of that as soon as practicable and share and discuss the draft issues letter with Ofwat before it is sent to the parties.

15. Ofwat will then provide its final opinion on the issues raised by the merger to the CMA as soon as practicable but no later than two working days before the issues letter is provided to the parties. The issues letter will normally be sent on or after day 25. Ofwat will provide the CMA with a confidential and non-confidential version of its opinion. The merger parties will then be provided with Ofwat's opinion alongside the issues letter. The CMA will share with Ofwat the issues letter (or a non-confidential version of it) at the same time as it is sent to the parties.⁴ The CMA will consider any response Ofwat subsequently makes to the parties' response to the issues letter.
16. Ofwat staff involved in producing the opinion will make all reasonable effort to be available to meet the CMA case team to explain the reasoning and analysis underlying the opinion provided. The CMA may ask Ofwat to provide further information in relation to arguments it raised or in relation to additional evidence provided by the merger parties in response to the issues letter.

Meetings with the merger parties

17. Meetings with the merger parties will generally be held separately by Ofwat and the CMA. However, both Ofwat and the CMA expect the merger parties to be transparent with the information that is shared between the parties and the respective authorities. Where appropriate, joint meetings may be held between the merger parties, the CMA and Ofwat in order to facilitate the phase 1 investigation and ensure administrative efficiency.
18. Ofwat will attend the state of play call and issues meetings between the CMA and the parties. Moreover, Ofwat will be given the same time period as the parties to submit any further written responses to the CMA as a result of evidence submitted or discussion at the issues meeting.
19. If necessary, both Ofwat and the merger parties will be given individual access to the phase 1 decision maker during the issues meeting.

Undertakings in lieu of a reference to phase 2

20. The CMA has the ability to accept UILs offered by the merger parties at phase 1 of the investigation but cannot impose remedies on the merger parties. Both

⁴ Whether Ofwat receives all of the issues paper or an excised version of it will depend on disclosure gateways available to the CMA including Part 9 of the EA02.

the CMA and Ofwat will strongly encourage merging parties to consider the possibility of offering UILs early in the investigation and to liaise with both the CMA and Ofwat as soon as possible if the merger parties are considering undertakings.⁵

21. The merger parties can offer UILs at any point during the phase 1 investigation; however the latest the parties can offer such UILs is five working days after receiving the CMA's decision that the duty to refer is met (the 'duty to refer decision').
22. In the special water merger regime, the CMA can accept UILs in order to remedy, mitigate or prevent the water merger's prejudicial effect on Ofwat's ability to make comparisons between water enterprises that the merger has had, may have had or may be likely to have. When forming a view on UILs the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the prejudicial effect on Ofwat's ability to make comparisons. The CMA may also have regard to the effect of any action on any RCBs in relation to the merger.⁶
23. Before the CMA makes a decision on any UILs offered, the CMA must request and consider Ofwat's opinion on the effect of the UILs.⁷
24. Within the statutory timetable the CMA has until the tenth working day after the parties have received the CMA's duty to refer decision to decide whether there are reasonable grounds for believing that the UILs offered might be accepted by the CMA. The CMA must reach a final decision on acceptance of the UILs within 50 working days from the date of the parties' receipt of the CMA's duty to refer decision, although the CMA can extend this by a further 40 working days if it considers there are special reasons for doing so.
25. The CMA will take into account Ofwat's opinion in deciding whether to accept the UILs, to extend the period in which the decision will be made, or to reject the UILs and proceed to phase 2.
26. Where the merger parties are willing to initiate discussion on potential UILs before the CMA duty to refer decision has been taken, the CMA will inform Ofwat as soon as practicable about any material discussions on UILs with the merger parties and will endeavour to include Ofwat in any substantive

⁵ See also [CMA2](#), paragraph 8.7.

⁶ Sections 33D(2), (4) and (5) of WIA.

⁷ Section 33(6) of WIA.

discussions with the merger parties. In any case, it will share with Ofwat any relevant information provided by the parties on potential UILs.

27. If the parties offer UILs after receiving the CMA's duty to refer decision, the CMA will share with Ofwat any formal offer in writing (or, if appropriate, a non-confidential version of it).
28. In these circumstances, Ofwat will provide its opinion to the CMA as soon as practicable after the merger parties' submission of their formal offer and in any case Ofwat will provide its opinion no later than the ninth working day after the parties have received the CMA's duty to refer decision. In light of the CMA's timetable to make a decision on the UILs offered Ofwat may consider this its provisional decision and if the CMA decides to consult on the UILs offered Ofwat will provide its final opinion on the UILs at least two days before the start of the consultation period. In previous general merger cases consultations have been launched between three to four weeks after the reference decision. The CMA will notify Ofwat as soon as it can as to when it intends to begin the public consultation.
29. If the CMA does not agree with Ofwat's opinion on the UILs offered by the parties, it will inform Ofwat before making its final decision and take into account Ofwat's representations before making its final decision.

Publication of the decision and related documents⁸

30. By working day 40 of the phase 1 investigation the CMA publicly announces its decision. In some cases this is accompanied by a press release. The CMA's communications team will liaise with Ofwat to provide it with advance notice of when the press release will be issued and its content, in strict confidence. Ofwat will not issue any press release or announcement on the merger prior to the public announcement of a CMA decision.
31. Following discussions with the merger parties and Ofwat, a non-confidential version of the full CMA decision will be published at a later date. Ofwat will provide the CMA with a confidential version of its opinion for the purpose of the CMA's decision on the merger. For publication purposes, Ofwat will also provide the CMA with a non-confidential version of its opinion.
32. The publication of Ofwat's opinion will not occur until after the non-confidential decision is published by the CMA unless otherwise agreed with the CMA.

⁸ See also [CMA2](#), Chapter 9.

33. Ofwat's opinion may contain information that is confidential (either as regards the merger parties or other confidential information known to Ofwat). As set out above, Ofwat may share such information with the CMA. To the extent that the merger parties consider that information they provide to Ofwat should not be included in the published version of Ofwat's opinion, they should submit a non-confidential version of such submission to Ofwat and state clearly what information should remain confidential to Ofwat, together with the reasons for this.
34. A link to publications related to the merger will be provided on each organisation's respective websites.

Requesting and sharing information

35. To minimise the burden on merger parties, where appropriate, Ofwat and the CMA will coordinate information requests. The CMA will request a waiver from the parties to facilitate disclosure of information between the CMA and Ofwat.
36. Sharing of information (including data) between the CMA and Ofwat is crucial for the effective fulfilment of their respective duties under the special water merger regime and should reduce the burden on merger parties which could otherwise arise, for example from duplicative information requests. The CMA and Ofwat may, where appropriate, discuss with each other water merger issues that the merging parties bring to their attention; informal advice they will be providing or have provided; pre-notification drafts; and information obtained throughout the phase 1 investigation.
37. Any disclosure of information between the CMA and Ofwat, and any use by the recipient of such information, shall only be to the extent permitted by law, including by reference to the provisions of section 206 of the WIA and Part 9 of the EA02. The information and data sharing from the CMA to Ofwat will include information that the CMA considers will facilitate the exercise of its statutory functions under the WIA. If either or both of the merger parties request that the CMA should not share with Ofwat some or all of the information or data submitted to it, they should submit a non-confidential version of such submission and state clearly what information should remain confidential to the CMA, together with the reasons for this. However, in certain circumstances, whilst having regard to the confidentiality requests, the CMA may nonetheless decide to disclose information to Ofwat without the consent of the merger parties. This may occur, for example, where it considers that disclosure is necessary to enable the CMA to exercise its statutory functions,

including the need to have regard to Ofwat's opinion.⁹ This is likely to include the parties' written response to the CMA's issues letter.

38. Information with respect to any particular business which has been obtained by virtue of any of the provisions of the WIA and relates to the affairs of any individual or to any particular business is subject to the restriction on disclosure in section 206 of the WIA. Such information may only be disclosed by Ofwat or the CMA where permitted by section 206 of the WIA or as otherwise allowed by law. For example, the CMA and Ofwat may share such information between them for the purpose of facilitating the carrying out by Ofwat or the CMA of any of their functions by virtue of the WIA or for the purpose of facilitating the carrying out by the CMA of any of its functions under the EA02. Where the CMA shares with Ofwat information and data to which Part 9 of the EA02 applies, it will only be used by Ofwat for the purposes necessary to carry out its functions in relation to the review of the water merger, and (unless it is already publicly available) will not be further disclosed by Ofwat. If Ofwat requires any of the information held by the CMA to facilitate the exercise of its other functions it can request the information from the CMA for disclosure specifically for that purpose, in which case the CMA will conduct a separate assessment of the disclosure of confidential information.¹⁰

⁹ The CMA's obligations and policy as to confidentiality generally in phase 1 merger investigations are set out in [CMA2](#), paragraphs 7.21–27.

¹⁰ Sections 241(3) and 244 of the EA02.