RESPONSE TO CMA CALL FOR INPUT

Phase 2 merger investigations

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ALLEN & OVERY

Allen & Overy LLP
One Bishops Square
London
E1 6AD

1. INTRODUCTION AND GENERAL COMMENTS

1.1 This response represents the views of Allen & Overy LLP (**A&O**) on the Competition and Markets Authority (**CMA**)'s call for input on its Phase 2 merger investigations process dated 29 June 2023 (the **CFI**).

1.2 Our views are based on A&O's extensive experience advising clients on the application and process of UK merger control and feedback received from our clients that have participated in CMA Phase 2 investigations. We welcome the opportunity to respond to this CFI and the CMA's readiness to engage closely with stakeholders about how the Phase 2 process could be improved.

1.3 Overall, we think the CMA's Phase 2 process works well, including the independent Inquiry Group model. We have confidence that the decision-making which results from that process is robust and legally-sound.

1.4 We note that the CMA's focus in this CFI is on changes which could be made within the existing legal framework. We also appreciate the statutory constraints referred to by the CMA in the CFI, including the deadline for Phase 2 investigations and the resource constraints on the CMA more generally in its role as a public authority.

1.5 We nevertheless think that this is an opportune time for such a discussion given it has been nearly 10 years since the current Phase 2 process was established following the combination of the legacy OFT and Competition Commission to form the CMA. We note that while small amendments to the CMA's Phase 2 process have been made since the adoption of the key guidance in January 2014 (Guidance on the CMA's jurisdiction and procedure (**CMA2**)), the Phase 2 process as described in CMA2 has not been substantially updated in that time. Since 2014, there have been both organisational changes at the CMA and developments in approach to its substantive merger control assessment, including novel theories of harm. There have also been significant wider economic changes including Brexit and the continued rise of the digital economy. The CMA is now also reviewing larger and more complex transactions, with an increasingly international dimension that requires extensive cooperation with foreign competition agencies. We therefore agree that this is a good juncture for the CMA to pause and ask stakeholders what improvements could be made to its Phase 2 processes to ensure that they continue to work well, and reflect the case load that the CMA will need to manage in the years to come.

1.6 Considering which, we also welcome the CMA seeking views in the CFI about whether there are aspects of regimes in other jurisdictions which could inform any changes to the UK regime. In that regard, and as covered more fully in our comments below, we consider there to be aspects of, for example, the European Commission's (**EC**) Phase 2 processes that could be adopted in the UK (as detailed below).

1.7 A key theme in our comments in this response is the importance for fair process and ensuring that the merging parties have sufficient opportunity for meaningful engagement with the Inquiry Group and senior CMA officials within the case team on substantive issues, including at an early stage in the Phase 2 process.

1.8 We do not think that improvements in this regard necessitate a radical overhaul. Rather, we think these can be achieved in a proportionate way through small changes to the key stages within the existing process, in particular to the "set-piece" CMA meetings with the merging parties.

1.9 We have set out our specific comments below. We have prepared these by considering the issues raised by the CMA in the CFI and each of the four key topics discussed at the recent CMA roundtable, namely: (i) engagement on substance; (ii) engagement on remedies; (iii) engagement with third parties; and (iv) international comparators.

1.10 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website. We would be happy to discuss any of the points made in this response if the CMA would find it helpful to do so.

2. ENGAGEMENT ON SUBSTANCE

2.1 The CMA asks in the CFI whether there are ways in which merging parties would be able to engage more effectively with Inquiry Groups in relation to the competitive assessment of a merger. As noted above, we do not think that significant changes to the existing Phase 2 process are required, and this extends to engagement on substance.

2.2 We appreciate that it is necessary at the outset of the Phase 2 process for the Inquiry Group in particular, who will be new to the case, to familiarise themselves with the facts and the potential issues. We also appreciate that it is usually necessary for the CMA to engage in further information-gathering, including third party outreach, in weeks 1 to 6 of a Phase 2 investigation.

2.3 However, our key comment on this topic is that it would be helpful for merging parties and their advisers to have a greater understanding earlier in the Phase 2 process about the Inquiry Group's emerging thinking on the substantive issues.

2.4 Our experience is that merging parties and their advisers do not currently get a sense of the CMA's (and the Inquiry Group's) substantive thinking and understanding of the case until a relatively late stage in the Phase 2 process, in particular as compared to the equivalent process at the EC. The Inquiry Group and senior decision makers appear at times to be less willing than their counterparts at the EC to engage in dialogue on the substantive issues after the initial information gathering stage, preferring instead to wait until the CMA's views are more established towards the end of the CMA's main analysis stage (weeks 7 to 15), often after the Main Party Hearing.

2.5 This practice can in turn lead to a perception that there is a relatively narrow window for merging parties to share their views with the CMA, or to influence its provisional thinking, before it adopts Provisional Findings by the end of week 15.

2.6 We think it would be useful for the Inquiry Group and/or senior decision makers within the case team to have more regular check-ins with the merging parties throughout the Phase 2 process. We think this could be facilitated by designating a member of the Inquiry Group as a lead point of contact for the merging parties. While this person could not of course express binding views of the Inquiry Group, it would be a helpful process to facilitate substantive discussion on the markets and the transaction.

2.7 In addition to these general points, we have a few specific points about key stages in the Phase 2 process. These focus on identifying how the process could be enhanced to facilitate a substantive dialogue between the CMA and the merging parties earlier in Phase 2, while ensuring the administrative process remains achievable in light of the CMA's limited resources and the statutory timeframe:

A. Early stages of the Phase 2 process (weeks 1–15)

<u>Site visits</u>

2.8 We think that site visits are an important part of the early stages of a Phase 2 process. Our experience is that this initial dialogue between the Inquiry Group and representatives from the merging parties allows the Inquiry Group to learn about the merging parties' businesses and the relevant industry first hand.

2.9 The CMA notes at paragraph 11.32 CMA2 that the CMA "*may*" also ask the merging parties to present on particular issues of relevance in the inquiry during the site visit. We have observed an increasing

trend of merging parties presenting on substantive points during the site visits. We suggest that this trend should be formalised in any updates to CMA2 to provide all merging parties with the opportunity to make brief initial submissions on substance to the CMA and the Inquiry Group during the site visit, should they wish to do so.

2.10 If the CMA is not minded to adapt the purpose of the site visits in this way, our view is that it should otherwise ensure that the merging parties have an opportunity to engage with the Inquiry Group on the substance of the case in the opening few weeks of the Phase 2 process.

2.11 This opportunity should be in addition to, rather than a substitute for, other opportunities to engage on substance in the rest of the Phase 2 process as set out in our comments below.

Issues Statement

2.12 The CMA currently shares an Issues Statement at the end of week 6.

2.13 In CMA2, the CMA describes the Issues Statement as reflecting the one or more theories of harm which will form the framework for its Phase 2 analysis and outlining the issues the CMA will be exploring. In our experience, the Issues Statement adds limited further value for the merging parties as it rarely goes beyond the CMA's Phase 1 Decision.

2.14 We think the Issues Statement could therefore be removed or reduced in scope. For example, it could be limited to confirming any issues which are additional or different to those set out in the CMA's Phase 1 Decision. We think the time savings brought about by such a change would help to facilitate the implementation of the changes we recommend below and elsewhere in this response.

Annotated Issues Statement and Working Papers

2.15 Later in its Phase 2 process, the CMA produces an Annotated Issues Statement, which is designed to share the Inquiry Group's current thinking on the substantive issues. The CMA may also disclose working papers covering particular aspects of its competitive assessment. We think that the Annotated Issues Statement and the working papers have an important role to play in providing the merging parties with insight into the Inquiry Group's views. We also appreciate the CMA's willingness to disclose details about its underlying analysis, which we think forms an important part of its duty to consult.

2.16 However, our experience is that these documents, and in particular the working papers, do not always allow the merging parties to identify the CMA's "direction of travel" in the same way as the issues letter shared at Phase 1. The working papers in particular are often lengthy and received on an incremental basis. They are followed by the Annotated Issues Statement at a relatively late stage.

2.17 This means that the merging parties and their advisers often have limited time in practice to consider the content of the working papers in light of the Annotated Issues Statement and adequately reflect all of these materials in their representations at the Main Party Hearing.

2.18 While the Phase 1 issues letter sets out the CMA's case for any referral to Phase 2, we think the CMA could adapt the Annotated Issues Statement and working papers to provide a form of "Phase 2 Issues Letter", more akin to the EC's Phase 2 Statement of Objections. This document would focus on identifying the CMA's emerging thinking about any areas of concern. Consequently, merging parties and their advisers would be able to target their subsequent representations to addressing any matters which are genuinely in dispute. Unlike written representations on the Annotated Issues Statement and working papers, which are usually due after the Main Party Hearing, merging parties should be permitted to make representations on this proposed "Phase 2 Issues Letter" in advance of the Main Party Hearing. We would expect this in turn to produce resource savings for the CMA, including in reviewing those representations.

2.19 We appreciate that the changes suggested above may require additional time, including to ensure that the CMA can carry out the put-back process with third parties (which we understand is often achieved through the disclosure of draft working papers) and assess the merging parties' representations in advance of the Main Party Hearing. While this may mean that it is necessary to hold Main Party Hearings slightly later in the Phase 2 process, we think this would remain a worthwhile change and enhance the value of the Main Party Hearings for both the CMA and the merging parties.

B. Later stages of the Phase 2 process (week 15 onwards)

Main Party Hearings

2.20 The Main Party Hearings are the merging parties' only current guaranteed opportunity to address the Inquiry Group and other senior officials within the CMA case team orally ahead of Provisional Findings, and we therefore welcome these hearings as a critical part of the Phase 2 process.

2.21 However, in line with our opening remarks about the importance of dialogue between the Inquiry Group and the merging parties on the substantive issues, our view is that the format of these hearing could be adapted to ensure that they provide the opportunity for a genuine exchange of views.

2.22 While the merging parties are provided with an opportunity at the beginning of the hearing to make representations, our experience is that much of the hearing is then allocated to the Inquiry Group asking questions to the merging parties. Given the merging parties will have only just presented their views, and will not yet have provided their main written representations on the working papers and Annotated Issues Statement, those questions are often factual in nature and inevitably do not take full account of the merging parties' positions.

2.23 The result can be a hearing which, while valuable, nonetheless involves the CMA and the merging parties talking past, rather than to, each other about the substantive issues.

2.24 We think that these hearings could therefore be adapted to dedicate more time to substantive discussion and less time to the Q&A process, which would be closer to the approach in a Phase 1 Issues Meeting.

2.25 The changes we have suggested above would facilitate this by ensuring that merging parties understand the CMA's emerging thinking earlier in the process, and have the opportunity to formulate and share written representations in advance of the hearing.

Provisional Findings

2.26 We do not have any specific points which we wish to raise about the Provisional Findings step, or the remainder of the Phase 2 process. However, we note that the time between the Provisional Findings and the CMA's Final Decision is limited. We think this underlines the comments we make above about the importance of ensuring that there is sufficient engagement between the Inquiry Group and the merging parties earlier in the Phase 2 process, and in particular in advance of the Main Party Hearing and the subsequent Provisional Findings.

3. ENGAGEMENT ON REMEDIES

3.1 The CMA asks in the CFI whether there are ways in which merging parties would be able to engage more effectively with Inquiry Groups in relation to remedies.

3.2 We have recent positive experience of representing clients in fast-track processes at Phase 2. We welcomed the flexibility the CMA showed in our cases and thought the Phase 2 fast-track process worked well. Our clients welcomed the opportunity to dispense with certain steps in the process and discuss remedies with CMA decision-makers at an earlier stage and our view is that such a fast-track process should become a regular feature at Phase 2 in appropriate cases, and that CMA2 should be

updated to reflect this and to provide more detailed guidance to merging parties about what the Phase 2 fast-track process entails.

3.3 Outside the fast-track process, our observation is that merging parties may be unwilling to discuss remedies with the CMA, even on a without prejudice basis, until they understand the CMA's views on the substantive issues more fully. To encourage such without prejudice discussions the CMA could consider adding more detail in its guidance on the processes that it considers it would typically put in place to ensure that early remedy discussions are not prejudicial to an SLC finding. Current guidance indicates that the CMA will consider what "additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC decision".[1] Providing detail on the types of safeguards that the CMA would expect to put in place would be helpful. This could include the discussions being led by a Director of the remedies, business and financial analysis team who is otherwise not involved in the inquiry process. This would be useful as there are several important mechanistic and 'in principle' issues that could be worked through on a potential remedy proposal ahead of such a remedy being proposed to the Inquiry Group.

3.4 Consistent with our comments above, we think that the CMA could further facilitate earlier engagement on remedies by engaging in dialogue with the merging parties about the likely substantive issues earlier in the Phase 2 process. As detailed above, this could include permitting substantive representations during the site visit or at a similarly early point in the process, and the CMA sharing its views in a form of "Phase 2 Issues Letter" ahead of the Main Party Hearing.

3.5 It may also be useful to create separate opportunities for the merging parties to meet with the CMA, including the Inquiry Group, to discuss possible remedies. For example, the CMA may wish to consider separating the Response Hearing into two meetings, one focusing on the substantive issues and another on remedies.

4. ENGAGEMENT WITH THIRD PARTIES

4.1 We welcome the extent of the CMA's engagement with third parties during its merger control processes, which we think plays an important part in ensuring the robustness of its decision-making. Our experience is that the CMA's Phase 2 process is amongst the most transparent of the major merger control processes and provides interested third parties with ample opportunities to share their views.

4.2 However, we note that the CMA's information-gathering processes can also be extensive and require third parties to dedicate significant resources to responding to requests for information in circumstances where they may hold no information of particular value to the CMA, or otherwise have no strong views about the particular transaction.

4.3 We would therefore encourage the CMA to consider how it could gather the information it requires in a way which minimises the burden on third parties. This may, for example, involve more informal proportionate engagement with third parties to gain an initial understanding of their views and the information they are able to provide ahead of issuing formal requests for information. It may also involve dispensing with formal requests entirely in appropriate cases.

4.4 Finally, our experience is that third parties are often concerned about how the information they provide to the CMA will be used, in particular given the potentially serious commercial consequences which could flow from the CMA disclosing their views to the merging parties or more widely. We also note the increasing trend of third-party information being disclosed to merging parties' advisers in full via confidentiality rings.

[1] 'Merger remedies guidance', CMA (13 December 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf

4.5 While we appreciate that the CMA is under an obligation to ensure that the merging parties understand the basis ("gist") for the CMA's conclusions, our experience is that this trend may be acting as a disincentive to full and open engagement by third parties with the CMA's information gathering processes.

4.6 We would therefore ask the CMA to keep under review the balance it strikes between the potentially competing interests of the merging parties and third parties in this regard, and otherwise to consider what additional comfort it can provide to third parties who provide information during its merger control processes.

5. INTERNATIONAL COMPARATORS

5.1 We welcome the robust nature of the CMA's Phase 2 merger control process, and our view is that it compares favourably to the equivalent processes of other merger control regulators globally.

5.2 As noted in our comments above, we think that certain aspects of the CMA's Phase 2 process could nevertheless be enhanced to facilitate closer and earlier engagement between the merging parties and the Inquiry Group about the substantive issues. We think such changes would be more akin to the approach taken by the EC during its Phase 2 process (as described above).

Allen & Overy LLP
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