Ashurst

Call for information: Phase 2 investigations Response of Ashurst LLP

25 August 2023

1. Introduction

Ashurst LLP welcomes the opportunity to respond to the call for information by the Competition and Markets Authority (**CMA**) on the Phase 2 merger investigation process (29 June 2023). This response contains our own views, based on our experience of advising and representing clients on the application of the Enterprise Act 2002, and is not made on behalf of any of our clients.

We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

As set out in more detail below, our main suggestions are that changes be introduced to:

a) Enable early engagement in the form of a hearing/issues meeting directly between the merging parties and the Panel on its proposed theories of harm. This should take place prior to the provisional findings. To ensure effective engagement, the parties will need to understand the CMA's thinking in advance of the hearing and we would suggest that this could be achieved through the introduction of a Phase 2 issues letter supported by disclosure of the working papers and underlying evidence on which the CMA is relying.

b) Allow the CMA and the merging parties to discuss remedies at an earlier stage of Phase 2 (before the provisional remedies notice). This would have the benefit of aligning the CMA's process with its international counterparts (notably, the European Commission) and ensuring that the remedies process is not condensed into the end of the Phase 2 process.

2. Are there ways in which merging parties (and others) would be able to engage more effectively with inquiry groups in relation to the competitive assessment of a merger?

Yes, in our view, it is important for the merging parties to have earlier and more meaningful engagement with inquiry groups, which should allow the parties to fully

understand and respond to the CMA's theories of harm. This would be beneficial for both the CMA and the merging parties and allow the CMA to deepen its understanding of any potential issues and possible solutions.

Specifically, we recommend that the CMA enable parties to engage directly with the Panel at the beginning of Phase 2 for the purposes of a teach-in prior to the site visit. This teach-in would complement the site visit and enable the Panel to directly engage with the parties' (as well as the case team's) views from the beginning of Phase 2.

In addition, we would recommend that the parties are given the opportunity to engage directly with the Panel in the context of a hearing/meeting on its theories of harm before the CMA publishes its provisional findings. As the provisional findings are effectively a public statement of the CMA's more or less final view, it is important that the parties have meaningful opportunities to understand and respond to the Panel's detailed case in support of a substantial lessening of competition (**SLC**) finding prior to that point. To achieve this, we would propose that the parties are provided with more detailed information and evidence underlying the Panel's thinking on a potential SLC finding. This could be accomplished through the CMA issuing a detailed Phase 2 issues letter and providing appropriate access to the CMA's file, including working papers that set out and evidence the proposed theory, or theories, of harm.

The parties should also be offered a genuine opportunity to respond to the CMA's case for an SLC before the Panel makes its provisional decision in a hearing or "Phase 2 issues meeting" with the Panel (before the provisional findings) We would suggest that these meetings take place around weeks 9 to 11 of Phase 2.

We also recommend that the CMA ensures that there is sufficient engagement with the merging parties following the provisional findings and before the Final Report is issued.

It would also be beneficial for the parties to have ongoing informal dialogue with the Panel, where appropriate.

In terms of engagement with third parties, we consider that third parties already have appropriate access to, and opportunities to engage with, the case team and, where appropriate, the Panel. In our view, working papers and other materials containing the Panel's developing thinking should not be shared with third parties, unless there is a particular point that needs to be verified with a particular third party. To ensure the parties' rights of defence are respected, the parties should have access to the information provided by third parties (including questionnaire responses), at least in the form of anonymised summaries and/or non-confidential versions. This would enable the parties to directly engage with comments from third parties and address the CMA's potential concerns.

3. **Are there ways in which merging parties (and others) would be able to engage more effectively with inquiry groups in relation to remedies?**

Please refer to our comments in section 6 below.

4. **Do the existing key opportunities to make written submission (i.e., in response to the issues statement, annotated issues statement/working papers, provisional findings and remedies working paper) work well? How could they be improved?**

Please refer to our comments in section 2 above.

5. **Do the existing key opportunities for direct in-person engagement with the inquiry group (i.e., the site visit, main party hearing and response hearing) work well? How could they be improved?**

Please refer to our comments in section 2 above.

6. **What are the perceived barriers to engagement on possible remedies prior to the CMA's provisional findings (and what factors might explain why the existing mechanism for "without prejudice" remedies discussions in Phase 2 investigations has rarely been used in practice since its introduction in 2020)?**

Currently, merging parties cannot engage constructively on remedies early in a Phase 2 investigation without effectively conceding that an SLC exists. This is problematic, particularly in cases where more complex remedies may be required, as consideration of potential remedies is restricted to the end of the Phase 2 process. Parties are likely to want to understand whether, in principle, the proposed remedies may be acceptable to the CMA before conceding that there is an SLC.

The European Commission's process enables parties to front-load the discussion of remedies, which allows potential solutions to be given more detailed consideration.

Under the current procedure, merging parties may be hesitant to make use of the "without prejudice" parallel track remedies discussions. This will reflect the fact, as noted above, that the parties lack an understanding of the CMA's case and thinking during the early stages of Phase 2. Parties may be particularly reluctant where undertakings were offered (but rejected) at Phase 1.

To promote more meaningful engagement on remedies earlier in the Phase 2 process, we would suggest that remedies discussions should start following a hearing on the CMA's emerging thinking (see section 2 above). These discussions should take place around weeks 9 to 11 of the Phase 2 process, ahead of the

remedies notice (around week 15). We would suggest that discussions begin with one of the senior directors and/or the director of remedies and subsequently involve a meeting with the Panel before the remedies notice is issued. These meetings should be additional to the response hearing, which would offer a further opportunity for the Panel to ask final questions on substance.

Allowing remedies discussions to take place at an earlier stage, may also enable more effective and considered discussion of the possibility of non-structural remedies. It is particularly difficult for parties to demonstrate that non-structural remedies will fully address the CMA's concerns if the discussion of remedies is limited to the end of the Phase 2 process.

Earlier remedies discussions could also create additional flexibility and, in appropriate cases, eliminate the need for a full Phase 2 review where the CMA and merging parties are able to agree remedies early in a Phase 2 investigation. This may also offer the benefit of bringing the CMA's timetable into line with other jurisdictions in relation to global transactions and enable remedies discussions to be synchronised across jurisdictions.

7. **Are there ways in which merging parties (and others) would be able to engage more effectively with inquiry groups in relation to remedies?**

Please refer to our comments in section 6 above.

8. **Are there aspects of regimes in other jurisdictions that you consider might work well within the UK regime?**

Our comments above draw on our experience in other jurisdictions, particularly our experience of engaging with the European Commission in merger control cases.

In particular, the European Commission's process enables: (i) the parties to have real engagement with decision-makers at an earlier stage and (ii) potential remedies to be discussed in parallel with consideration of the case more broadly.

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