RESPONSE TO CALL FOR INFORMATION ON PHASE 2 MERGER INVESTIGATIONS

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Non-confidential

1. Introduction

We welcome the CMA's Call for Information and the CMA's readiness to listen to feedback and seek to improve the Phase 2 process.

Our comments focus on the assessment and consideration of economic evidence at Phase 2 and are based on extensive experience of Phase 2 cases in the UK and other jurisdictions.[2] There are many aspects of the UK Phase 2 process that work well and compare favourably with other jurisdictions. The comments here are not intended to be comprehensive, instead identifying some key areas where we think that the Phase 2 process could be improved within the existing statutory framework.

Our overall view is that the Phase 2 process should be guided by key principles of transparency, engagement and scrutiny, each of which leads to a more informed evidence base and better decisions. These principles are especially important in a system with limited scrutiny of economic arguments and evidence as a result of the judicial review standard of appeal. Too often scrutiny and debate during a given case are mistaken for broader institutional criticism, which leads to reduced transparency and engagement. Both the CMA and merging parties and their advisers should work together to create and support systems and processes that foster in-case dialogue.

2. Engagement with economists

While access to the Panel is understandably limited and structured, there is scope for more open economic dialogue with the Case Team. In recent years, the CMA Case Team economists have become very difficult to access for any technical discussion and debate – something which also cannot realistically be achieved in the context of Panel Hearings, and therefore ends up missing from the process altogether. Written papers cannot achieve the same degree of interaction and understanding as a full "without prejudice" discussion to make sure that all the economists involved understand (even if they still do not agree with) each other's views and the evidence on which those views are based.

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1 The authors are all Vice Presidents at CRA. The views in this note are those of the authors alone and do not represent the position of CRA or any other experts at CRA.

2 CRA has been involved with approximately 15 CMA Phase 2 mergers over the last three years.

Specifically, in our experience, it is now very rare for economist meetings to take place with the CMA even when technical economic submissions have been made and are helpful to understanding the effects of the case or determinative of the outcome (and even when specific requests are made). Often economist meetings are taking place with other agencies, discussing the objectives, probative value and limitations of economic evidence. The economist discussions with other agencies are both evaluating analysis submitted on behalf of the merging parties and analysis undertaken by agency economists that has been shared. In both cases, openness and dialogue around economic evidence leads to a better understanding of the economic evidence, its probative value and its limitations, and creates greater confidence for the merging parties that their views are being fully heard, understood and engaged with.

This therefore misses an opportunity for better and more robust decisions, and this is seen in the CMA's increasingly frequent binary dismissal of economic evidence ('*it has this weakness therefore no weight is attached'*) rather than a more nuanced understanding of the probative value and limitations of any given evidence, and appropriate weight attached (*'despite its limitations, the evidence has some value and will be considered alongside the other available evidence, albeit with lower weight ascribed'*). Open discussions can have the same effect as that of experts in a litigation process in setting aside areas of agreement and focusing on the areas of contention (e.g. particular assumption(s), evidence or method(s) that are really critical to the results of an analysis and on which there is legitimate disagreement).

We recommend that where discrete economic arguments and evidence are critical to the outcome of the case, there should be open (without prejudice) dialogue between the Case Team economists and the economists of the merging parties.

3. Access to the Inquiry Group

There are three 'access gates' for the merging parties to make oral arguments to the Inquiry Group (the ***Panel***): the Site Visit at the outset of the Phase 2 process (which often serves as a teach-in on the facts of the market), the Main Parties' Hearings following the Annotation Issues Statement (***AIS***) and Working Papers (***WPs***), and the Response Hearings, following the Provisional Findings (***PFs***). These in-person meetings are especially important as they are the only opportunities for the merging parties to articulate their key arguments to the Panel in-person. These face-to-face meetings are particularly important in cases involving substantial written responses that the Panel may not be able to review in detail.

In our experience the Site Visit generally works well, acting as an effective teach-in on the facts of the industry, and gives the merging parties the opportunity to present the commercial logic of their transaction to the Panel and to provide their initial responses to the concerns raised in the Phase I Decision. We note however that this meeting occurs before the working papers and therefore before the merging parties have had full visibility of the Phase II concerns.

Given this, in our view the effectiveness and value of the other two hearings could be significantly improved:

- **The Main Parties' Hearing**: The merging parties are typically given only 5-15 minutes at the start to make substantive arguments. The Panel often request the merging parties to keep this short. The meeting becomes a one-way information gathering exercise where the Panel go through a series of pre-planned questions. Some of these are the Panel's own questions while others have been given to the Panel by the Case Team and are read out.
- **The Response Hearing**: The merging parties are again given only 5-15 minutes at the start to respond to often extensive substantive findings outlined in the PFs before the Panel quickly moves the Hearing to a one-way information gathering exercise to evaluate possible remedies.

In both hearings, after the brief 'opening statement', the merging parties are passive and are given limited chance to make substantive arguments. When merging parties do try to make substantive arguments, the Panel commonly truncate those responses and ask the parties to follow-up in writing. This structure misses an important opportunity for an open dialogue and debate, in which issues can be properly flushed out and understood. By contrast written submissions, while clearly of value, make an active to-and-fro to understand the other side's views properly time-consuming and cumbersome to achieve, and not always realistic within the timeframes available. By contrast, a longer opportunity for the merging parties to present their case orally, and for follow-up questions from the Panel and Case Team following that, would give a much more flexible and effective opportunity for the Parties to properly understand the CMA's concerns, and for the CMA to fully understand and engage with the merging parties' counter-arguments and evidence.

We recommend the Main Parties' and Response Hearings are split into two: the first part allocated to substantive discussions around the key issues determining the outcome of the case; and the second part used for any residual information gathering on substance (in the case of the Main Parties' Hearing) and on remedies (in the case of the Response Hearing). This would likely require a longer time to be allocated to each Hearing.

4. AIS and Working Papers

Historically, the CMA has been reluctant to shift its view from its PFs and this has placed significant emphasis on visibility of the CMA's emerging thinking in the AIS and WPs and the opportunity for the merging parties to respond at this stage.

- **Format and content**: WPs are highly variable across case teams: on some cases WPs are 'rejigged' versions of slides that have been used by the Case Team to present emerging thinking to the Panel and others are well-developed drafts that resemble draft PFs (the latterly commonly case teams that have continued from Phase 1 and which risk reflecting confirmation biases). Similarly, WPs often try to cover off all aspects of the case or formulaically consider standardised chapters. However, typically, there are between one and four critical issues that determine a Phase 2 case (e.g. counterfactual, substitutability estimates, incentive to foreclose).

  We recommend that CMA is transparent and sets out the key determinative issues in its emerging thinking and focuses the Working Papers on those.

- **Sharing data and analysis from WPs**. While there is a trade-off between the CMA being transparent in sharing the analysis underpinning its emerging thinking and the resources required to prepare analysis for sharing and review by merging parties, currently very limited underlying data and analysis is shared at this stage (and less than in the past). Requests for even straightforward analysis (e.g. market share methodology and underlying data) are commonly rejected, with the CMA noting that its statutory obligations do not compel it to share anything prior to PFs.

  We believe this is wrong in principle and that the CMA should default to be as transparent as possible. If the parties do find errors or weaknesses in the CMA's analysis this can be an advantage to the CMA to reach the right decision. Ensuring that any such errors are not reflected in the final decision would also make any adverse finding more robust, and a successful appeal against any such finding less likely – saving substantial time, expense and resources on both sides.

5. Possible enhanced role for Procedural Officer

In addition to the recommendations above, in our view it could also be helpful to support these measures with the introduction of an independent officer managing the procedural aspects of the case. Currently,

the Procedural Officer has a very limited role in mergers (handling disputes over redactions) and gets involved only with issues raised by the merging parties.

There is scope for a senior arbiter that is independent of the Case Team and runs all procedural aspects of the case. The ongoing involvement of this expanded Procedural Officer may be necessary (rather than only at the request of the merging parties) as the risk of damaging relationships with case teams during an ongoing case creates a strong deterrent to making a request. The expanded role of the Procedural Officer would be to manage and balance the flow of information to the Panel (from both the Case Team and the merging parties), including:

- Organise and conduct the Main Parties' and Response Hearings, including ensuring discussion and debate on the critical issues of the case.
- Organise and conduct meetings between the Case Team and the Panel where the Case Team presents evidence, updates and emerging thinking.
- Manages the flow of information and evidence to the Panel, including analysis and evidence from both the Case Team and merging parties.
- To manage information shared with the merging parties and to decide on requests for access to additional information.

We suggest an expanded Procedural Officer role that has specific functions outlined in guidance and would act independently of the Case Team and whose main role is to advise the Panel may offer some benefits.

6. Remedies: the need for escape valves

The CMA Phase 2 process is costly and inflexible relative to other jurisdictions. We do not believe it needs to be. There is a mutual interest in allowing 'escape valves' for the merging parties from the Phase 2 timeline, particularly in the context of remedy proposals.

The updated remedies guidance allowing merging parties to concede an SLC and expedite remedy discussions at Phase 2 (to align with other jurisdictions or to allow the CMA to carve out areas of concern and focus its assessment on other residual areas) is unlikely to be used, other than in exceptional circumstances. There are no incentives to concede the SLC. Carving out areas of concern does not lead to a revised expectation of the CMA resolving competition concerns on the residual areas of the case. This is a missed opportunity to provide escape valves for the merging parties and for the CMA to save resources.

We recognise the need to ensure that any expedited Phase 2 remedy process does not distort the merging parties' incentives to offer UILs at Phase 1. However, *we believe processes can be introduced that allow for continued discussions on remedies with the merging parties independent of and without the knowledge of the Panel (and the Phase 2 Case Team)*. For example, discussions could continue with the RBFA team and if they become satisfied that an advanced remedy proposal resolves competition concerns, it can then put this to the Panel with a recommendation (with respect to the competition concerns identified at Phase 1).