The City of London Law Society

Open consultation on the CMA's Call for Information – Phase 2 Merger Investigations[1]

Response from the City of London Law Society

1. Introduction and summary

1.1 The City of London Law Society ("**CLLS**") welcomes the opportunity to comment on the Competition and Markets Authority's ("**CMA**") public consultation on its approach to Phase 2 merger control investigations (the "**Consultation**").

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent both complainants and those companies under investigation by regulators.

1.3 The Committee members responsible for the preparation of this response are:

(a) **Antonio Bavasso**, STB Law

(b) **Nelson Jung**, Clifford Chance

(c) **Mark Jephcott**, Simmons & Simmons

(d) **Nicole Kar**, Linklaters LLP

(e) **Samantha Mobley**, Baker McKenzie

(f) **Jonathan Parker**, Latham & Watkins

(g) **Nigel Parr**, Ashurst

(h) **Paula Riedel**, Kirkland & Ellis

1.4 Our comments are based on our members' significant experience and expertise in advising on the application of the Enterprise Act, 2002 in relation to a wide variety of transactions.

1.5 We welcome the opportunity to comment with a view to proposing avenues for improved communication and engagement between the CMA and merging parties throughout the Phase 2 process, and for parties to better understand the CMA's position and in turn to have their views heard.

1.6 The CMA specifically has requested input on the six points set out in further detail below.

1.7 Our key suggestions are as follows:

(a) Include a pre-site visit teach-in with the Panel early in the Phase 2 process.

(b) Include an earlier opportunity to engage directly and in detail with the panel on its theories of harm, including both before and after provisional findings. Pre-

[1] Call for information: Phase 2 merger investigations - GOV.UK (www.gov.uk)

provisional findings this would include opportunities to view the CMA's current thinking on the SLC (including through the introduction of a Phase 2 issues letter or Statement of Objections, and sight of working papers and evidence expressly setting out and supporting the CMA's theories of harm) and a proper opportunity to respond (including through the introduction of a Phase 2 issues meeting where parties can engage with the CMA on its emerging thinking, at around week 8).

(c) Introduce earlier opportunities to discuss remedies in the form of an initial discussion with a senior director and/or director of remedies, followed by an initial remedies meeting, after week 11 and before the Notice of Provisional Remedies. The later response hearing could be retained but it should no longer be necessary (as it currently is in practice) for this to focus primarily or exclusively on remedies.

1.8 As an Annex to this submission, the Committee also has reflected these proposals by way of markup of the table outlining the CMA's Phase 2 process from its guidance on jurisdiction and procedure (CMA2).

2. Question: 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?

2.1 The Committee submits that Parties should have earlier and more meaningful engagement with inquiry groups, including opportunities to have visibility on and respond to the CMA's (developing) thinking on theories of harm.

2.2 First, the Committee proposes that parties should have a right to a teach-in with the panel (this could be an early / initial site visit incorporating a teach-in) earlier than the main site visit. This would occur at the beginning of Phase 2, around week 2. Committee members have had mixed experience in cases where sometimes the panel is willing to attend a teach-in, and in other cases they respond that there will be no meetings until the site visit. We are not suggesting that a teach-in would replace the site visit but it would give the panel exposure to the parties' perspective.

2.3 The Committee also proposes that parties should be given an opportunity to engage directly with the panel on its theories of harm, including both (i) an opportunity to review and respond to theories of harm before the publication of provisional findings and (ii) further engagement post-provisional findings and before the issuance of the Final Report. With respect to the former, the path towards enabling better insight into the CMA's thinking as well as opportunities to respond at an early stage is twofold:

(a) Ensuring that parties can obtain more information from the CMA in relation to its case for the SLC. This could take the form of a combination of (i) the CMA issuing either a Statement of Objections, or a detailed Phase 2 issues letter which could be an expanded version of the issues statement that is pushed back further into the Phase 2 process in the CMA's current procedure, and (ii) providing appropriate access to the file including working papers that actually state and substantiate the theory/theories of harm.

(b) Ensuring that parties have a proper opportunity to respond to this prior to the CMA taking a provisional decision. In this connection, the Committee proposes that a Phase 2 issues meeting or state-of-play meeting should be held prior to provisional findings where the parties can respond to the Phase 2 issues letter and engage

directly with the panel on its emerging thinking. Such a meeting would ideally take place around week 8 of Phase 2.

2.4 It is important that these key steps happen before provisional findings[2], which in effect are not entirely "provisional" but a public statement of the CMA's position and as such do not grant the parties a "day in court" (as provided for in many other jurisdictions), including meaningful opportunities to know and respond to the panel's detailed case in support of an SLC finding.

2.5 The main party hearing could be retained in a similar format to the current procedure, and take place around week 12-13, leaving another month or so between the issues meeting and main party hearing and then another two weeks or so before the provisional findings.

2.6 As for engagement with third parties, the Committee submits that working papers or other materials containing the Panel's emerging thinking on theories of harm should not be shared with third parties, unless particular extracts need to be verified. The Committee considers that third parties currently have sufficient access to and opportunities to engage with the panel. Finally, the Committee considers that parties should have access via a confidentiality ring or access to file to confidential, unredacted versions of what third parties have conveyed or submitted (including questionnaire responses).

3. Do the existing key opportunities to make written submissions (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?

3.1 Please refer to the comments provided in section 2 of this submission above.

4. 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)?

4.1 There is currently no real ability to engage constructively on remedies early in Phase 2 without conceding an SLC. The Committee considers that this is a problem as it means that, particularly in more complex remedies cases, the process is highly compressed, is back ended rather than front loaded (as the European Commission's process can be) and means less consideration is given to the "fix" than to the problem.

4.2 The Committee considers that under the current procedure parties may be reluctant to take advantage of "without prejudice" parallel track remedies discussions in part because of a lack of insight into the CMA's case and thinking early on in Phase 2, particularly where undertakings were offered but rejected in Phase 1.

4.3 In order to foster more meaningful engagement earlier on in the Phase 2 process, the Committee proposes that the time to begin talking about remedies should be after an initial meeting on the CMA's emerging thinking (see section 2 of this submission above), which would take place around week 8 of the Phase 2 process, and before the remedies notice (around week 15). This would start with one of the senior directors and/or director of

[2] If in fact provisional findings are to remain a part of the process in future

remedies, leading up to a remedies meeting with the panel which also would take place before the remedies notice.

4.4 By contrast, under the current process, the response hearing focusses on remedies. The Committee does not propose that there be no response hearing at all, as this may still provide an opportunity for the panel to ask final questions on substance, but rather to introduce a separate, early meeting on remedies as outlined above.

4.5 The Committee notes as an additional comment, that opening up earlier discussions on remedies in this way may also provide an opportunity to engage more deeply and effectively on the possibility of non-structural remedies.

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

5.1 Please refer generally to the comments outlined in section 4 of this submission.

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

6.1 The recommended updates above to the CMA's current process reflect aspects seen in other jurisdictions, notably in the EU pursuant to the European Commission's process.

6.2 In particular, the Commission's process incorporates an oral hearing where parties can have real engagement on substance.[3] The Commission's Phase 2 process also normally includes an opportunity to attend a state of play meeting twice before the Commission's issuance of a statement of objections. Parties thereby have a chance to understand the Commission's preliminary view on the outcome of the Phase 2 investigation and the type of objections it may have, together with supporting evidence. The proposals outlined in part 2 of this submission are intended to introduce into the existing CMA Phase 2 process similar opportunities for parties to engage with and have sight of the CMA's thinking early on, and to respond to it.

6.3 Similarly, the proposals outlined in section 4 of this submission in relation to remedies reflect aspects of the EU process where parallel remedies discussions occur with participation and engagement on the part of decision makers, and where several meetings and discussions may take place over the course of Phase 2 as the parties' and regulator's thinking on remedies develops on an ongoing basis. This is in contrast to the current CMA process, whereby discussions on remedies typically do not pick up until after the publication of Provisional Findings and a Remedies Notice, which means that this workstream is back-ended and creates pressure to focus primarily on remedies at the time of the response hearing.

7. Other: Internal challenge within the CMA

7.1 **Internal challenge within the CMA:** While we see the significant efficiencies in having (at least some) case team members carry across from Phase 1 to Phase 2, we think there is a strong case to institutionalise internal challenge during the Phase 2 process to mitigate the risks of (Phase 1 decision) confirmation bias affecting the Phase 2 outcome. One suggestion

[3] The oral hearing occurs after the Statement of Objections ("SO"), but as the SO is not public, the oral hearing can provide a more meaningful opportunity to engage.

is to formalise the role of the Devil's Advocate in Phase 2 and ensure the role is afforded sufficient resource / support / time to be in a position to effectively advocate the "other side" to the case team.

8. Conclusion

8.1 We welcome the opportunity to comment on the Consultation, in view of developing a collaborative approach with the CMA in the course of its Phase 2 process. We would also welcome continued dialogue with the CMA as its policies, practice and experience develop, including, for example, how behavioural remedies might be more readily factored into the process going forward, and would be very happy to discuss this or any of the points raised in this response.

CLLS Competition Law Committee

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Figure: The key stages of a typical phase 2 inquiry

	MILESTONES	CMA	PARTIES
FOLLOWING REFERRAL: Possible suspension of reference (anticipated mergers only)			
Following reference to phase 2	Possible abandonment of transaction	CMA considers, in response to any request by merger parties, whether transaction may be abandoned and whether to suspend the phase 2 investigation for up to three weeks. If transaction is abandoned, CMA cancels reference. CMA publishes notice of suspension (and termination of any suspension if merger is not abandoned).	Merger parties may request suspension of reference in light of any possible abandonment of transaction.
STAGE 1: Phase 2 information gathering		**Weeks 1–6**[1]	
	Reference	CMA issues phase 2 opening letter to merger parties.	Where appropriate, merger parties attend case management meeting and data meeting with CMA case team (which will usually be by telephone/videoconference).
		CMA considers need for modified interim measures.	Merger parties discuss with the CMA any ongoing phase 1 IEOs or if necessary phase 2 interim measures and reporting on compliance. CMA makes interim order or merger parties accept interim undertakings. CMA may also consider unwinding integration.

[1] Information gathering continues to some extent throughout the inquiry. However, this initial phase (around weeks 1 to 6) is the period during which parties should expect information gathering to be most intensive (although the precise extent of necessary information gathering during this period will vary from case to case, depending on the extent, and ongoing relevance to the CMA's investigation, of information previously gathered at phase 1).

	MILESTONES	CMA	PARTIES
		CMA creates administrative timetable. Timetable is published after it is shared with the merger parties.	Merger parties comment on administrative timetable.
	Initial information-gathering	CMA issues information requests to merger parties under section 109 of the Act (and to third parties, usually on a voluntary basis) as necessary.	Merger parties (and third parties) respond to information requests.
		Panel attends preliminary teach-in (or initial site visit incorporating a teach-in) with the Parties.	Merger parties arrange and run teach-in/initial site visit to provide the panel with exposure to the parties' perspective,.
		CMA develops any consumer surveys.	Merger parties provided opportunity to comment on any draft consumer survey.[2]
		CMA attends site visit (if being held).	Merger parties organise site visit.
		CMA conducts calls and meetings with third parties to the extent necessary to supplement existing evidence base.	Third parties give oral evidence.
	[Publication of issues statement, reflecting theories of harm on which the CMA is focusing - suggest removing this step and replacing with issuing a statement of objections or	CMA publishes issues statement and considers responses to it.	Merger parties (and third parties) respond to issues statement.

[2] The CMA does not typically share its customer or competitor questions with the merger parties.

	MILESTONES	CMA	PARTIES
	issues letter earlier – see below]		
STAGE 2: Phase 2 assessment		**Weeks 7–15**	
		Proposed update to the procedure in this window of the process: CMA issues a statement of objections or issues letter at an earlier stage and as a more expanded version of what (in the current process) comes later in the form of an issues statement at a later stage below. Together with access to working papers and other materials setting out theories of harm, this provides merger parties with an initial view of the CMA's current thinking. *Parties then would have an opportunity to respond before provisional findings, including through a two-hour Phase 2 state of play meeting or issues meeting where merger parties can engage with the CMA on its emerging thinking, around week 8 (in advance of the main party hearings).* *Separately, the CMA may then engage with the merger parties on remedies through discussion with a director followed by a remedies meeting.* CMA conducts analysis of evidence. CMA holds a 'main party hearing' with each merger party around weeks 12-13. [An annotated issues statement is sent to the merger parties in advance of the main party hearing setting out	*Proposed update to the procedure in this window of the process: As noted at left, merger parties would have an opportunity to view and respond to the CMA's emerging thinking on theories of harm in the form of a statement of objections or Phase 2 issues letter and access to working papers/materials setting out the CMA's thinking, and would attend a Phase 2 state of play or issues meeting around week 8 (in advance of the main party hearings). Thereafter merger parties also may commence discussions with a director on remedies followed by a preliminary remedies meeting, in advance of publication of the Remedies Notice.* Merger parties attend main party hearing around weeks 12-13. Merger parties comment on annotated issues statement and any working papers (or extracts of working papers) disclosed to them.

	MILESTONES	CMA	PARTIES
		the Inquiry Group's emerging thinking by reference to the matters outlined in the issues statement. Key working papers (or extracts of them) may will also be disclosed to the merger parties as appropriate in advance of the main party hearing. – these steps could come around week 8]	
		Put-back of material to parties where appropriate.	Parties check put-back.[3]
Around week 15	Publication of Notice of provisional findings, provisional findings and (if relevant) Notice of Possible Remedies.	The provisional findings report is the main means the CMA uses to satisfy its duty to consult under section 104 of the Act, by disclosing its provisional decisions, and the underlying reasoning.	
STAGE 3: After provisional findings		**Weeks 16–24**	
		CMA considers responses to provisional findings and (if relevant) Notice of Possible Remedies	Merger parties (and third parties) comment on provisional findings and (if relevant) any Notice of Possible Remedies.
		Where new evidence has been obtained after provisional findings, and to the extent not previously	Parties check put-back.

[3] The CMA will typically not 'put back' text from written submissions or agreed oral evidence with parties. See further paragraph 12.8 below.

	MILESTONES	CMA	PARTIES
		commented on, put-back of material to parties for checking for factual accuracy and to identify confidential information prior to publication of final report.	
		Where relevant the CMA will conduct subsequent hearings ('response hearings') to receive evidence on any remedies proposals and brief submissions on the provisional findings.	Merger parties (and sometimes third parties, if appropriate) attend response hearings.
		CMA produces remedies working paper and discloses this to merger parties for comment.	Merger parties comment on remedies working paper.
Week 24	Statutory deadline for publication of the final report	CMA publishes final report by the end of week 24 (subject to any extension of statutory deadline).	
STAGE 4: Implementation of remedies – after publication of the CMA's final report			**Weeks 24 –36**
		CMA considers whether any variation to interim measures is necessary.	CMA varies interim order or merger parties accept revised or additional interim undertakings if appropriate. CMA may also consider unwinding any integration.
		CMA creates timetable for implementation of undertakings/order, and informs merger parties of key milestones.	
		CMA consults merger parties (and, where relevant, third parties) on draft undertakings/order.	Merger parties (and, where relevant, third parties) comment on draft undertakings/order and request excisions (if any) prior to publication.

	MILESTONES	CMA	PARTIES
		CMA consults publicly on draft undertakings/order.	Merger parties (and third parties) comment further on draft undertakings/order.
Week 36	Statutory deadline for implementation of remedies (subject to any extensions of statutory deadlines)	CMA accepts final undertakings/makes final order within statutory 12 week deadline (subject to extension by six weeks if there are special reasons to do so). Responsibility for further implementation is assigned to a Group appointed to oversee this part of the process (usually the original Inquiry Group).	