Response to CMA Call for Information: Phase 2 Merger Investigations

Introduction

1. Cleary Gottlieb Steen & Hamilton LLP ("**Cleary Gottlieb**") welcomes the opportunity to respond to the Competition and Markets Authority's call for information in relation to its Phase 2 merger investigation procedures. Before responding to the specific questions raised, we provide some general remarks about Phase 2 merger procedures and some suggestions for improvement.

2. There are many positive aspects of the current Phase 2 merger procedures:

    a. One of the greatest strengths of the UK merger regime is having a group of independent experts, the Inquiry Group, appointed as decision-makers to review the merger with a "fresh pair of eyes" at Phase 2. This has the potential to increase robustness of decision-making through reducing the risk of confirmation bias, ensuring fairer outcomes.

    b. Phase 2 investigations are conducted in a transparent manner with the CMA publishing details of the issues it is investigating, its Provisional Findings (**PFs**) and Final Report, enabling merging parties and third parties to make submissions.

    c. Parties are provided with opportunities to engage directly with the Inquiry Group as decision-makers on the case at the site visit and formal hearings.

3. Notwithstanding these strengths, we think it is time for the procedures to be updated in a number of respects. It is worth recalling in this connection that the procedures date back to a time when Phase 2 investigations:

    a. were conducted by a separate agency (the Competition Commission and before that the Monopolies and Mergers Commission);

    b. were considerably less intensive in terms of the volume of data and documents needing to be analysed; and

    c. did not often involve complex global mergers as, prior to Brexit, the large majority of these were reviewed by the European Commission under the EU Merger Regulation.

4. The principal shortcoming of the current procedures is that they do not provide sufficient opportunities for parties:

    a. to understand fully the case against them until the Inquiry Group has reached its Provisional Findings, when it is difficult for parties to change the direction of the case;

    b. to present their views on the substantive case orally to the Inquiry Group; and

c. to engage with the Inquiry Group in a meaningful way on remedies, which is especially problematic where it is necessary to design global remedies that work in a number of jurisdictions.

Our Proposed Changes

5. We consider that these issues are relatively easy to fix in a way that would not overly burden the CMA and would enable the Inquiry Group to complete investigations within the statutory timeframes. There are also some areas in which the CMA could gain efficiency through dropping some current procedural steps. In summary, our proposed changes are:

   a. **Enhanced early substantive engagement with the Inquiry Group**. With increasingly complex cases, the Inquiry Group and case team would benefit from increased early engagement with the parties to enable them to understand more quickly the markets and products, and the parties' views on the substantive issues. The parties would benefit from a greater understanding of the Inquiry Group's concerns at an earlier stage of the case. This may also have potential to reduce the volume of written requests for information or enable these to be more focused, saving CMA resources. See proposals 1-3 below.

   b. **Enhanced opportunities for the parties to present their substantive case to the Inquiry Group orally at the hearings.** While parties currently have access to the Inquiry Group at hearings, the structure of hearings does not allow the parties to present their views on the CMA case. This is a weakness of the current system that could be easily corrected. Doing so would provide an important procedural right to parties and would support more robust decision-making by the Inquiry Group, as it would allow them to understand better the parties' positions before they reach a decision on their PFs or their Final Report. See proposals 4 and 6 below.

   c. **Improved early engagement on remedies.** The scope of the CMA's concerns often narrows during a Phase 2 investigation as the CMA focuses on specific areas of concern, while dropping others. While early remedy discussions on a without prejudice basis are sometimes offered, parties may be reluctant to engage in these if they do not yet know whether the Inquiry Group is moving towards a substantial lessening of competition (**SLC**) finding. Parties may also only be willing to discuss remedies in relation to some potential SLCs but not others. There can also be concerns that discussions may only be attended by the case team, who are not the decision-makers in the case. To resolve this, we propose offering an Initial Remedies Discussion meeting to be attended by at least one Inquiry Group member after the Emerging Views Paper but before the Provisional Findings. See proposal 5 below.

Proposal 1: Remove Issues Statement procedural step

6. Currently, the Inquiry Group spends the first few weeks of Phase 2 developing an Issues Statement that summarises those issues that the Inquiry Group have decided to focus on. In practice, this document often simply summarises the issues in the Phase 1 decision and does not therefore provide additional guidance to the parties or third parties about the Inquiry Group's thinking.

7. We propose that the CMA drops the current practice of publishing an Issues Statement. Instead, the investigation could commence on the basis of the issues set out in the CMA's Phase 1 decision. This would be an efficiency saving for the CMA since it would eliminate the CMA time spent in developing the Issues Statement, as well as reviewing responses to it.

Proposal 2: Replace Site Visit with Teach-in Session and Initial Meeting with Inquiry Group

8. We propose that the CMA offers the opportunity to have two meetings with the merging parties in the first few weeks of Phase 2: a Teach-in Session and an Initial Meeting. These meetings could be combined into one meeting if expedient to do so, for example due to scheduling difficulties for parties based outside the UK. This would not involve significant additional resources since Teach-in Sessions are already held in a number of Phase 2 investigations and the Initial Meeting would be a substitute for the current Site Visit, which is very well received by businesses.

9. **Teach-in Session:** The purpose of the Teach-in Session would be to educate the Inquiry Group and case team members on the relevant products and markets. This would benefit the CMA by ensuring the Inquiry Group and case team are up to speed quickly and providing an early opportunity for them to ask direct questions of the business people, rather than needing to wait for written responses to formal requests for information. The merging parties would also welcome the opportunity to ensure that the case team and decision-makers understand their business and any specific market dynamics. Teach-in Sessions are already used in some investigations and so this proposal would simply involve rolling out this best practice to all cases. It could be held virtually on Teams or in person (e.g. at the offices of a party or its lawyers). We think a two-hour slot should be sufficient for most cases.

10. **Initial meeting:** The purpose of the Initial Meeting would be for the merging parties to present to the Inquiry Group their views on the Phase 1 decision, indicating areas of agreement and disagreement. It would also provide an early opportunity for the Inquiry Group and case team to ask questions to ensure they understand the merging parties' views at the outset of the investigation, rather than relying on second-hand briefings from the CMA's Phase 1 case team. This would be very similar to the format of many current site visits and so would involve the rolling out of best practice. We think that a three to four hour slot should be sufficient for most cases.

Proposal 3: Replace Annotated Issues Statement and Working Papers with an Emerging Views Paper and Supporting Evidence

11. Once the Inquiry Group has progressed its thinking, we propose that the CMA should issue the merging parties with an Emerging Views Paper summarising the issues the CMA is still considering and its emerging views on those issues, as well as the evidence that the CMA had received on the issues from the parties and third parties. The CMA should provide parties with the key pieces of Supporting Evidence they are relying on (through a confidentiality ring if necessary) to provide the parties with the opportunity to respond to this evidence. This would enable parties to better assess the strength of the case against them, which could facilitate earlier remedies discussions where the parties reach the view that the CMA has a strong case. It would also enable the parties to provide their views on the evidence where this is not robust or has been

misunderstood. This would replace the current Annotated Issues Statement and Working Papers stages.

12. Parties would be invited to respond to the Emerging Views Paper and Supporting Evidence in writing, as they are currently invited to respond to the Annotated Issues Statement and Working Papers.

Proposal 4: Redesign the Main Party Hearing

13. Currently, the Main Party Hearing is structured to provide the parties with the opportunity to make a short opening statement (typically limited to around 15 minutes in duration), followed by the Inquiry Group asking pre-prepared questions of the parties for around three hours. This can cause frustration as the parties do not have sufficient time to present their case orally to the decision-makers in the case.

14. We propose restructuring the hearing to provide the opportunity for the parties to present orally their response to the Emerging Views Paper. This would be followed by questions from the Inquiry Group, some of which could be pre-prepared by the CMA team, in particular if the hearing was timed to fall after the parties had responded in writing to the Emerging Views Paper. The CMA could time a break in the hearing after the party's presentation to enable the Inquiry Group to discuss any additional areas of questioning they should pursue. We think that a four-hour hearing should be sufficient in most cases – with a two-hour presentation from the party and two hours of questions to follow.

Proposal 5: Initial Remedies Discussion

15. After the parties have seen the Emerging Views Paper and Supporting Evidence and the Main Party Hearing has taken place, we suggest that the CMA routinely invite parties to participate in a Remedies Discussion that would be held on a 'without prejudice' basis (so that the parties need not concede an SLC). This is the most likely stage at which parties may be willing to engage in a hypothetical remedies discussion where they consider that there is a strong likelihood of an SLC finding at PFs stage. It would also provide the Inquiry Group with input on remedies before they need to publish their Notice of Possible Remedies if they find an SLC at PFs stage. This should be attended by at least one Inquiry Group member so the parties have confidence that they are speaking directly with (at least one of) the decision-makers on the case. Further discussions could be scheduled as appropriate to continue the dialogue.

16. We recommend that the CMA be ready to explore remedy options for some SLCs but not others, as the strength of the CMA's case may well vary by SLC, affecting parties' willingness to engage in hypothetical remedies discussions.

17. We further recommend that the CMA indicates in revised procedural guidance that parties may request an Initial Remedies Discussion at an earlier stage of the investigation, for example if they recognise that there is likely to be an SLC in a particular area and/or the parties are trying to coordinate a global remedy package that will work for a number of competition agencies.

Proposal 6: Redesign the Response Hearing

18. The Response Hearing is held after the CMA has issued its PFs if it has found an SLC and issued a Notice of Possible Remedies. Similarly to the current Main Party Hearing, the parties are typically given the opportunity to make a short opening statement of around 15 minutes in duration, followed by the Inquiry Group asking pre-prepared questions of the parties for around two to three hours. The Inquiry Group questioning focuses almost entirely on potential remedies and remedy design. This format gives the parties the impression that the CMA has already made up its mind with regard to the SLC(s) and is not interested in the parties' views on the provisional views the CMA has reached in the PFs. This is a serious flaw in the current procedures and presents risks to the robustness of CMA final decisions.

19. We therefore propose that the hearing is redesigned in a similar manner to our proposal for the Main Party Hearing. The parties would be given the opportunity to present orally their response to the PFs and the Notice of Possible Remedies. This would be followed by questions from the Inquiry Group, some of which could be pre-prepared in advance. We think that a four-hour hearing should be sufficient in most cases – with a two-hour presentation from the party and two hours of questions to follow.

The CMA's Questions

We respond below to the questions in the Call for Input.

1. **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. Within the current timetable there is very little opportunity to engage with the Inquiry Group on its emerging thinking or comment on third party evidence prior to provision of the working papers, which often occurs three months into proceedings. Further, the parties have no opportunity to assess the evidence relied on by the Inquiry Group or whether the Inquiry Group has accurately interpreted that evidence. This makes it difficult for the parties to address the Inquiry Group's concerns.

Please refer to our Proposals 1-4 and 6 above for our suggestions as to how merging parties would be able to engage more effectively with the Inquiry Group on the substance of the case.

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

Yes. Under the CMA's current procedures, parties have little opportunity to discuss remedy proposals directly with the Inquiry Group prior to the PFs. They may find themselves trying to devise and refine remedies, submitting successive proposals over a short period of time in the last few weeks of the investigation. The inability to engage in "across the table" exchanges earlier on in the procedure can stand in the way of reaching agreement on acceptable remedies within the prescribed time period.

Please refer to our Proposals 2-6 above for our suggestions as to how there can be more effective dialogue with the Inquiry Group on remedies, which requires the parties to have a better understanding of the focus of the Inquiry Group's substantive concerns.

The review of multi-jurisdictional mergers would be more efficient if the Inquiry Group were more flexible in coordinating remedies with other competition authorities. For example, the CMA could consider holding joint remedy discussions in appropriate cases with other relevant agencies. Where the parties are prepared to concede an SLC in a given market and have already offered remedies to another competition agency that clearly address that SLC in the UK too, the CMA should consider engaging in early remedies discussions on that SLC even if there are other SLCs still under consideration.

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

Yes. Please refer to our Proposals 1-3 above. It is important that parties are given sufficient time to digest and respond to the CMA's papers.

On the Remedies Working Paper specifically, parties are typically only given five days to respond, which is very tight and can be insufficient time to provide the Inquiry Group with effective solutions to the risks the Inquiry Group has raised in the paper. The CMA should consider allowing extra time for this important remedy design stage. Our Proposals 5 and 6 would also help to start a more productive dialogue on the detail of remedies earlier in the process.

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

Improvements are required to the opportunities for in-person engagement with the Inquiry Group. Please refer to our Proposals 2, 4 and 6 above.

5. **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)?**

There are three main reasons why parties may be reluctant to discuss remedies at an early stage of the investigation.

First, merging parties may consider they have a strong case on the substance that the merger should be cleared. In such cases, they may be reluctant to engage in remedy discussions unless and until they understand that the CMA disagrees and that the CMA has strong evidence to support their case. Our Proposals 2-4 would facilitate more effective communication between the Inquiry Group and the parties prior to the PFs being issued. This is likely to result in an increased willingness to engage constructively in an Initial Remedies Discussion (see Proposal 5) where the parties realise that the Inquiry Group is likely to find an SLC and has robust Supportive Evidence to back this up.

Second, merging parties may recognise that remedies may be required from the outset of the case, but they do not understand clearly the nature of the CMA's concerns. They may therefore be unwilling to engage in remedies discussions until they understand the concerns they need to address in the remedy design.

Finally, parties may be concerned that if they engage on remedies prior to the PFs, they will reduce their chances of having the merger unconditionally cleared.

Our Proposals 2-5 would help to mitigate these concerns and support earlier discussions on remedies.

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

State of Play meetings in the European Commission's process work well as they allow the parties to engage with the case team on its emerging thinking. This provides parties with a better understanding of the issues and any remedies that may be required to address them. Our Proposals 2-5 would seek to achieve this through improving early engagement with the Inquiry Group.

The European Commission shares "key documents" with merging parties following the opening of a Phase 2 investigation and provides merging parties with access to its entire case file when it sends a statement of objections. Issues of confidentiality are usually dealt with by providing access to outside counsel under the terms of a confidentiality ring.

Not providing parties with access to the key evidence relied on by the Inquiry Group is a serious deficiency in the current CMA procedures. Unless a party can review the underlying materials that the Inquiry Group has summarised, it has no way of knowing whether the CMA has summarised them accurately, correctly and fairly understood them, been balanced in its appreciation, identified inaccuracies, or overlooked exculpatory evidence. In the current Phase 2 process, there is no way of verifying this without making an application to the Competition Appeals Tribunal ("**CAT**").

Our Proposal 3 would require the CMA to provide the parties with the evidence supporting the Inquiry Group's Emerging Views Paper (under a confidentiality ring if necessary). This would strengthen the parties' rights of defence, be consistent with international norms, relieve the CMA of the need to prepare summaries of third-party evidence, reduce the need for disclosure applications to the CAT, and would result in more robust decisions. It is also likely to result in earlier remedies discussions in cases where the parties realise that the CMA has a strong case against them.

7. Other comments on the Phase 2 process

If the limited availability of CMA panel members is causing logistical issues for the CMA in planning in-person meetings with parties, the CMA could consider reducing the size of Inquiry Groups from four to three panel members. This may make it easier for the panel members to coordinate their availability.

For Phase 2 investigations of completed mergers, the scope of interim enforcement orders ("**IEOs**") or interim orders ("**IOs**") imposed on the parties is unreasonably broad and there is insufficient opportunity to discuss this with the Inquiry Group. The process places

disproportionate obligations on both parties and on the CMA, and managing it can often be more burdensome than the substantive review of the merger, for all concerned. As noted in The European Competition Lawyers Forum's response to the CMA's public consultation on interim measures in merger investigations, which we co-authored in 2021, the Inquiry Group could provide more meaningful feedback as to actions that it considers would be outside the scope of the IEO or IO (because, for example, they are in the ordinary course of business).

Under the current system, to avoid legal uncertainty and possible fines, companies can feel obligated to "over derogate" by requesting derogations for activities that might not fall within the IEO. If the Inquiry Group were to engage more in dialogue that could help the parties avoid such derogations and thereby reduce burdens for the Inquiry Group and for themselves. Alternatively, the CMA could make greater use of focused Interim Undertakings ("**IUs**"), as have been used in a few recent cases.

In addition, it is unnecessarily burdensome for a Monitoring Trustee to be required in Phase 2 cases where an IEO/IO or IUs are in place regardless of whether there have been any compliance issues identified. Parties should be allowed to continue to self-assess in absence of any failure to comply unless the CMA has reasonable grounds to believe that compliance failures may occur.

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