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22 August 2023

Dear CMA team

Call for information: Phase 2 merger investigations

Geradin Partners is a boutique law firm based in Brussels and London that specialises in competition law, competition litigation and digital regulation. We have been involved in some Phase 2 merger cases at the CMA in recent years, and four members of our team were formerly senior lawyers at the CMA. We welcome the opportunity to respond to the CMA's timely consultation on its Phase 2 merger processes.

We believe the current Phase 2 process is fundamentally sound, but there are some revisions that could be made to ensure the process remains fit for purpose in the coming years. Our main recommendation is that the CMA could update its engagement with the merging parties, and third parties where appropriate, so that they feel more closely involved in the case. At present, the merging parties sometimes feel that they are excluded from the process. This jeopardises the quality of the CMA's decisions and it harms the credibility of the process.

We know from our experience on both sides of Phase 2 investigations that they are complex and intense. Any changes that increase external engagement will place additional pressure on the CMA staff team (and we do not believe that allocating more staff to Phase 2 teams would be beneficial). However, we think it is essential in ensuring continuing support for the CMA's mission among external stakeholders.

The remainder of this response sets out our specific recommendations.

Additional engagement with the Inquiry Group prior to the Provisional Findings (PFs)

There is a widespread and well-justified belief that the CMA becomes more reluctant to change its mind after the PFs have been issued, not least because the CMA has carefully considered the available evidence by that stage, it has publicly announced its provisional views, and the statutory deadline for the CMA's final decision is looming. The recent post-PFs reversals in *Microsoft/Activision* and *Copart/Hills Motors* cases do not undermine the general veracity of that belief (and indeed the circumstances of these reversals both suggest that some additional pre-PFs engagement would have been beneficial).[1]

Further, we believe there is no good reason for the current situation in which the merging parties are in the dark as to the CMA's views until the night before the PFs are published (and again being in the dark in the lead up to the final decision). While some parties will have correctly guessed the CMA's views, there are examples of large companies with experienced competition law advisors who seem to have been stunned at the outcome of their cases. Greater knowledge of where the case is heading would benefit both sides (and the merger regime as a whole).

At present, merging parties only meet the Inquiry Group which will be deciding their case on two occasions prior to the PFs – at the site visit and at the main party hearing. Neither of these occasions provides an ideal forum for the Group and the merging parties to freely discuss the substantive issues in the case. We believe there is scope for at least two additional meetings at which the merging parties can make targeted presentations and the Group can explain the status of their investigation, the areas they are currently focused on, and whether there are any areas that would benefit from further submissions from the merging parties. Most importantly, there would be a back and forth dialogue between the two sides. The first meeting could be in the first few weeks of the case, and the discussion would relate to the Phase 1 findings and the Group's intended avenues of investigation. The second meeting could be around 6-8 weeks later, i.e. nearer to the working papers stage of the process, and the merging parties would expect to receive a more developed update on the direction of the case with the proviso that the views are still subject to change. The Group could explain what evidence has been received and what is still outstanding.

The meetings should be as informal as possible, with no transcribers or formal minutes. As the Group's views will still be evolving, the merging parties should bear a responsibility to accept the feedback in the right spirit. For example, it would not be appropriate for the merging parties to subsequently complain about the CMA changing its focus or 'flip-flopping' on certain issues.

We would hope that the opportunity for better dialogue would not only improve the quality of the outcome and the fairness of the process, but it would also reduce the work burden on both sides. For the parties, it might reduce the need to make submissions that miss the point because they will be better informed about the CMA's focus. For the CMA, it might clear up misunderstandings, encourage the parties to submit useful data at an early stage, and enable the Group to narrow the

[1] Other examples arguably include *Ausurus Group/Metal & Waste Recycling*, and perhaps *Central Manchester University Hospitals/University Hospital of South Manchester*, but cases involving post-PFs changes to the substantive findings are a tiny percentage of Phase 2 cases.

focus of its inquiry. If it helps to keep the CMA's workload manageable, the Issues Statement could be dropped from the process as it generally adds little to the published Phase 1 decision.

In our experience, the CMA staff teams (including the Project Director) have been happy to meet with the merging parties on a regular basis. This has been greatly appreciated, and should continue but, in the minds of the senior management of the merging parties, it is often not seen as a substitute for meeting directly with the Group. This concern is amplified whenever the staff team (understandably) declines to answer a question because they cannot speak for the independent Group.

More timely disclosure of underlying analysis

At present, the merging parties receive a collection of working papers and the annotated issues statement shortly before the main party hearing. These documents vary from case to case in their length and in how much they reveal about the Group's current views. Given the huge amount of work required to produce these documents, we doubt there is scope to provide them to the merging parties any earlier in the process. However, there is plenty of scope to make them more useful to the parties, which would improve the process and reduce the risk of the PFs relying on incorrect facts or analysis. If the additional face-to-face meetings described above have been successful, there may even be scope for the CMA to produce fewer working papers.

Working papers are often very difficult for the merging parties to interpret because they contain snippets of analysis without explaining how they fit into the wider picture or what conclusions are being drawn from the analysis. We do not believe there is significant value in concealing the Group's emerging views from the parties in this way. It would not require significant extra work for the CMA to provide more of its analysis and conclusions, as these documents already exist within the CMA.

Similarly, the working papers do not tend to provide the CMA's underlying data and analysis. Their inclusion would improve the quality and fairness of the process and, in particular, would improve the quality of the PFs, which ought in turn to reduce the amount of work required post-PFs. The data and analysis are both available pre-PFs, so again it would not require significant extra work to provide these to the parties. Often the parties would be allowed to see the data and analysis once the PFs have been issued, so this would be a matter of bringing it forward to a more useful time, rather than imposing an additional consultation period.

Another reason why working papers are less useful than they might be is the reliance on quite vague statements about third party evidence. For example, a working paper might include a statement in a slide deck along the lines of "two third parties stated X". Without the context of how many third parties were asked, what precise position each of them occupy in the industry, what specific questions they were asked,[2] whether the CMA agrees with their statements, and whether there is

[2] The CMA draws an artificial distinction between surveys (for which it does consult the parties on the wording of the questions) and questionnaires (for which it does not). We believe the CMA's process would be enhanced by

conflicting evidence, the merging parties cannot intelligently respond to the working paper. Again, this would not require a significant amount of extra work. We understand the CMA's reluctance to provide full 'access to file' disclosure, and the UK courts have of course ruled that it is not required, but a revised disclosure process would reduce the high levels of frustration that merging parties currently experience.

International co-operation

It is desirable for leading competition authorities worldwide to co-operate so that the process can be made more efficient for companies involved in multi-jurisdictional mergers, and the competition authorities can save resources by benefiting from the insights of their peers. A relatively consistent approach to merger control globally also helps international businesses to operate. Co-operation between authorities helps competition authorities to understand where their views diverge so that the divergence can be managed efficiently and explained clearly to stakeholders. Other authorities can also gain from the extensive experience built up in the CMA's RBFA team.

For these reasons, we fully support the CMA (or the UK Government on its behalf) entering into co-operation agreements with the leading merger control jurisdictions worldwide, allowing for the sharing of information but also mutual assistance (including, for example, joint discussion and monitoring of remedies) in appropriate cases.[3] We encourage the CMA to push forward with such co-operation agreements to ensure that they are as ambitious in their scope as possible.

In addition, now that the CMA has several years of post-Brexit experience and has investigated high profile international cases such as *Microsoft/Activision*, *Veolia/Suez*, *Meta/Giphy*, *Cargotec/Konecranes* and others, we believe there would be a benefit in setting out some of the lessons learnt in written guidance. It would be helpful for merging parties to understand what co-operation occurs between authorities and at what stages of the case, and how the CMA deals with situations where its inquiry is ahead of, or behind, the investigations of authorities such as the European Commission and the US agencies. The guidance could also explain how the CMA takes account of remedies that are in the process of being agreed, or have already been agreed, in other jurisdictions. The existence of other authorities' remedies does unavoidably affect the CMA's substantive analysis and its remedy choice. Further clarity on these issues would be welcome.

Remedies discussions

The CMA's call for information asks for views on the perceived barriers to engagement on possible remedies prior to the PFs, and what factors might explain why the existing mechanism for 'without prejudice' remedies discussions has rarely been used in practice since its introduction in 2020.

providing the merging parties with the questions in both situations, ideally with a few days to make representations before the interviews are conducted.

[3] Take, for example, cases involving the Island of Ireland or Channel crossings, but potentially also worldwide transactions that impact different jurisdictions in the same way.

We believe that the issues discussed above are the primary reason for any lack of appetite to discuss remedies. Merging parties cannot initiate a sensible discussion about remedies if they do not know where the inquiry is headed and therefore do not know what specific issue they may need to remedy. In our view, the other reason for a lack of early remedy discussions is the CMA's rigid remedies policies relating to behavioural remedies and, to a lesser extent, partial divestitures. Putting aside the question of whether or not the CMA's remedy policies are sustainable, the merging parties may sometimes feel that there is little benefit in discussing complex remedies with the Group at an early stage because the CMA is not open minded to such remedies. If the only remedy that is likely to be accepted is a clear-cut divestiture, there is little need to discuss the issue pre-PFs.

We believe the current remedy process could also be improved by an increased willingness by the Group to give clearer steers to the merging parties. As for the substantive assessment discussed above, parties often do not know whether their proposed remedy has been accepted until they see the final report.

Conclusion

In summary, we would welcome some revisions to the Phase 2 process that would increase the face-to-face engagement with the Group and would reduce the current concealment of the Group's analysis and views prior to the PFs. This can be achieved by the inclusion of a handful of additional meetings with the Group prior to the PFs and some increased disclosure at the working paper stage (and earlier where possible).

We consent to this response being published in full if the CMA wishes to do so.

Yours faithfully

Tom Smith
On behalf of Geradin Partners