LATHAM&WATKINS

25 August 2023

RESPONSE TO CMA's CALL FOR INFORMATION

Phase 2 Merger Investigations

1. Introduction

1.1 We welcome the opportunity to respond to the CMA's call for information in relation to Phase 2 merger investigations. We note the CMA's current focus is on changes that could be made to the Phase 2 process within the existing legislation, taking into account the changes that have already been proposed in the Digital Markets, Competition and Consumers Bill.

1.2 In this response, we have made suggestions focused on addressing what we regard, from our experience and clients' feedback, as the single most important area of the Phase 2 process in need of reform, namely that, currently, merging parties do not know the full extent of the CMA's case for the merger under investigation giving rise to a substantial lessening of competition ("**SLC**"), and the evidence on which this is based, prior to a provisional public decision having been taken by the CMA from which it deviates only in exceptional circumstances.

1.3 We consider this to be a fundamental issue of due process and transparency that would address a notably asymmetric deficit under the current process in the robustness of the CMA's decision-making. Currently, the parties' case in favour of "no SLC" is rightly challenged by the case team with full access to all evidence (as well as narrative control and weekly access to the Inquiry Group). However, the robustness of decision-making process also depends on the case for SLC equally being subject to timely challenge and stress-testing via proper rights of defence. Our experience is that this is currently not the case, which makes this consultation so important.

1.4 In this regard, we have set out below the following four changes that could be made within the existing system: (1) the introduction of a Phase 2 Issues Letter and Issues Meeting; (2) greater access to information on the CMA's case file, including exculpatory evidence; (3) more flexible and frequent access to the Inquiry Group, particularly prior to publication of the Provisional Findings; and (4) clarity and consistency regarding Phase 2 'without prejudice' remedy discussions.

2. Phase 2 Issues Letter and Issues Meeting

2.1 Currently, merging parties do not know the precise contours of the CMA's case for SLC and do not have an opportunity to make representations on the CMA's position until after the CMA has published its Provisional Findings around week 16 of the Phase 2 process. Instead, merging parties have access to an Annotated Issues Statement and redacted Working Papers. To some extent, these indicate the CMA's direction of travel on SLC but they do not summarise nor typically set out a comprehensive analysis on the theories of harm (and their evidentiary support) that the CMA is considering. Importantly, they also do not set out the CMA's current views in relation to whether the transaction gives rise to an SLC.

2.2 In addition, whilst merging parties are able to respond in writing to the CMA's Provisional Findings, they only have a single opportunity to interact with the Inquiry Group at the Response Hearing where there is no meaningful ability to present their

defence to the CMA's case for SLC. The Response Hearing is by design almost entirely focused on remedies and merging parties are often given no more than 15 minutes or so at the start of this hearing to comment on substance. In our view, this is the wrong balance between the CMA's ongoing consideration of the substance of the case and remedies, which may not ultimately be relevant unless the CMA has ruled out reversing its Provisional Findings.

2.3 We consider that in circumstances where (1) the Inquiry Group has had to take a (provisional) decision on substance prior to the Provisional Findings; (2) the Provisional Findings are a public document; and (3) the focus of the CMA's investigation has moved from a consideration of substance to a consideration of remedies following the publication of the Provisional Findings, this provides practical and institutional momentum towards an outcome that is (understandably) extremely difficult to reverse. This is supported by the fact that, in practice, the CMA (including its predecessors) has changed its position on SLC following the publication of Provisional Findings in an outcome-determinative manner (*e.g.*, a change from SLC to no SLC "across the board") only rarely since 2003 and since 2014 only in exceptional circumstances (where it appears that the SLC position is indefensible, rather than an outcome where no SLC is, on reflection, decided to be the better view)

2.4 Accordingly, we suggest that merging parties know the full extent of the CMA's case for SLC, and the evidence on which that decision is based, prior to a public decision having been taken by the CMA. We also consider that merging parties should have the ability to respond to the CMA, both in writing and orally, before this decision is taken. There are a number of ways in which this could be implemented. However, our suggestion would be that, one way to address this issue, could be to include something along the lines of a Phase 2 Issues Letter, followed by a Phase 2 Issues Meeting, which we believe could work well in the current Phase 2 structure. This would be somewhat similar, but would not need to be identical, to a Statement of Objections and Oral Hearing in a European Commission ("**Commission**") Phase 2 process.

2.5 Such a Phase 2 Issues Letter would also have the benefit of aligning the process and procedural safeguards of the CMA Phase 2 process with those that already exist in the CMA's own Phase 1 process (*i.e.*, to allow merging parties the opportunity to understand and comment in writing and orally on the CMA's case for SLC, prior to Provisional Findings).

2.6 We note that the Phase 2 Issues Letter would not necessarily need to be an additional document for the CMA case to produce, adding incremental burden to the Phase 2 process and on the CMA teams. It could, for example, replace the current Working Papers. The Issues Letter could also be more concise than Working Papers and focus on the key theories of harm that the CMA is actively considering. This would make it easier for the CMA to produce and easier for merging parties to respond. The Issues Letter could also replace the Annotated Issues Statement and perhaps also the Issues Statement itself as, in almost all cases, we consider that the latter adds very little to the merging parties' understanding of the CMA's investigation given the availability of a detailed Phase 1 decision, which *de facto* forms the basis in substance for the Issues Statement.

2.7 The Phase 2 Issues Meeting could also replace the need for a separate Main Party Hearing. Contrary to the current Main Party Hearing process, the merging parties

should be given the opportunity to rebut the CMA's case for SLC and address any questions the Inquiry Group or case team might have as part of that meeting. In recent years, the CMA has moved away from a more open discussion during the Main Party Hearing to a more deposition-style approach with a strong resistance against hearing any perceived "advocacy" from merging parties' advisors (including expert commentary on technical or evidentiary points).

2.8 The Site Visit already provides ample first opportunity for the Inquiry Group to ask oral questions directly of the merging parties Therefore, replacing the Main Party Hearing with a Phase 2 Issues Meeting, would not deprive the Inquiry Group of the opportunity to hear directly and gather evidence from merging parties' business representatives and such a meeting format (as in Phase 1) allows the CMA directly to ask all additional oral questions. However, it would ensure that this occurs earlier in the process, as is more appropriate.

2.9 If the proposed Phase 2 Issues Letter were signed off by the Project Director or Senior Director of Mergers, one additional potential benefit of the suggest approach would be that the independent Inquiry Group would have the opportunity to act in a quasi-judicial capacity by taking into account not only the case team's position but also the merging parties' response, prior to taking a decision on Provisional Findings.

2.10 In terms of timing within the current Phase 2 process, the Issues Letter would need to come after the CMA's information-gathering stage but several weeks in advance of Provisional Findings, to ensure that (1) merging parties had enough time to respond in writing and prepare for the Issues Meeting; (2) the Inquiry Group has a suitable period of time to consider the arguments put forward at the Issues Meeting and the merging parties' written response; and (3) the case team has sufficient time to draft the Provisional Findings. Accordingly, sending the Phase 2 Issues Letter to the merging parties around week 8-9, with an Issues Meeting around week 12, would give the Inquiry Group sufficient time to issue its Provisional Findings in around week 16.

3. Access to information

3.1 Merging parties do not currently have access to the evidence on which the CMA has relied in reaching its decision, including any exculpatory evidence that has been received. This creates an inequality of arms and results in a fundamental lack of trust from the antitrust bar in the robustness of the Phase 2 decision-making process. Due process is therefore currently structurally flawed in the Phase 2 process as merging parties are unable to properly exercise their rights of defence.

3.2 Whilst some of the evidence on which the CMA relies on will be included in Working Papers and the Provisional Findings, this (1) often suffers from being incomplete; (2) does not normally reveal exculpatory evidence as the CMA will typically only include or give weight to information that supports its case; and (3) for reasons already outlined above, is provided too late in the process to allow the merging parties to meaningful engage and rebut. Whilst failing to reveal exculpatory evidence may be consistent with an adversarial model, it fundamentally undermines the "inquisitorial" nature of the

Phase 2 structure and process which should allow for challenge to incriminating evidence via timely and full access to exculpatory evidence.[1]

3.3 As a result of the *Meta/Giphy* litigation, the CMA now provides more information than was previously the case. However, this continues to be insufficient since (1) the CMA still only discloses evidence that it chooses to rely upon in its Provisional Findings through an unredacted version and (2) this information is not timely as it is not provided to the merging parties before the CMA has taken a public decision on SLC.

3.4 We would recommend providing merging parties with access to significantly more information at the same time as issuing its Phase 2 Issues Letter. One way in which this could be achieved includes by way of a confidentiality ring. At a minimum, this should include the CMA's questionnaires to third parties and their responses, any transcripts of calls or hearings with third parties, market share data, survey results, and any other documentary evidence obtained from third parties.

3.5 By disclosing this in a confidentiality ring and providing the CMA's case for an SLC in a Phase 2 Issues Letter, this would negate the need for lengthy Working Papers since the parties would have both access to *all* of the evidence and the CMA's case for SLC. This would give the parties the opportunity to present views on evidence it might never otherwise see in the current process and on CMA analysis that it might only learn about following the publication of Provisional Findings.

3.6 We consider this disclosure of information, in combination with knowing the CMA's full case for SLC, to be particularly important in the UK system where oversight by the CAT is only at the judicial review standard and does not permit a merits review. Where CMA decisions on substance can typically only be overturned if they are irrational, which is an extremely high evidentiary bar for merging parties to meet, it places even greater emphasis on the CMA's administrative procedure to ensure due process and to permit merging parties to fully exercise their rights of defence. International confidence in the robustness of the UK system depends, in part, on confidence in these points of due process.

4. Access to decision-makers

4.1 Access to the Inquiry Group is usually limited to three meetings per investigation; at the Site Visit, at the Main Party Hearing and at the Response Hearing, if one is needed. In relation to these meetings, we consider that (1) the Site Visit is too early in the process as the Inquiry Group is only in the early phase of its investigation; (2) the Main Party Hearing has become more of a deposition-style session and there are very limited opportunities for the merging parties to engage on the crux of the substance of the case – such as the theories of harm that may underpin prohibition or other remedial action; and (3) the Response Hearing is too late in the process, as noted, because the CMA has already reached a public decision on SLC and its focus has shifted to a consideration of remedies.

[1] Even in most common law adversarial models, however, it is normally a requirement that the plaintiff or prosecutor provides discovery or access to exculpatory evidence.

4.2 By international comparison, the Commission is typically more flexible in terms of Phase 2 meetings, where it is not uncommon to have multiple meetings with the head of unit, the Deputy Director General for Mergers and also the Commissioner, if needed.

4.3 We would recommend increased access to the Inquiry Group or at least the Inquiry Chair along with the Project Director. One suggestion to address this could include an early teach-in followed by a weekly or bi-monthly state of play call(s) to discuss progress of the case, evidence received, address any questions the Inquiry Group might have, and discuss what further input might be of most assistance to the Inquiry Group at that stage (if any).

4.4 We also consider the views of the case team on economic and other technical evidentiary matters to be very important, as the case team will present the narrative conclusions on such detail to the Inquiry Group, who cannot be expected to probe it in forensic detail. Relative to the pre-CMA and early-CMA era, the CMA has substantially cut back on the ability to engage with CMA staff on such issues, even if they are novel, highly consequential and do not necessarily inherently favour the parties' case. In our experience, virtual meeting requests are often denied outright. To address this cultural change that undermines the "truth-seeking" posture of the regime, it would be useful to build in a presumption of at least 1-2 technical meeting(s) with the case team at Phase 2 well in advance of the Issues Meeting / Main Party Hearing stage.

5. Remedies

5.1 The Phase 2 process would also benefit from clarity on the fact that merging parties are able to engage with the CMA on the substance of potential remedies, through 'without prejudice' discussions, at any stage of the process. Currently, other than when the fast-track Phase 2 process is used (and merging parties therefore have to concede all SLCs found in Phase 1), the substantive remedy discussions are often left to after the Provisional Findings and, in practice, normally take place at the Response Hearing. Experience in trying to engage in such 'without prejudice' discussions earlier in the Phase 2 process has been mixed and the process could therefore be improved including through (1) clearly stating (*e.g.*, in updated procedural guidance) that such remedy discussions are possible at any point in the Phase 2 process; and (2) ensuring that such guidance is consistently applied by case teams in practice.

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