Linklaters

CMA call for information on Phase 2 merger process

Linklaters' Response

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1 Introduction

(1) We welcome the opportunity to respond to the Competition and Markets Authority's ("**CMA**") call for information on the Phase 2 merger process. In this paper, we comment on: (i) engagement with the independent inquiry groups that take decisions in Phase 2 mergers (the "**CMA Panel**") (section 2); (ii) engagement with the CMA case team (section 3); (iii) access to file (section 4); (iv) facilitation of remedies discussions early in Phase 2 (section 5); and (v) internal challenge within the CMA (section 6). The **Annex** sets out our suggested adjustments to the Phase 2 timetable, reflecting these comments.

2 Engagement with the CMA Panel

(2) The current Phase 2 process provides for two opportunities for the merging parties ("**Parties**") to directly interact with the CMA Panel before publication of the Provisional Findings ("**PFs**") – the site visit and main party hearings ("**MPH**"). These are both valuable opportunities for engagement and for Parties to answer questions about their businesses. However, we think that there is scope for the Parties to engage more effectively with the CMA Panel at an earlier stage in relation to the competitive assessment of the case and that such engagement would assist the CMA to reach more robust PFs and ultimately, Final Reports.

2.1 Ensuring the CMA Panel hears "both sides" of the case from the outset

(3) We propose that the Parties are, as a matter of ordinary course, given a right to provide the CMA Panel with a "teach-in" early in the Phase 2 process (before the site visit). Under the current system, the CMA Panel hears the case team's perspective early in Phase 2. Given many members of the case team typically transfer from Phase 1 and thus are likely to have some sense of ownership of the Phase 1 referral decision, it is not realistic to expect such a briefing could be truly "neutral". Allowing the Parties to conduct a teach-in would ensure that the CMA Panel also has exposure to the Parties' perspective early in the Phase 2 process and therefore provide a more balanced starting point.

(4) We have had mixed experiences in the past of the CMA offering / agreeing to teach-ins during Phase 2 processes. While some CMA Panels have been willing to attend teach-ins (or even proactively requested them), others have refused any meetings until the site visit. In cases where we have had teach-ins, we believe they were useful for the CMA Panel and Parties appreciated the opportunity to engage and have their perspective heard early in the process.

(5) We would welcome having a right to a teach-in built into the process to ensure consistency in Phase 2 inquiries, with Parties able to waive the right if not deemed useful.

2.2 More effective and efficient engagement on the central question of SLC in the critical phase of the inquiry

(6) The period of the CMA's inquiry in the lead up to PFs is the most critical part of the process for the central question of SLC, but the current system does not allow the Parties to engage with the CMA Panel on its SLC case until after publication of PFs. In difficult cases this is generally too late in the

process for meaningful engagement[1] and in practice, the CMA rarely retreats from the position set out in its PFs (and as discussed further below response hearings tend to focus on remedy design).

(7) We believe that relatively minor procedural changes could allow the Parties to understand and more effectively engage with the case for SLC in their written response to the Annotated Issues Statement ("**AIS**") and Working Papers ("**WPs**"), as well as in the MPH. This would in turn assist the CMA to reach more robust PFs and avoid a situation where the Parties feel that they have not had visibility of or the opportunity to respond to the CMA's SLC case until after PFs, when it is in practice, generally "too late". We outline below suggested changes to the process in relation to: (i) the AIS/WPs; and (ii) the MPH.

2.2.1 An AIS that engages directly with the key issue of SLC

(8) The CMA currently provides Parties with an AIS containing its emerging thinking on matters outlined in the Issues Statement as well as WPs, but these documents stop short of explicitly articulating the case for SLC (or SLCs) the case team is considering. This leads to a situation in which the Parties and their advisors, are seeking to "read the tea leaves" of the WPs and AIS to make an educated guess as to the shape any case for SLC could take. While experienced advisors can make relatively accurate educated guesses in many cases, this is not always the case and can result in the MPH and response to the AIS / WPs being at least partially if not wholly "shadow boxing", which is inefficient for both the CMA and the Parties.

(9) We believe Parties could more meaningfully engage with the potential SLC case in writing and at the MPH (and therefore more effectively assist the CMA's inquiry) if the AIS explicitly sets out the SLC case. While we appreciate one of the reasons for the current approach is that the CMA Panel has not yet formed even a provisional view on the SLC question, we think this could be resolved if these documents took the form of an Issues Letter in Phase 1 – i.e., that they are explicitly not intended to be balanced, but rather to put the case for SLC at its highest.[2]

2.2.2 A restructured MPH to allow direct engagement on the SLC question

(10) The MPH is currently structured as two separate hearings with each of the Parties. During each hearing, the CMA asks the relevant business a number of questions to test evidence and explore key issues. Any opening statement from the relevant party is limited to about 15 minutes. The main drawback of the question-and-answer format is that there is no opportunity to discuss the potential theories of harm and the Parties' views on these.

(11) We suggest that the MPH is restructured so that the CMA first conducts a "Joint Issues Meeting" where both Parties attend and present their response to the AIS and WPs. Like the Issues Meeting in Phase 1, this would allow the Parties to engage with the theories of harm being considered, as well as affording the Parties the opportunity to provide and explain additional evidence. An agenda can be agreed in advance so that the hearing is focussed on key topics.

(12) The CMA would then conduct follow-up hearings with each Party in which it can ask any follow-up questions coming out of the Joint Issues Meeting similar to the existing question-and-answer format of the current MPH structure.

(13) We do not consider that these changes would lead to a materially greater time commitment for the CMA. Under the current process, it is often the case that the Parties want to respond to the SLC case either

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[1] As noted by the CAT in *Sainsbury's and Asda v CMA* (2019), *"Although the Applicants will in due course be able to make submissions in response to the Provisional Findings, we think it is unrealistic to suggest that once the Group has reached provisional conclusions based upon those underlying analyses, the Group would readily require the CMA staff to adopt a different methodology, or even significantly to revise the underlying analysis. That stage of the inquiry will effectively be passed."*

[2] We expect that in the majority of Phase 2 cases there will remain a live question on SLC at this stage of the CMA's investigation, but in rare cases where any SLC has already been effectively dismissed at early stages, this could be dispensed with.

in the abstract at MPH or in detail during the remedies hearing after PFs. Allowing for a "Joint Issues Meeting" at the start of the MPH gives the Parties the opportunity to do so at a predesignated time and likely would lead to efficiencies elsewhere in the process.

2.3 Engagement after publication of PFs

(14) Parties should be able to continue to engage directly with the CMA Panel on the SLC case after publication of PFs. In our experience, the response hearings after PFs tend to focus primarily (sometimes exclusively) on remedies. Parties should be given an adequate opportunity to engage on substance to ensure the PFs are indeed treated as provisional.

(15) In cases where the CMA amends the theories of harm after publication of the PFs, we would recommend there is consultation with the Parties on these changes. In some cases, it will clearly be appropriate for this to be through the publication of supplemental PFs, but in others where changes are more minor, private consultation with the Parties before publication of the Final Report may suffice.

2.4 Availability of CMA Panel

(16) More generally, given the limited opportunities for direct engagement, it is important for the Parties to have access to the full CMA Panel during key "set piece" meetings. When the CMA Panel is being chosen, we would recommend that consideration is given to the diary/availability of the Panel members (particularly in light of any other commitments they have), to ensure that they have sufficient availability to have a level of flexibility around the dates of key milestones in the case. Given the significant resource constraints imposed on the management of companies undergoing a Phase 2 investigation, we consider it appropriate for adequate and commensurate resource to be made available by the CMA Panel.

3 Ongoing engagement with the CMA case team

(17) While we recognise there is an understandable desire to formalise communications between Parties and the CMA case team, we believe there is a benefit to collaborative interactions and engagement between the Parties and the case team on evidential issues which inevitably arise through the Phase 2 process.

(18) We have had mixed experiences on the level of "informal" ongoing engagement case teams are willing or able to offer but have had productive and helpful interactions with case teams in some cases. For example, in a case where there were questions over the tender data provided by the parties, we had a direct discussion between external economic advisors and the CMA's economists which assisted to cut through a number of issues. Similarly, direct engagement on the economic evidence and analysis submitted by the Parties would allow for a discussion on any points of disagreement / misunderstanding. We have in some cases also had productive direct discussions around availability of documents.

(19) We believe these interactions can assist understanding on both sides and enhance the efficiency of the process, among other things, by avoiding the need for, or reducing the scope of, RFIs. We would welcome this type of engagement being institutionalised through formal clarification that the case team will be available to engage *on ad hoc* issues throughout the process.

4 Access to file

(20) We welcome the CMA's increased use of its mandatory information gathering powers to collect information from third parties. As the CMA has rightly recognised, such evidence is particularly important in fast-evolving markets in which the competitive strategies of rivals is often critical to a full and accurate competitive assessment. We also welcome that the CMA now provides the Parties' advisors with access to certain evidence from third parties. However, we believe that the current approach limits the Parties'

ability to make informed submissions and engage with (and where appropriate, challenge) the CMA's thinking in a timely fashion. We believe the following changes would improve this.

(21) **Full access to file.** The Parties should be given full access to file rather than select extracts or summaries. In the case of investigations under the Competition Act 1998, the CMA provides each party with (a) copies of the documents directly referred to in the Statement of Objections; and (b) a schedule containing a detailed list of all documents on the CMA's file. Businesses are given a reasonable opportunity to inspect additional documents listed in the schedule upon request and the CMA provides access to file and uses confidentiality rings where appropriate in other situations.[3] We believe it would be appropriate for the CMA to adopt a similar process during a Phase 2 inquiry, to protect the Parties' right to reply, and do not consider that this would negatively impact the CMA's timetable, given confidentiality rings can be set up swiftly to include external advisors.

(22) **Timing.** We have concerns that the CMA only discloses third party evidence after publication of PFs. It would be more effective for the Parties to be given access in early stages of Phase 2 – no later than with the AIS and WPs, but sufficiently in advance of the MPH – to allow engagement and response to the CMA's case. Given that confidentiality rings are now a standard part of the CMA's Phase 2 process, this should not result in any incremental administrative burden. This would give Parties the opportunity to address and respond to critical evidence prior to the CMA taking issuing its PFs.

(23) **Phase 1 evidence.** In cases where important third-party evidence has been gathered at Phase 1 and is being relied upon, the CMA should consider providing access even earlier. As above, this should not result in any incremental administrative burden.

(24) **Allowing disclosure to Parties where necessary.** While we appreciate the rationale behind CMA's standard approach of disclosing third party information only to external advisors through a confidentiality ring, we believe there will be some circumstances in which *at least some* confidentiality ring information needs to be shared with *at least some* individuals at the Parties. This might be the case, for example, if the information is so material that external lawyers are unable to take proper instructions without at least some limited disclosure to their client. This may be rare, but we believe the CMA should be open to the inclusion of at least in-house legal counsel in a more limited confidentiality ring in appropriate cases.

5 Early engagement on remedies

(25) The CMA has sought views on whether there are barriers to discussing remedies at an early stage of a Phase 2 process. We believe that the biggest challenge in this regard is that it is not possible to engage formally with the CMA on remedies early in Phase 2, unless the Parties concede that there is an SLC. This is particularly problematic in more complex remedies cases e.g., when remedies are being identified for interlinked theories of harm, or where a structural remedy is not available. The Phase 2 timetable is so highly compressed that without early engagement, the Parties may simply be "timed out" of offering an adequate remedy.

(26) We believe that the process would be improved if Parties are able to engage constructively with the CMA on remedies in parallel to engaging on the question of SLC, similarly to how undertakings-in-lieu are considered in Phase 1. There are a number of ways this could work. One option is to have resource from the Remedies, Business and Financial Analysis Group assigned to each Phase 2 case soon after reference. The CMA might also consider appointing a Director from its Mergers team to be available to any remedies workstream.

(27) In our view, having dedicated and expert individuals available to discuss potential remedies would be more effective and attractive to Parties than the current informal option of "without prejudice" discussions

[3] Guidance on the CMA's investigation procedures in Competition Act 1998 cases, paras 11.25-11.26.

with the case team for several reasons. The discussions could be kept confidential from those considering the SLC question, unless and until the Parties agree otherwise. The inclusion of team members for the specific purpose of discussing potential remedies at the outset would also alleviate the resource constraint that inevitably exists in any attempt to informally "dual-track" SLC and remedy discussions.

6 Institutionalising internal challenge

(28) Prior to the creation of the CMA, the Phase 2 team within the Competition Commission was entirely different to the Phase 1 team within the Office of Fair Trading. This is not the case with the CMA case teams. While in the early days of the CMA only one or two case team members would move to Phase 2, in recent years it has become common for many if not most of the key members of the Phase 1 case team – often including the Project Director – to move to Phase 2.

(29) We recognise there are significant efficiencies of continuity. The main drawback of this is that it compounds the risk of (Phase 1) confirmation bias. While the decision is made by the CMA Panel, the case team plays a critical role in determining and framing the evidence considered by the panel members. There is therefore a strong case to institutionalise a process of internal scrutiny and challenge.

(30) The CMA's Phase 1 process provides a blueprint for this. A CMA staff member is charged to act as a "devil's advocate" and comment critically on the case team's recommended outcomes. This enhances the level of scrutiny and assists the Phase 1 decision maker. We believe there would be similar benefits to having a Phase 2 "devil's advocate" to support the CMA Panel. It will be important to ensure that this role is adequately resourced at a senior level, and the person has the ability effectively advocate for the "other side" (whether it is for, or against clearance).

Annex Proposed adjustments to Phase 2 timetable (additions shown in blue)

Current process		Adjusted Process
Day 1	Reference Decision	Reference Decision
Weeks 1-6 **Phase 2 Information gathering**	CMA issues information requests to Parties and third parties	CMA issues information requests to Parties and third parties
	Site Visit	Teach-in (around Week 2) for the Parties to present their case
		Site Visit (Week 4-5)
	Issues Statement	Issues Statement
		CMA to provide Parties with access to any Phase 1 evidence on which the Issues Statement is based
	Responses to Issues Statement	Responses to Issues Statement
Weeks 7-15 **Phase 2 assessment**	Annotated Issues Statement	Annotated Issues Statement that also provides CMA's current thinking on potential SLC case (i.e. "case for SLC")
	Working Papers	Working Papers
		Access to File: CMA to provide access to third-party evidence cited in AIS and WPs to advisors in a confidentiality ring
	Response to Annotated Issues Statement and Working Papers	Response to Annotated issues Statement and Working Papers
	Main Party Hearings – 3 hours with each Party	Main Party Hearing (modified format): **Joint Issues Meeting** where both Parties attend and present their response to the SLC case laid out in the AIS and WPs **Follow-up hearings** with each Party where the CMA can ask any follow-up questions
Week 15	PFs	PFs
	Notice of Possible Remedies (if applicable)	Notice of Possible Remedies (if applicable)
	Establish confidential ring for advisors to have access to key internal documents and third-party evidence.	**Full access to file:** CMA to provide access to <u>all</u> third-party evidence to advisors (to the extent not already done along with AIS and WPs)
Weeks 16-24 **Post PFs**	Responses to PFs	Responses to PFs
	Response Hearing	**Response Hearing:** CMA to ensure that Parties are allowed to make detailed submissions on the SLC case, with sufficient time available for Panel engagement on these, and not just Q&A focused on remedies
	Final Responses	Final Responses
Week 24	Final Decision	Final Decision