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Response to CMA call for information on Phase 2 mergers

Introduction

1 Mills & Reeve LLP welcomes the opportunity to comment on the CMA's call for information on Phase 2 merger investigations published on 29 June 2023 (the "call for information").

2 Mills & Reeve is a national UK law firm with 156 partners and over 600 lawyers operating from seven offices in Birmingham, Cambridge, Leeds, London, Manchester, Norwich, and Oxford. Mills & Reeve has been named in the Sunday Times 100 Best Companies to Work For list for a record 20 years running and has recently been awarded the highest, platinum status by Investors in People. We are one of the top performing law firms in the UK when it comes to client satisfaction. Our annual survey of almost 700 clients fed-back a recommendation score of 91% (although we are striving for 95% as part of our 2025 strategy).

3 Mills & Reeve's competition practice is made up of experts specialising in this field, with the lead partner having over 23 years of experience advising domestic and international clients across a wide range of UK and EU competition law matters, including experience of UK merger control. We act for a range of clients who have varying experience of CMA merger investigation processes. Our comments below are based on the experience of our competition team in advising on all aspects of the CMA merger process, including at Phase 2, both at Mills & Reeve and in their previous firms.

4 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. In order to assist the CMA, we have provided focussed comments, limited to the questions asked in the call for information. We would be happy to discuss our responses or our experiences with Phase 2 merger investigations more generally, at the CMA's convenience.

5 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA website.

Response to the CMA's call for information on Phase 2 merger investigations

Key issues the CMA wants to explore

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?

6 We consider that "effective" engagement would provide an opportunity for both the merger parties and the inquiry group / CMA phase 2 case team[1] to share thinking on the competitive assessment of a merger in a genuine process of discussion and interaction, rather than being limited to a small number of 'set pieces' / formal contact.

7 We consider that engagement opportunities of this nature between the merging parties and Inquiry Groups on the substantive competitive assessment of a merger are limited at present. Although the merging parties have an opportunity to meet the CMA case team at the first meeting and to put forward substantive evidence in response to information requests (in weeks 1-6), the first real opportunity to review the Inquiry Group's thinking and submit comments and evidence to shape this thinking comes only at the annotated issues statement / working papers stage prior to the main party hearing (circa weeks 10 -12). This can feel late in the process and the merging parties' perception can be that, at the point at which the CMA has already "gone into print," it may be difficult to influence materially the views set out in the working papers.

8 We would therefore welcome additional opportunities for effective engagement with the CMA on the substance of the merger before working papers are published. We suggest this could be at achieved at two points.

(a) Firstly, at the initial case management meeting between the CMA case team and the parties. Although this meeting is clearly focussed on procedural points and should, in our view, continue to have this focus, it would be an early opportunity for the parties to present an overview of the transaction, the relevant market(s) and sector(s), and to describe the conditions of competition. The CMA case team could then put questions to the parties. We consider that this would be a valuable opportunity to provide an accessible way for the CMA case team to understand the parties' positions and flush out early questions or points of clarification. Recognising that preparing a presentation could potentially place an additional burden on some merger parties and may not be appropriate in all cases, we would also be

[1] Where relevant, we have commented on the ability of the merger parties to engage with the Inquiry Group that is appointed by the Chair of the CMA, as well as the CMA phase 2 case team which supports the Inquiry Group.

in favour of the merging parties being invited to make a presentation, rather than it being an obligation.

(b) Second, we consider an additional "early thinking" meeting would have merit. We consider this should take place before the annotated issues statement / working papers are published and would give the CMA case team the opportunity to present the overall direction of travel (as set out by the Inquiry Group), initial thinking on the substance of the merger and the evidence received to date. The CMA case team could talk though their understanding of specific types or items of evidence received and seek views on its interpretation or ask for clarification.

9 We acknowledge that there may be reluctance on the part of Inquiry Groups and case teams to share thinking before it is fully developed, to avoid criticism of any misunderstandings or lack of clarity, and also to avoid any reliance being placed upon early views. However, we believe that the benefits of sharing initial substantive thinking earlier in the process and allowing it to be discussed would outweigh these risks, in particular if the meeting is clearly billed and understood as a "thinking meeting," and not binding on the Inquiry Group.

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

10 From the merging parties' perspective, there can be a sense that important remedies discussions are rushed and come too late in the phase 2 process (week 16 onwards). Set against this is a possible reluctance on the part of merger parties to engage too early or too deeply on remedies before the Inquiry Group's thinking on the substance crystallises, in other words, at a time when the case might still be "won" thereby avoiding the need for remedies altogether (see also our comments in paragraph 21 of our response).

11 One possible way for dealing with this would be to have a completely standalone remedies hearing after the response hearing and before the publication of the final report. This would allow the parties to discuss and engage more deeply with the Inquiry Group on remedies. It would also avoid the parties having to advocate in the same hearing both for clearance without remedies, and for specific remedies in the event that clearance is not achieved.

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?

12 In accordance with our comments above, we consider that the opportunity to respond to the annotated issues statement / working papers and would be improved if CMA case team and merger parties were able to engage in a substantive discussion on these prior to their publication, through an "early thinking meeting."

13 In practice, where the publication of the working papers is staggered, this can also make it difficult for the merging parties to respond effectively. In our view, this could be improved if the CMA were to share an indicative timeline or work plan setting out which papers are anticipated and when they are expected to be published so that the parties can plan and allocate resources appropriately. This might also allow the parties to respond more holistically in relation to the overarching concerns or issues identified by the Inquiry Group, rather than responding in a piece meal way.

14 As noted above, any timeline/ work plan should not have a binding effect on the CMA and would be provided for the parties' convenience only.

15 Written submissions in response to the provisional findings could also be made more efficient if the CMA also produced an overview or mapping document, setting out in general terms where the working papers have been taken into account in the provisional findings, or changed or abandoned. This could also set out which of the parties' main comments have been accepted or not. From the merger parties' perspective, it can be inefficient and time consuming to try to "track through" comments made on the working papers into the provisional findings, and this would help to avoid this. It would also enable both the CMA and the merger parties to focus clearly on those issues which remain open or in dispute.

16 Finally, we consider that the process for providing written submissions on the non-confidential versions of documents prior to publication does not work well. At present, confidentiality reviews are usually conducted under very short deadlines and we consider that at least a full working day should be allocated to making representations, given that the substantive documents and their annexes (provisional findings; notice of possible remedies and final report) are often lengthy.

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

Main party hearing

17 Although the merging parties are able to make opening and/or closing statements at the main party hearing if they so wish, typically only 15 minutes are allocated to these aspects and the majority of the main party hearing is dedicated to questions from the Inquiry Group and the case team, with those questions being prepared in advance. The perception of some merging parties, therefore, is that the main party hearing does not offer a meaningful opportunity for the merger parties to present or discuss directly with the Inquiry Group the issues set out in the annotated issues statement / working papers. The format of the main party hearing also means that this hearing can be an adversarial, high-pressure experience for the merging parties.

18 We consider that one option for improving the main parties hearing would be to allow the merging parties to suggest agenda items and/or indicate key points they wish to explore or discuss with the Inquiry Group. This may create a less adversarial, more collaborative discussion of the facts and issues at hand.

Response hearing

19 At present merger parties are allocated only a short time at the beginning of the response hearing to make brief representations on the provisional findings before the agenda turns to remedies. As this is the only opportunity for the merger parties to address the Inquiry Group (the decision makers in the case) directly on substantive points to come out of provisional findings and is therefore an important interaction for both the Inquiry Group and the merger parties, our view is that this aspect of the current format does not work well. As explained above, we consider that the response hearing could be improved by dedicating that hearing to representations and discussions on the provisional findings and holding a separate hearing for discussions on remedies.

20 Overall, we consider that more frequent, lower key engagement with the CMA case team and the Inquiry Group would be beneficial and help to reduce the sense that the process is a series of “high stakes” set pieces, with limited meaningful opportunities for discussion.

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)?

21 Our view is that the existing mechanism for “without prejudice” remedies discussions prior to publication of provisional findings is rarely used because the parties fear that early engagement on this topic will lead to the presumption that they have lost the substantive case for clearance

without remedy. This fear is genuinely held, notwithstanding that the discussions are stated to be on a "without prejudice basis." See also our comments above in respect of the remedies hearing.

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

22 We have no specific comments on this question, save that caution may be appropriate when considering the scope for reading across procedural aspects from merger control regimes which operate quite differently to the UK system.