Slaughter and May response to CMA Call for information: Phase 2 merger investigations

1. Executive summary

1.1 We welcome the opportunity to respond to the Competition and Markets Authority's (**CMA**) call for information on its Phase 2 merger investigation process (the **Call for Information**).

1.2 We are supportive of the CMA's initiative to improve aspects of the Phase 2 process to ensure that the process operates as effectively and efficiently as possible. As we explain below, there are certain aspects of the CMA's current practice that can give rise to significant issues for merging parties and their advisors, impacting procedural fairness and substantive outcomes. We would urge the CMA to consider these issues as part of its work to identify areas for improvement, and to address them appropriately in its practice and in the next iteration of the CMA's Guidance on jurisdiction and procedure (CMA2) (the **Guidance**) and other relevant CMA guidance.[1]

1.3 In our response below, we have commented on the key issues identified by the CMA in its Call for Information document. We also include some constructive suggestions on other areas of the Phase 2 process that could be improved. Overall, we believe that improving transparency and engagement between the CMA and merging parties, and reducing the burdens of the current process, would benefit both businesses and the CMA, allowing parties, advisors, and case teams to focus on substantive issues.

1.4 Two particular aspects of the current Phase 2 process seem to us in most urgent need of redress:

(i) The highly stylised "key touch points" approach to engagement with the CMA (and the inquiry group in particular) results in a lack of meaningful opportunities for open, "two-way" dialogue with the CMA on both substance and remedies.

(ii) The absence of any robust access to file process means that the merging parties are largely in the dark about the evidence being used to support an adverse finding.

2. Response to Call for Information questions

2.1 The CMA has identified six key areas on which it is seeking views, which we address in turn below.

2.2 In line with the CMA's focus (as stated in its Call for Information document), our comments focus on changes that could be made within the existing legislation, taking into account the impact of the changes already proposed to the UK merger control regime in the recent Digital Markets, Competition and Consumers Bill.

[1] Including, in respect of the Phase 2 process, Rules of procedure for merger, market and special reference groups (CMA17) and Transparency and disclosure: Statement of the CMA's policy and approach (CMA6).

A. 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?

2.3 For effective engagement to be possible, merging parties require more regular and consistent access to both the case team (and not just principal case officers (**PCOs**)) and the inquiry group (beyond the site visit and hearing), throughout the Phase 2 process.

2.4 The current system based on mechanical "key touch points" at Phase 2, with requests for information and the parties presenting to the inquiry group only at the site visit, and being questioned by the inquiry group at the hearing stage, is inadequate. To facilitate engagement on issues that matter, there should be much greater opportunity for "two-way" dialogues between the CMA and merging parties.

2.5 Notable areas of improvement in this regard would include:

(i) A working assumption that each party would be given at least a full day (with breaks) to present to the inquiry group as part of their site visit. Should the parties not need that time, it of course does not need to be taken but repeated experiences of the CMA case teams challenging the duration of site visits (and even the length of individual sessions within a site visit) leaves a strong impression of minds already being closed to the parties' arguments at the earliest stages of Phase 2.

(ii) A requirement that all members of the inquiry group will attend the site visits and the hearings in person absent exceptional emergency circumstances. The availability of Panel members and the likely weeks of site visits and hearings are known to the CMA at the time of the appointment of the inquiry group. For parties to discover that their case is being decided by someone they have never met, nor had the chance to speak to, creates a particularly negative impression of the CMA process and cannot be optimal for the absent Panel member with respect to their understanding of the case.

(iii) At least two additional substantive discussion meetings (distinct from the main party hearings) between the CMA and the merging parties, one before and one after the issuance of the annotated issues statement. These meetings should involve the CMA giving an update on the status of their investigation and allow the merging parties to make representations in response to that update. These meetings could either involve the inquiry group directly, or at least the case team presenting the views of the inquiry group as well as the case team.

(iv) At least one substantive discussion meeting (distinct from the response/remedies hearing) between the CMA and the merging parties after the provisional findings stage, before the issuance of a draft remedies notice.

(v) The response hearing should be a two-way dialogue where the parties are able to challenge the CMA's provisional findings and seek the inquiry group's views. The response hearing should therefore more clearly consider issues of

substance, and not just focus on remedies. Our experience is that on cases where remedies are available, the "response" element is cursory at best.

2.6 At the working level, it should be a minimum requirement that all directors and equivalents be available by phone. It is not appropriate that often only the PCO's telephone number is made available to the merging parties.

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

2.7 While the CMA encourages parties to discuss remedies before the CMA has reached its conclusion, the opacity of its current process discourages that approach. Even when parties decide to engage in early and detailed discussions on remedies with the CMA, our experience is that parties often have limited visibility over the CMA's developing views on a case until the later stages of the Phase 2 process. Crucially, while other competition authorities are willing to be transparent about their emerging thinking in a remedies context, the CMA's views on a remedies package can be withheld from the parties and other regulators until the publication of the final report. This opacity, which is built into the CMA's Phase 2 practice and process, is neither workable nor acceptable as a matter of good public administration.

2.8 The challenges of the current remedy process are then compounded as what should be the default position (where parties discuss remedies only after the CMA has reached a negative conclusion) does not work well. Parties should be given more time to engage and also to allow for the practical implementation of remedies. They should not be penalised for following the standard procedure rather than pre-emptively offering remedies, particularly in circumstances where it is not possible for them to ascertain how the CMA's thinking on a case is evolving, owing to the lack of feedback from the CMA (as explained above).

C. Do the existing key opportunities to make written submissions work well? How could they be improved?

2.9 The response to the provisional findings does not represent a meaningful opportunity for parties to share their views on the CMA's thinking: the CMA very rarely changes its conclusions between provisional findings and the final report.[2] A more meaningful alternative would be to dispense with published provisional findings and instead provide more meaningful conclusions at the working papers stage alongside access to the file. This would give merging parties a genuine opportunity to address the inquiry group's views at the main party hearing or a separate meeting, coupled with the suggestions above in terms of meaningful two-way dialogue.

2.10 Parties' rights of defence are also impacted by a number of Phase 2 processes running in parallel. The response to the issues statement usually runs in parallel with the site visit; and the working papers / annotated issues statement stage usually coincides with

[2] We are only aware of four cases since 2008 where the CMA, having initially issued adverse provisional findings, has reversed its findings of a "substantial lessening of competition" altogether in its final report – clearing the transaction on that basis.

the main party hearings. These events are also taking place whilst the CMA is continuing to send the parties multiple section 109 requests and/or RFIs. This places a significant constraint on the ability of merging parties to adequately prepare written responses whilst also preparing for the site visit or main party hearing. Either the periods for responding to those papers should be extended or they should more clearly be sequenced rather than running in parallel. The current approach does not allow the parties to provide meaningful and comprehensive submissions.

2.11 We note that the CMA states in its Guidance that the Phase 2 process is "*not well suited to accommodating unsolicited submissions*" outside of the key stages of the process.[3] However, the ability to make submissions throughout the Phase 2 process (and especially during the initial phase of the process) represents a key avenue for the parties to submit evidence and arguments to the CMA. In line with our comments above, ongoing dialogue between the CMA and the parties should be encouraged, not deterred.

D. Do the existing key opportunities for direct in-person engagement with the inquiry group work well? How could they be improved?

2.12 As a general comment, the existing opportunities for direct in-person engagement are limited to highly stylised "set piece" interactions. This does not enable constructive, working level interactions to take place with the CMA on the substance of a case or on remedies. This represents a key flaw in the Phase 2 process that the CMA must address, for efficiency reasons and to ensure that parties have a genuine opportunity to understand and address the inquiry group's views (see above for further suggestions in this regard, including in relation to mandatory inquiry group attendance at these events).

2.13 In addition, our experience is that, in the context of the main party hearing, the pre-hearing agenda provided by the CMA is often lacking in detail, to the detriment of the parties' rights of defence. Given the large number of documents provided to the CMA during the course of an investigation, it is unreasonable and procedurally unfair to expect individuals representing the parties to be able to answer questions on the spot in relation to internal documents which they may have never seen before, or which they may have been granted very little notice to consider (e.g. one day).

2.14 We would therefore recommend that the CMA codify in its Guidance its practice of providing the parties with a comprehensive list of documents that it plans to refer to in its questioning during formal hearings, with as much advance notice as practicable, as well as a clear indication of which elements of such documents the CMA wishes to discuss. Providing a list of documents a minimum of a week in advance and signposting to the relevant extracts (where applicable) would give the individuals an opportunity to familiarise themselves with the documents and their context prior to the hearing, making discussions more fruitful, and protecting parties' rights of defence.

E. 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

[3] See paragraph 11.13 of the Guidance.

mechanism for 'without prejudice' remedies discussions in Phase 2 investigations has rarely been used in practice since its introduction in 2020?

2.15 As explained above, a general barrier to open engagement on remedies (including on a "without prejudice" basis) is the lack of transparency and clarity over the CMA's emerging thinking and the absence of constructive "two-way" dialogue. While parties are given opportunities to make representations, they do not receive the necessary feedback in the opposite direction that would make it worthwhile for parties to engage with the CMA prior to the provisional findings stage. Only by improving this fundamental flaw in the process do we see that the mechanism for without prejudice remedies discussions could become a credible option for more merging parties.

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

2.16 In many jurisdictions, access to the competition authority's file is a fundamental procedural guarantee to protect parties' rights of defence and the principle of equality of arms. For example, during the EU merger control process, the access to file procedure is "*intended to enable the effective exercise of the [parties'] rights of defence against the objections brought forward by the Commission*".[4] The purpose of access to the file is to allow addressees of relevant decisions to acquaint themselves with the evidence so that they can express their views effectively on the authority's preliminary conclusions. Access to the file is an integral part of the parties' right to be heard.

2.17 Specifically, to preserve procedural fairness, parties must be able to properly scrutinise third party evidence and how the CMA has approached the questions it has put to third parties. The current approach is inadequate for two reasons:

(i) The CMA generally takes the view that in providing the "gist" of third party submissions made in response to the CMA's market investigation questionnaire, it is not required to disclose the underlying questions. This approach is at odds with the openness of the CMA in disclosing merging parties' submissions to third parties (but not vice versa). As a matter of good public administration, we would therefore urge the CMA to provide full access to file. Or, at a minimum, to (a) adopt a more purposive interpretation to what it counts as the "gist" of a case, and (b) allow the parties to see all the questions asked of third parties.

(ii) Second, by providing this information only with its provisional findings, the CMA severely curtails the ability of the merging parties to respond properly to the claims being made by third parties. The CMA should not be reaching its provisional conclusions on a case without first allowing the merging parties to respond to key issues raised by third parties, in particular in circumstances where the CMA very rarely alters its conclusions on substance in its final report as compared to its provisional findings (as explained above).

[4] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07).

2.18 In addition, as explained in more detail above, the highly stylised stages of the current Phase 2 process do not allow for ongoing, transparent, working level discussions on substance and remedies. These discussions occur as standard with many competition authorities in other jurisdictions (the European Commission being a notable example). Adopting a similar approach for the CMA's Phase 2 process would significantly reduce the inefficiencies and procedural unfairness in the current system.

3. Other suggested areas for improvement

3.1 We offer below some suggestions on other selected aspects of the Phase 2 process that, in our view, could be improved:

(i) Access to file: We have already explained above the reasons why the CMA's approach to the provision of third party evidence is inadequate and at odds with the practice of competition authorities in other jurisdictions, including the European Commission.

We would like to emphasise that, in circumstances where the Phase 2 process does not include a meaningful access to file process, parties cannot have a genuine opportunity to respond to the allegations that have been made against them and to express their views on the CMA's provisional conclusions. In the interests of good public administration – and given what can be at stake for merging parties – we consider the CMA is at a minimum under a duty to provide better and more timely access to the inculpatory and exculpatory evidence on its file. The Guidance should be amended to reflect this.

We note that this approach is also at odds with the evidence that must be provided by the CMA under its duty of candour in the course of proceedings before the Competition Appeal Tribunal (**CAT**). There is no reason why the disclosure of relevant inculpatory and exculpatory evidence should be limited to such appeals before the CAT, and we therefore suggest that the CMA should offer this evidence upfront at the administrative stage.

(ii) Duty of independence: As the CMA is aware, a statutory duty of independence applies to members of CMA groups. This duty is set out in Schedule 4 to the Enterprise and Regulatory Reform Act 2013, which provides: "*in making decisions that they are required or permitted to make by virtue of any enactment, CMA groups must act independently of the CMA Board*".[5] Schedule 4 also provides that CMA board members involved in the decision to make a merger reference cannot be members of the resulting group. These provisions are restated in the CMA's Code of Conduct for CMA Panel Members (paragraphs 18-19).

In our view, allowing CMA panel members to sit on the CMA board is inconsistent with the statutory duty of independence. We would recommend that the CMA's

[5] See Enterprise and Regulatory Reform Act 2013, Schedule 4, paragraph 49 (Independence of Groups).

Code of Conduct and processes be amended to uphold that statutory duty and ensure that CMA groups are genuinely independent in practice.

(iii) Prioritisation of evidence: The CMA should adopt a clearer position on prioritisation of evidence, and properly codify its position in the Guidance and other relevant CMA guidelines. There is considerable legal uncertainty on the CMA's position, with statements made by merging parties or their representatives under penalty of criminal sanction sometimes being ignored in favour of the CMA case team's interpretation of discrete sentences in internal documents. This should be addressed as a matter of good public administration.

(iv) Overall burden of the process: Several aspects of the CMA's working practices in aggregate give rise to significant, unnecessary strain for merging parties. By way of example, the CMA will often set extremely short deadlines to review confidential information that the CMA intends to publish in short order (e.g. in the context of the CMA's provisional findings). CMA information requests also often ask for repeated and overlapping searches for documents which are burdensome, and seem unnecessary when extensive document sets have already been produced to the CMA. Dates for site visits and hearings would sensibly be settled at the outset of Phase 2 to reduce uncertainty and related practical difficulties, particularly where extensive travel is required for in-person attendance.

4. Concluding remarks

4.1 We would urge the CMA to take our feedback into account when considering future improvements to the Phase 2 merger investigation process. We understand that, following the Call for Information, the CMA intends to publish a revised draft version of the Guidance and will consult on all proposed changes. We are supportive of this initiative and consider codification of the CMA's practice to be essential for transparency, legal certainty and procedural fairness. We look forward to the opportunity to comment on any draft revisions to the Guidance in due course.

4.2 We note that other aspects of the CMA's merger control practice can give rise to significant issues for merging parties, advisors and other stakeholders. We have not sought to comprehensively cover all such issues in this response, but would welcome an opportunity to do so in the context of a broader review of the CMA's Guidance.

4.3 If you would like to discuss this submission or have any questions, please feel free to contact:

Claire Jeffs, Partner (Claire.Jeffs@SlaughterandMay.com)

Anna Lyle-Smythe, Partner (Anna.Lyle-Smythe@SlaughterandMay.com)

Jennyfer Moreau, Associate (Jennyfer.Moreau@SlaughterandMay.com)

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