CMA Consultation on Phase 2 Merger Investigations

1. We welcome the opportunity to comment on the CMA's consultation on aspects of the CMA's Phase 2 investigation process that could be revised to ensure that the process operates as effectively and efficiently as possible, published on 29 June 2023 (the "Consultation").

2. These comments represent the views of White & Case LLP, and nothing in this submission should be taken as representing the views of any of our clients. We do note address all points raised in the Consultation but focus on those which we consider to be the most material.

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

Direct engagement with the inquiry group

4. We recognise, and value, the fact that during a CMA Phase 2 investigation the merging parties have the ability to engage with the decision makers (i.e., the inquiry group of independent panel members). This does not happen in many other jurisdictions. However, the Phase 2 process offers only a limited number of opportunities for the merging parties to engage directly with the inquiry group in relation to the substantive assessment of a merger and (where relevant) potential remedies. A welcome development would be to improve the "dialogue" between the merging parties and the inquiry group by enabling the merging parties to engage directly and more often with the inquiry group – whilst at the same time recognising the statutory timing constraints for the CMA to complete a Phase 2 investigation.

5. As the Consultation notes, the existing key opportunities for direct in-person engagement with the inquiry group are the site visit, main party hearing, and response hearing. These are typically the parts of the investigation process that merging parties value the most, even if the detailed written submissions such as the response to the issues statement/annotated issues statement and provisional findings (and, where relevant, remedies working paper) may appear to be more important. Any opportunity for the merging parties to have more "face time" with the inquiry group would be welcomed and, in our view, should be encouraged.

6. For example, the site visit is intended to be "*an opportunity for the CMA to gain a greater understanding of the merger parties' businesses*"[1] but a not insignificant part of a site visit is often understandably used by the parties as an opportunity to present their case given that the next time the merging parties will actually be able to speak to the inquiry group is at the main party hearing by which time the group's views are often already fairly advanced (or at least perceived to be), albeit still developing. In order to enable the CMA to have as much time as possible to understand the parties' businesses at the site visit we suggest it might be helpful to allow the parties a separate opportunity (either shortly before or after the site visit, but probably before given the fact that the site visit may often take place several weeks after the start of Phase 2) to present their views on the merger. That way the site visit could focus more on fact-finding and allow the inquiry group to ask more detailed questions about the parties' businesses. This would give the merging parties an opportunity at the start of Phase 2 to explain directly to the Phase 2 decision makers why they disagree with the CMA's Phase 1 decision.

7. We consider that such an additional opportunity for the merging parties to engage directly with the inquiry group would not only be welcomed by merging parties but would be useful for the inquiry group. This additional face-to-face engagement between the merging parties and the inquiry group could easily be done within the existing statutory framework and would not impair the overall timetable. Such a meeting could be limited to no more than one hour and, whilst in-person meetings are to be encouraged whenever possible, could be conducted remotely or in-person depending on the circumstances.

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[1] CMA2, para. 11.32

8. In addition, we consider merging parties would welcome state of play calls with the inquiry group. These could take place at various intervals and could be used, for example, to inform the parties if any theories of harm originally identified in the issues statement were to be dropped (rather than the parties having to wait until receipt of the annotated issues statement). That would then enable the merging parties to focus on any remaining theories of harm which would result in a more efficient use of the parties' time and resources, and ultimately those of the CMA too if the staff and inquiry group did not need to read submissions on points that were no longer considered problematic.

Written submissions

9. The CMA notes in its guidance on jurisdiction and procedurethat a Phase 2 investigation is "*not well suited to accommodating unsolicited submissions*"[2] outside the key stages in the process, which the Consultation identifies as the publication of the issues statement, the annotated issues statement (and any working papers), the provisional findings and, where an SLC has been provisionally found and remedies are envisaged, the notice of possible remedies and the remedies working paper.

10. Whilst we recognise that these main junctures are the focal point for written submissions, it is important that merging parties are able to submit evidence to the CMA at any point in an investigation with the confidence that they will be fully considered by the CMA staff and the inquiry group. We are conscious that multiple submissions place a strain on case team and inquiry group resources but the reality of the pace of CMA merger investigations is that evidence gathering in response to the CMA's areas of concern can take time. Merging parties are more readily able to assist the CMA in cases where the CMA's thinking is discussed with advisers openly and as early as possible and on an on-going basis. In other words if, e.g., following third party submissions, the CMA considers that a particular topic requires detailed assessment the CMA should inform the parties as soon as reasonably practicable (and not wait until the annotated issues statement) to give the merging parties as much time as possible to consider the points in question. As advisers we have found it useful in other jurisdictions where the authority engages with the merging parties in this way, and about the desired format and topics of submissions, and we would encourage inquiry groups in Phase 2 CMA cases to similarly engage as transparently as possible in this regard.

11. For example, the CMA could indicate on a without prejudice basis that it would welcome submissions on particular points, especially where the views of the merging parties and third parties may not be consistent, as well as on potential remedies where the CMA's developing thinking may indicate that an SLC may be provisionally found. A clear statement from the CMA that merging parties are able to make submissions throughout the Phase 2 process – and as early as possible in response to any particular concerns – would be welcomed. In particular, as regards remedies, the current process is very time-constrained with a short timeframe to submit comments on a notice of possible remedies. Therefore any opportunity for the parties to have more meaningful engagement with the inquiry group (or staff) in advance of provisional findings would be welcome. For example, if after the main party hearing the inquiry group has not ruled out the possibility of a provisional SLC early engagement with the merging parties should take place.[3]

Other issues

12. The lack of access to file under the current CMA procedure raises issues about procedural fairness. Access to the European Commission's file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. As a result, the European Commission shares key documents (including third party responses to market questionnaires) with

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2 CMA2, para. 11.13

3 To the extent there is a concern this would reveal the inquiry group's developing thinking before the merging parties are informed of the provisional findings shortly before publication we note that in Phase 1 cases the parties are informed at the "state of play" meeting whether or not an issues meeting will take place. If no issues meeting is to take place the merging parties in fact know what the decision will up to c. 20 working days before the decision is announced. As an indication that a provisional SLC finding cannot be ruled out would not be final, and could change, any concerns about listed companies' disclosure obligations could probably be addressed (although this point may require further exploration).

merging parties following the opening of Phase 2 investigations and provides them with access to its case file when it sends a statement of objections.

13. We consider that the CMA should amend its practice and provide the merging parties' advisers with copies of third party submissions and responses to the CMA's questionnaires within confidentiality rings (as would typically be the case, for example, if the CMA's final decision were appealed). Whilst we recognise the importance of protecting confidentiality and encouraging third parties to participate in merger investigations (and note that non-confidential summaries of third party comments are sometimes published) the lack of transparency often relating to third party submissions makes it very difficult for merging parties to properly defend themselves. Whilst we acknowledge that there is no general right of "access to file" within CMA merger control proceedings, in the interests of good public administration and procedural fairness – and given what can be at stake for merging parties – we consider the CMA should provide timely access to the inculpatory and exculpatory evidence on its file. We consider the CMA's current approach in a Phase 2 investigation of providing the "gist" of third party submissions in its provisional findings is inadequate as it is often too late in the process for the merging parties to properly respond to the claims being made by third parties.

14. We hope that these comments may be useful as the CMA considers the comments received in response to the Consultation. If you have any queries about these comments or would like to discuss any matters arising therefrom please contact Marc Israel (marc.israel@whitecase.com; 020 7532 1137) or Michael Engel (michael.engel@whitecase.com; 020 7532 1462).

White & Case LLP
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