THE CMA'S CALL FOR INFORMATION:
PHASE 2 MERGER INVESTIGATIONS

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

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RESPONSE TO THE CMA'S CALL FOR INFORMATION ON PHASE 2 MERGER INVESTIGATIONS

1. Introduction and summary

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to respond to the CMA's call for information of 29 June 2023 on the Phase 2 merger process (the ***Call for Information***).

1.2 Freshfields has extensive experience advising clients on in-depth merger control investigations before the CMA, as well as other major national and supra-national competition authorities and regulators worldwide. We believe our experience provides us with valuable insight into both institutional design and merger enforcement procedures. Freshfields recognises the CMA's leading reputation in merger control enforcement globally. We welcome the CMA's continued efforts to improve its existing framework.

1.3 The Call for Information asks for responses about the effectiveness of the current Phase 2 investigation process in the context of both the competitive assessment and remedies – in particular, whether the merging parties have an effective opportunity to engage with the inquiry groups which deal with Phase 2 mergers (both in person and *via* written submissions) and whether there are barriers in the current operation of existing processes to early engagement on remedies discussions.

1.4 Our key concern with the current Phase 2 framework is the nature and quality of engagement with the inquiry group that is afforded to the merging parties. In our view, there is a lack of effective opportunity for effective engagement at each of the three phases set out in the CMA's procedural guidance.[1] While occasions to address the inquiry group exist, in practice this engagement is strictly circumscribed and involves very limited opportunity for the merging parties to put their case to the group based on meaningful insight on the issues the group considers most important, or on which it requires more support for the parties' case.

1.5 The primary opportunities for oral interaction with the inquiry group are the hearings. These currently occur too late in the process to allow merging parties an effective means of discussing their case with the decision-makers in a manner that can help frame the investigation and the group's assessment. Opening statements at hearings are expected to be short, with a significant majority of the time spent at the hearing taken up with answering questions posed by the group and the staff. Currently, hearings are conducted in a manner that lacks any real element of interactive discussion where the group will be prepared to express views on the points put to them (orally at the hearing or previously in writing) – on the substance and on proposed remedies. Equally, the staff will frequently defer to the group and not be prepared to express views themselves. The absence of a real-time exchange of views in a timely fashion with the inquiry groups or the staff reduces the effectiveness of engagement at all stages of the process, and makes remedy discussions in particular very difficult.

1.6 This rigidity and absence of an open, mutual dialogue between the inquiry groups and the merging parties is reinforced by the lack of an effective access to file process that would enhance constructive conversation between the CMA and the merging parties. In that context, merging parties are more reluctant to initiate early remedies discussions with the inquiry group compared with other major jurisdictions.

1.7 We appreciate that the CMA is constrained by its statutory deadline for Phase 2 merger investigations.[2] However, we believe that, comfortably within those constraints, the process would materially benefit from more timely and effective engagement between the merging

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1 *Mergers: Guidance on the CMA's jurisdiction and procedure* guidance (***CMA2***), Figure: the key stages of a typical phase 2 inquiry (pages 72-75).

2 CMA129, *Merger Assessment Guidelines* dated 18 March 2021 (***CMA129***), para. 2.21.

parties and the inquiry group, where earlier feedback on the inquiry group's assessment can be presented to the merging parties, frank views can be exchanged, and more relevant information can be shared. We consider that this can be accommodated within the current statutory process by changing the manner in which the response hearings are conducted. Indeed, the current process, which is perceived as formal and stylised, is now markedly out of line with good international practice and a greater degree of openness in this respect would also encourage the informed dialogue we discuss above.

1.8 We also note that the Digital Markets, Competition and Consumers Bill (the ***DMCC Bill***) will introduce additional flexibility into the current Phase 2 framework. Nevertheless, we consider that the current process could be further improved in a number of important respects. We set out our suggestions in this response.

1.9 Please note that this response does not represent the position of any of our clients or any individual partners in our Firm. We would be happy to discuss any of our comments in more detail and contribute to any further thinking or analysis on these issues.

2. The current milestones do not provide sufficient opportunities for the merging parties to engage effectively on the substantive competitive assessment

2.1 The CMA's Phase 2 investigation is, as the CMA itself acknowledges, "*formal in nature…and…not well suited to accommodating unsolicited submissions*"[3] outside of the formal milestones at which merging parties may present in person[4] or respond in writing.[5]

2.2 This formality, and the current stylised format of hearings in practice, impedes effective engagement between parties and decision-makers at Phase 2. Merging parties do not typically have direct access to the inquiry group (or its delegates who have authority to have a meaningful discussion) outside of the small number of formal opportunities presented under the current structure. Rather, informal dialogue is limited to periodic check-in calls, largely on process issues, with the case team during the course of the procedure. While the case team updates provide a helpful steer on the status of the investigation, they do not provide insight to the inquiry group's emerging thinking on the competitive assessment (or indeed remedies) nor any detail on the status of the CMA's market investigation: the case team frequently appears not to be empowered (or to consider themselves to be constrained) to discuss issues of substance with the merging parties. Indeed, in practice case teams will nearly always strictly maintain that any discussion as to the substance must take place in the context of one of the formal milestones set out in the CMA's procedural guidance.

2.3 The entire Phase 2 process therefore hinges significantly on the formal and stylised milestones which – as currently implemented – do not provide the merging parties with meaningful opportunities to engage constructively with the inquiry group or access evidence which would enable them to make representations and make their case effectively.

2.4 The current Phase 2 investigative framework is split into three phases.[6] Based on our experience, revising the milestones and content of these phases could significantly improve efficiency and effectiveness.

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3 CMA2, para. 11.13.

4 The site visit, the main party hearings and the response hearings.

5 The responses to the Issues Statement, the Annotated Issues Statement, working papers, Provisional Findings and Notice of Possible Remedies (***Remedies Notice***).

6 CMA2, Figure: the key stages of a typical phase 2 inquiry (page 77).

2.5 We consider that the current milestones in the CMA's Phase 2 framework could be better sequenced / improved as follows.

(i) Reorganise the initial information gathering phase

2.6 The initial information gathering phase is very intensive as the inquiry group is set up and begins to "*acquaint itself with the relevant information to…answer each of the statutory questions including whether the merger will lead to [a substantial lessening of competition (**SLC**)]*."[7] We believe the initial information gathering phase could be reorganised to make it more efficient and effective.

2.7 First, we believe that there is merit in removing the Issues Statement as an early milestone. Although this document "*forms the framework for the CMA's competitive analysis at phase 2 and outlines the issues which the inquiry will be exploring*,"[8] the Issues Statement is published at an early stage of the CMA's information gathering exercise, at a point where the inquiry group either does not have access to, or has not had a meaningful opportunity to review, any new evidence it may have received from either the merging parties or third parties at the initial stages of the Phase 2 merger investigation. As a result, the Issues Statement often repeats the findings set out in the Phase 1 Decision, which is published shortly before the Issues Statement and to which the parties have an opportunity to respond.

2.8 We therefore welcome the CMA's suggestion to replace the Issues Statement and Annotated Issues Statement with a consolidated document which would be issued later in the process, after the CMA has had an opportunity to consider additional evidence and submissions provided as part of the information gathering phase.[9] As a working document, this does not, in our view, need to be published in full as it would increase the burden on the inquiry group as they develop their thinking ahead of PFs. To the extent publicity is required, we believe an executive summary would be sufficient to provide third parties with an opportunity to respond.

2.9 Additionally, the CMA's procedural guidance explains that the site visit is, in essence, intended to provide the inquiry group with additional insight into the merging parties' activities by way of a "teach-in."[10] However, in our experience, the site visit typically only occurs *after* the Issues Statement is published, effectively rendering the site visit ineffective in assisting the inquiry group's early framing of the issues to investigate. To give full effect to the actual purpose of the site visit and to ensure that the inquiry group may benefit from engagement with the merging parties as they acquaint themselves with the case, we believe the site visit and any additional teach-in sessions (as required by the case) should take place at an earlier stage and in any event *before* the CMA publishes any initial substantive findings. The opportunity of the site visit could also usefully be an opportunity for the merging parties to provide their views on the key issues of substance in the case in addition to any teach-in(s) on technical issues relating to the parties' businesses.

2.10 Based on our experience, the above would not only alleviate the pressure on the inquiry group to conclude its initial information gathering phase during a short timeframe, but also help to

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7 CMA129, para. 2.20. Per CMA2, the "information gathering" phase lasts up to six weeks. During this phase, the CMA builds on the evidence gathered in Phase 1 and collects additional evidence (if required) through RFIs issued to the parties, Section 109 Notices and third-party and stakeholder engagement. An Issues Statement is also published at this stage which, in our experience, often precedes the site visit and responses received from third parties (para 11.6).

8 CMA2, para. 11.30.

9 This was discussed during a roundtable organised by the CMA on 2 August 2023 (the ***Roundtable***).

10 CMA2, para. 11.32.

satisfy the CMA's responsibility to apply "*a 'fresh pair of eyes' in relation to the CMA's phase 1 investigation*."[11]

(ii) Introduce opportunities for the merging parties to have direct access to and proper engagement with the inquiry group during the Phase 2 assessment and after the Provisional Findings

2.11 The initial information gathering is followed by a longer "Phase 2 assessment" phase (between weeks 7 and 15) during which the CMA issues an Annotated Issues Statement and key working papers (or extracts of them) to which the merging parties may respond.[12] The major milestone before the CMA publishes its Provisional Findings (***PFs***) is the main party hearings where the inquiry group and case team may "*test certain evidence and explore key issues with the merger parties*."[13] After the main party hearings, the CMA prepares and publishes its PFs. Where the CMA provisionally finds an SLC (or SLCs), the PFs are published together with the Remedies Notice.[14] Response hearings will usually take place after the deadline for responses to the Remedies Notice but before the deadline for responses to the PFs.[15]

2.12 Under the current framework, there are few opportunities for the merging parties to engage directly and effectively with the inquiry group at an early enough stage to influence the course of the investigation. To this end, we note that:

(a) Prior to the main party hearings, there is no formal mechanism for "State of Play" or similar meetings where the merging parties can have real-time, face-to-face discussions with the inquiry group about the status of the investigation or their emerging thinking or concerns. As noted above, although Phase 2 case teams offer check-ins on process issues during this phase, such check-ins are not conducive to discussing the substance of the case as the case teams often defer to the inquiry group and the PFs as the means by which the CMA will satisfy its duty to consult, and by which time, as explained further below, it is too late in the process. As a result, merging parties have no sense as to how their substantive submissions are being put to the inquiry group, nor how those submissions are being received by them (or indeed, by the staff), thereby foregoing the opportunity for a frank and effective exchange of views.

Inspiration can be drawn from other leading agencies worldwide whose substantive assessments are often closely aligned to the CMA, in particular the EU[16] and the US[17] where there is more regular engagement with the decision-makers about their ongoing assessment and a more open dialogue with the case team or staff-level team members. Access to and the ability to engage in "back-and-forth" discussion with the ultimate decision-maker and/or the senior staff team who is in direct contact with the decision-maker, in particular under the EU regime, is a feature that could easily be imported into the UK process if the inquiry group, or delegates who have authority to have a

11 CMA2, para. 10.7.
12 Put-backs are not substantive submissions and are therefore not addressed here.
13 CMA2, para. 12.5.
14 CMA2, para. 13.2.
15 CMA2, para. 13.16.
16 See DG Competition Best Practices on the conduct of EC merger proceedings, para. 33(c): "*The [state of play meeting] also serves to assist DG Competition in deciding the appropriate framework for its further investigation by discussing with the notifying parties matters such as the market definition and competition concerns outlined in the Article 6(1)(c) decision. The meeting is also intended to serve as a forum for mutually informing each other of any planned economic or other studies. The approximate timetable of the Phase II procedure may also be discussed.*"
17 Where a Second Request is issued, merging parties usually enter into timing agreements where engagement with staff and the timing of engagement and document production moves forward at agreed intervals.

meaningful discussion, were able to discuss issues directly with the merging parties in conjunction with the CMA case team.

As such, the CMA's assessment process would materially improve if the Phase 2 case team is empowered to engage on substance or if at least two State of Play meetings – at which the merging parties are provided with a substantive update on the CMA's emerging thinking – were introduced. Given the independence of the inquiry group, this would be most effective if the group, or part of it, were to attend such meetings. This could occur before the main party hearings and before PFs are published, and in line with the ICN's Recommendations,[18] would go some way to opening-up more direct and meaningful channels of communication between the merging parties and the Phase 2 decision-maker.

(b) The main party hearings are currently conducted in an inquisitorial fashion, rather than as a hearing at which the parties have an opportunity to present their views – "*the CMA will ask the merger party a series of questions*"[19] which will be "*led*"[20] by the inquiry group or the Phase 2 case team. Due to the limited hearing time which is currently made available by the CMA (hearings are typically of shorter duration than they have been in the past), the merging parties are usually only able to make very brief opening and/or closing statements[21] and cannot introduce economic, technical or documentary evidential issues which may be central to the inquiry group's investigation. These points are usually considered too detailed for discussion at the hearings. Moreover, the question-and-answer format of hearings does not typically involve any exchange of views or comments from the decision-making group to the parties. Parties are often left unsure as to whether their answers have been satisfactory or the group's views on the responses they have given to the questions posed. Although the merging parties are able to make written submissions following the hearings, written submissions are not an adequate substitute – particularly when such submissions are presented at a moment when the inquiry group is finalising the PFs.

In our view, this stylised process is not conducive to good decision-making or constructive dialogue. Given the CMA places significant weight on economic evidence and internal documents, merging parties should be provided with an opportunity to introduce evidence and advance their submissions at a genuine hearing and not merely be respondents in a "committee-like" inquest. In our view, this could be achieved by revising the format of the main party hearings[22] in a way which allows greater

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18 DG Competition Best Practices on the conduct of EC merger proceedings, para. 33(c). Note that the International Competition Network (***ICN***) also makes similar recommendations under VI. Conduct of Merger Investigations: "*B. Merger investigation procedures should include opportunities for meetings or discussions between the competition agency and the merging parties at key points in the investigation. […] Comment 1: The competition agency should be available for consultation with the merging parties to inform them of any significant legal or practical issues that arise during the course of the investigation. Although scheduling meetings may not be necessary in non-complex cases, in appropriate cases merging parties should be afforded an opportunity to meet with the competition agency at key points of the investigation… Comment 2: As early as feasible, the competition agency should be prepared to discuss its current evaluation of the transaction with the merging parties and attempt to identify potentially dispositive issues.*"

19 CMA2, para. 12.6.

20 CMA2, para. 12.6.

21 CMA2, footnote 197: "*Merger parties must inform the case team in advance if they wish to make an opening or closing statement and discuss the appropriate length of such statements given the timing constraints of the hearing (typically no more than 15 minutes will be available for such statements).*"

22 At the Roundtable, there was discussion about involving third parties during the main party hearings. We strongly consider, however, that third-party involvement at any such hearings would be very difficult to manage (vis-à-vis client confidentiality) and could materially increase the duration of the overall hearing.

participation from the merging parties who should be able to make representations and defend their case. We believe this would work well in combination with the proposed consolidated Issues Statement which would set out the CMA's emerging substantive concerns.

2.13 We believe that the above changes would significantly enhance the quality of CMA decision-making as well as facilitating greater mutual understanding between the CMA and the merging parties – which is likely to lead to a more efficient process (including, as we explain below, with respect to remedies in appropriate cases). Such practices would be more consistent with practices in the EU and in the US where merging parties have opportunities for fuller engagement with the decision makers before any preliminary ruling or (in the US) decision to enjoin a transaction.

(iii) Revise the approach to the response hearings

2.14 Currently, the publication of PFs at around week 15 represents the first meaningful opportunity the merging parties have to consider the inquiry group's substantive assessment. At the same time, the merging parties are provided with the inquiry group's preliminary decision as to feasible remedies *via* the Remedies Notice. This (lack of) sequencing between two critical milestones understandably causes merging parties to believe that the inquiry group is closed off to any further consideration of the substance and has fully transitioned to considering remedies. Whilst not impossible, it is only very exceptionally that the CMA has changed its position from that set out in the PFs[23], which increases the perception that it is extremely difficult to discuss and participate in any effective exchange of views on the CMA's preliminary competitive assessment from this juncture onwards. Clearly, the lack of any time between publication of PFs and the Remedies Notice restricts the merging parties from engaging in any meaningful way on the inquiry group's substantive assessment. In fact, the only opportunity the merging parties have to respond orally to the inquiry group's substantive findings are at the beginning of the response hearings – the opportunity is typically short-lived as hearings will generally move quickly on to possible remedies.[24]

2.15 In light of the above, the UK process would benefit by revising the approach to the response hearings so that merging parties are able to make oral arguments in *response* to the inquiry group's substantive findings, as they can as part of equivalent processes in the EU and US. In the UK, this is particularly important given that merging parties do not have the benefit of full access to file, which means that their knowledge of the case is limited to the "gist of the evidence" set out in the PFs. That the response hearing adequately deals with the competitive assessment is important not only to protect the merging parties' rights of defence, but also to avoid exacerbating any perception that the inquiry group is closed off to further considering the substantive competition issues unless material new information emerges.

3. The merging parties cannot meaningfully address substance without access to file

3.1 The overall lack of effective engagement between the inquiry group and the merging parties is compounded by the absence of any access to file under the existing CMA process. Currently, it is only once PFs are published that the merging parties gain some – but still very limited – understanding of the feedback received by the CMA during the merger investigation. The lack of transparency undermines the ability for merging parties to exercise their rights of defence.

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23 The CMA has revised its position on the SLC in its Final Report in only 3 instances during the last 15 years.

24 CMA2, para. 13.17.

3.2 We acknowledge the body of precedent on the requisite standard of CMA disclosure in PFs. However, this does not make the approach an effective one. In an increasingly global regulatory landscape, the CMA's process for disclosing third party evidence falls short of expected international standards. We would welcome the introduction of a robust access to file process as part of the CMA's Phase 2 procedure and believe that it would go a considerable way to allowing the Parties to respond effectively to the PFs. Having access to the file is all the more important for merging parties given:

(a) The absence of a robust access to file process omits a critical check on the CMA's actions and its accountability. Good faith attempts to provide the "gist" of the CMA's case will often nevertheless miss the mark and it is inevitable that the gist does not give the full picture. Merging parties are unable to assess third party feedback in the round – unlike in the EU process – which prevents them from drawing critical connections between pieces of evidence.

(b) As a matter of principle, it is fundamental that merging parties have the right to examine the evidential basis of the case against them.

(c) Allowing the CMA to publish PFs without providing the merging parties with the corresponding ability to inspect and respond to the CMA's file undermines the integrity and robustness of the CMA's Phase 2 merger review and raises the question of whether the process sufficiently protects the parties' rights of defence.

(d) The CMA attributes significant weight to third party documentary evidence and the views of customers and competitors. Allowing the parties to inspect the file – or at least a non-confidential version of third-party submissions – would likely increase the probative value of any such contributions, as third parties would be aware that their submissions are open to scrutiny and challenge.

(e) As the CMA's role on the global stage expands post-Brexit, it will need to review a greater volume of transactions that are subject to parallel proceedings. A lack of access to file undermines the merging parties' confidence in the CMA's review process, particularly if the transaction concerns global markets where third party feedback may in any event be visible *via* parallel proceedings (such as in the EU). There have been occasions when the CMA and the European Commission have reached different views in light of third-party evidence received on the same markets, while the CMA has not permitted access to its file. This type of discrepancy materially undermines confidence in the UK process.

(f) Given the compressed timing of the CMA's Phase 2 review timetable, allowing access to file would enable merging parties to better understand the rationale for and context of the CMA's concerns, and therefore mean they are better placed to respond appropriately. This enhancement in mutual understanding would, in our view, significantly enhance the quality of dialogue between the CMA and the mering parties, and, in at least some cases, promote more effective (and possibly earlier) engagement on remedies – which we turn to next.

4. Promoting earlier remedies engagement

4.1 In our experience, merging parties have very limited incentive to engage with the CMA on remedies in any meaningful way prior to the publication of PFs under the current framework. As noted above, we believe that the root causes of this are the lack of early engagement between

the merging parties and the inquiry group and the opaque nature of the CMA's process in which the inquiry group's emerging thinking is not disclosed until late in the process.

4.2 Furthermore, merging parties cannot currently avoid publication of the PFs. In this respect, the rigidity of the CMA process means that there is no opportunity to shorten the process, which further limits the merging parties' incentive to engage at an earlier stage in the process. This situation contrasts with the EU process where merging parties can avoid receiving a Statement of Objections by negotiating remedies that address the European Commission's competition concerns.

4.3 Ultimately, the better the merging parties' understanding of the inquiry group's competition concerns, and the more frequent the opportunities are for frank discussion, the more likely it is that merging parties will be able and willing to meaningfully engage on remedies at an earlier stage. Moreover, the stylised and formalistic modes of engagement under the current structure inhibit candid discussions on remedies – with the case team not empowered to have meaningful discussions and no means of access to the inquiry group outside of the formal meeting structures.

4.4 We believe the inclusion of the State of Play meetings (as discussed above) before the publication of PFs would introduce an important new opportunity for engagement during the CMA's Phase 2 assessment which could prompt more open dialogue on the substantive concerns and engagement on remedies.

4.5 We note that the DMCC Bill is intended to resolve some of the issues highlighted above. We welcome the introduction of a "stop the clock" mechanism in Phase 2 to allow remedies negotiations at an earlier stage (*i.e.*, before PFs). The ability to apply a lengthier extension (of 11 weeks instead of the existing 8 weeks) could also help ensure that merging parties and the CMA have sufficient time to consider and engage on remedies without any such engagement affecting the merging parties' right to respond and contest the PFs. Remedies discussions are inherently fluid in nature and therefore, in order to be effective, the CMA Phase 2 process must flexibly accommodate for verbal and written communications between the merging parties and CMA decision-makers in a short timeframe. Introducing more regular engagement on substance during the substantive review would also facilitate early dialogue on remedies.

5. Conclusion

5.1 We appreciate the opportunity to respond to the CMA's Call for Information and would be happy to discuss any of the above points in further detail.

Freshfields Bruckhaus Deringer LLP

1 September 2023