# Response to the CMA's Call for Information: Phase 2 Merger Investigations

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## 1. Introduction

1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the Call for Information on Phase 2 merger investigations, as published by the Competition and Markets Authority ("**CMA**") on 29 June 2023 (the "**Call for Information**"). The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

1.2 Our response reflects our recent experience in advising merging parties, as well as third parties, on a number of CMA Phase 2 investigations and on equivalent investigations in similar jurisdictions.

1.3 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 to the extent necessary.

## 2. More opportunity to engage with the Inquiry Group in relation to the competitive assessment of a merger

2.1 This section responds to the CMA's first and fourth questions, as set out in section 3 of the Call for Information. Namely, (i) *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?*, and (iii) *do the existing key opportunities for direct in-person engagement with the inquiry group (ie the site visit, main party hearing, and response hearing) work well? How could they be improved?*.

2.2 A strength of the current Phase 2 process is that it does allow companies to engage directly with the Inquiry Group. We consider this to be an invaluable aspect of the Phase 2 process and that this engagement with the ultimate decision-makers is something which differentiates the UK from other jurisdictions. Our view, however, is that there is an opportunity to enhance and improve this engagement to the benefit of merging parties, interested third parties and also the CMA.

### (a) More in-person engagement at the early stage of the CMA process

### (i) Site visit

2.3 We consider that the site visit is a particularly helpful and important part of the Phase 2 process. It enables merging parties to provide an in-person explanation of their products / services, the market(s) in which they operate and the competition they face. It also provides an opportunity for merging parties to put forward their views to the Inquiry Group at an early stage of the CMA investigation. We think it is important to maintain this as a key part of the Phase 2 process.

### (ii) Flexibility to have additional in-person meetings / calls early in Phase 2

2.4 One common challenge with the site visit is that it can be rushed and difficult to address all of the different topics to be discussed in one meeting.

2.5 One way to manage this would be for the CMA to more consistently allow for "teach-in" sessions with the Inquiry Group (or relevant members of the Inquiry Group) and the CMA staff at the early stage of the Phase 2 process (either in person or virtually).

2.6 Often there can be specific products / services and/or aspects of how the market or a specific area of the market works which are key to the CMA's investigation and which require more time to discuss than the site visit currently allows for. One (or, if necessary, more)

additional shorter meetings between the merging parties and the CMA – which in some circumstances could be undertaken virtually – would provide the CMA with the opportunity to understand these key areas in more detail directly from the experts. We have seen this happen successfully on some previous cases and consider that it would be helpful for this practice to happen more consistently across all cases.

2.7 We think there is an advantage to having the Inquiry Group (or relevant members of the Inquiry Group) at these sessions as they will be able to obtain a detailed level of knowledge on key issues earlier in the process (including through asking questions of the business).

2.8 We also consider that this approach would generate efficiencies for the CMA as these "teach-in" sessions would also enable the CMA to focus its information requests and potentially reduce them given that the CMA will have the opportunity to learn more about the merging parties' businesses earlier on in the process (see further below).

**(b) Opportunity for the parties to present their case in-person to the Inquiry Group**

2.9 Currently there is no opportunity for the merging parties to be able to put forward their case in-person directly to the Inquiry Group once the merging parties have had sight of the Inquiry Group's emerging thinking.

2.10 We consider that having an additional meeting / hearing with the Inquiry Group where the merging parties would present their case in person (before the Provisional Findings) would be a significant enhancement to the Phase 2 process. We are of the view that this meeting should take place after the annotated issues statement and any working papers are issued by the CMA, but before the main party hearing.

2.11 This would benefit merging parties as they will have the chance to 'put their case' directly to the decision-makers (clients generally welcome the opportunity to do this during the issues meeting at Phase 1 but feel that this is missing at Phase 2).

2.12 It would also benefit the CMA as the CMA would not only have the chance to ask the merging parties a number of questions in person at this first meeting but it should also make for a more productive main party hearing with a sharper focus on the key substantive issues and evidence relating to those issues.

2.13 To maximise the benefit of these in-person meetings, our view is that the CMA should provide sufficient time for the merging parties to prepare for these (although we consider that the main party hearing could follow relatively shortly after the additional meeting / hearing which we propose).

## 3. Written submissions

3.1 This section responds to the CMA's third question, as set out in section 3 of the Call for Information. Namely, *do the existing key opportunities to make written submissions (ie in response to the issues statement, annotated issues statement/working papers, provisional findings, and remedies working paper) work well? How could they be improved?*.

**(a) Removing the requirement for an issues statement**

3.2 During Phase 2, the merging parties are required to make written submissions to the CMA in response to:

3.2.1 the issues statement;

3.2.2 the annotated issues statement and any working papers disclosed at the same time;

3.2.3 the Provisional Findings; and

3.2.4 a Notice of Possible Remedies and the CMA's remedies working paper.

3.3 In our view, the issues statement is an unnecessary procedural step in the CMA's Phase 2 process and could save the CMA, merging parties and interested third parties valuable time if removed. Whilst it sets out the CMA's possible theories regarding the main issues of the case and the questions that the CMA intends to examine in a merger investigation, we consider that the content of issues statements is generally not too dissimilar from what has already been established in the CMA's Phase 1 decision and in the terms of reference.

**(b) Information requests**

**(i) Opportunity for "teach-in" sessions to refine / reduce information requests**

3.4 We recognise that it is important for the CMA to obtain the necessary internal documents and data or other evidence from the merging parties. However, as set out above, we consider that the CMA could drive efficiencies and refine (and potentially reduce) information requests made, particularly in the early stages of Phase 2, by using the "teach-in" sessions, as mentioned above, to enable the CMA Inquiry Group and staff to focus in on the issues on which they feel they require further written information / evidence.

**(ii) Opportunity to comment on section 109 notices / information requests in draft before they are issued**

3.5 We note that, as part of its Phase 2 opening letter, the CMA invites the merging parties to participate in a data meeting to discuss what (if any) relevant additional or updated data, internal documents and other information sources, not already drawn on during the phase 1 investigation, may be available to the merging parties to help the CMA to focus subsequent information requests.

3.6 In our experience, we have found it very helpful when the CMA circulates draft section 109 notices / information requests to the merging parties before being finalised. Our view is that it would prove more efficient if *all* information requests were sent to the merging parties and their advisors in draft form and then discussed on a call with the CMA before they are then finalised and issued to the merging parties.

3.7 We consider that it is important to engage in this way – both in writing and as needed on calls – to ensure that the internal documents and data being requested are (a) capable of being complied with by the business and (b) useful and informative for the CMA's investigation. This is particularly because these types of information requests are typically costly and resource intensive for clients to respond to.

3.8 Our experience is that when the CMA does take this approach it is both welcomed by clients and results in a more helpful output for the CMA. Conversely, where this does not happen our experience is that it is significantly more challenging and costly for clients to respond to the notice / request and seemingly not helpful for the CMA's investigation, e.g. because the documents / data provided were not ultimately relied on by the CMA in its final report.

## 4. More opportunity to engage with the Inquiry Group in relation to remedies

4.1 This section responds to the CMA's second and fifth questions, as set out in section 3 of the Call for Information. Namely, (i) *are there ways in which merging parties (and others)*

*would be able to engage more effectively with inquiry groups in relation to remedies?*, and (ii) *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)?*.

**(a) Existing information should be taken into account when drafting the Notice of Possible Remedies**

4.2 The CMA often collects significant information during the course of its investigation which is relevant to the consideration of remedies (e.g. whether a remedy is feasible, whether it has been possible to sell a business previously, how long this has taken, etc.). We think it is important that this information is used when the CMA formulates the remedies which it proposes in its Notice of Possible Remedies. Otherwise, in our experience, and as discussed below, we have found that the notice can include remedies which are not workable from a practical perspective and therefore would not be a good use of resources for either the CMA or the merging parties to consider in detail.

**(b) Informal engagement with the CMA staff / opportunity to comment on remedies prior to the notice on remedies being published**

4.3 We consider that the opportunity provided by the existing Phase 2 process to have 'without prejudice' discussions on possible remedies is an important procedural step and is to be welcomed.

4.4 We note that each case is specific on its facts. However, in our experience, the majority of merging parties choose not to have a 'without prejudice' remedies discussion with the Inquiry Group at an early stage of the Phase 2 process as, at that moment in time, they firmly believe in the merits of the transaction and that it should be cleared without the need for remedies (the decision to proceed to a Phase 2 investigation is, in and of itself, typically a substantial decision for many clients).

4.5 There are some cases, particularly those where there are a number of different product areas (or local areas) at issue, where we consider that merging parties might be encouraged to engage in 'without prejudice' discussions at an earlier stage. Our view is that the key to enabling this is for the CMA staff to more consistently have an informal and regular dialogue with merging parties and their advisers during Phase 2. For example, if the CMA staff are empowered to provide more regular informal feedback to the merging parties and their advisers on the Inquiry Group's current thinking (e.g. giving a caveated steer on what issues look particularly problematic, where third parties are identifying particular concerns) this dialogue will aid merging parties in understanding at an earlier stage prior to the Provisional Findings what aspects of the transaction are likely to be particularly problematic so that they can then consider whether they would wish to propose remedies for those areas and engage proactively with the CMA on these.

4.6 More generally, we consider that this type of informal, regular engagement throughout Phase 2 inevitably helps with other procedural steps in the CMA's review process (such as ensuring the merging parties' compliance with any Interim Enforcement Order that is in force – a process which can be particularly burdensome for clients) and, as described above, maximises the value of any section 109 notices / information requests which are issued.

4.7 One additional procedural step which we consider that the CMA could helpfully take to encourage discussion of remedies at an earlier stage of the Phase 2 process is to provide an opportunity for the merging parties to give high level comments on possible remedies prior to and as part of the CMA's standard process for preparing its Notice of Possible Remedies. This would allow the process to be more efficient by ensuring that key pieces of

information about, for example, the merging parties' ability to divest and the possibility of behavioural remedies to be taken into account before the Notice of Possible Remedies is published. This opportunity to comment provides a procedural mechanism for the merging parties to put forward ideas on remedies prior to the Provisional Findings (on a without prejudice basis) without conceding on the merits.

## 5. Comparisons with other jurisdictions

5.1 This section responds to the CMA's sixth question, as set out in section 3 of the Call for Information. Namely, *are there aspects of regimes in other jurisdictions that you consider might work well within the UK regime?*.

5.2 In our team's experience, other equivalent regulators, such as the European Commission and German Bundeskartellamt, more regularly and consistently engage in informal discussions (including via ad hoc telephone calls) with merging parties and their advisors during Phase 2. Furthermore, the case teams at other regulators such as the European Commission and Bundeskartellamt are empowered and have the ability to provide the merging parties with their informal views on the issues at play and the issues which have been disregarded. As described above, we consider that this type of dialogue ensures a more efficient process due to the fact that any potential issues and/or questions can be addressed more quickly.

**Eversheds Sutherland (International) LLP**
**25 August 2023**