Response to CMA consultation: Draft Revised Guidance on Phase 2 merger investigations

A submission by Frontier Economics[1]

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Frontier Economics is an economic consultancy which regularly advises clients on national and European merger investigations, including a significant volume of CMA merger processes. In this response paper, we share our comments on the changes that the CMA is proposing to make to its Phase 2 merger investigation process, as set out in its November 2023 consultation document (the "**Draft Revised Guidance**").[2]

1 Introduction and summary

1. We welcome the opportunity to respond to the CMA's consultation on the Draft Revised Guidance. In this paper, we offer some observations in relation to the following questions that the CMA has set out, focusing in particular on the role of economic evidence in Phase 2 merger investigations.

    a. Overall, is the Draft Revised Guidance sufficiently clear and helpful?

    b. What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why?

    c. Are there any other amendments which you consider ought to be made to the Guidance?

2. We think the Draft Revised Guidance is clear and will introduce some positive changes that could help bring about more efficient and effective engagement between the CMA Case Team, the Inquiry Group and the merging parties in the early stages of Phase 2. The changes to the process proposed for weeks 1 to 6, such as the introduction of the Initial Substantial Meeting ("**ISM**") and the formalisation of teach-ins, should provide more opportunities to engage in discussions on the substantive competition issues early in the

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[2] https://assets.publishing.service.gov.uk/media/655788a4046ed400148b9b2f/Consultation_document_Nov23.pdf

process. We also welcome the opportunities that the process will create for productive engagement between the between the CMA's economists and the parties' economic advisers. Taken together, these changes should help the merging parties and their advisers to focus their efforts on pulling together the types of evidence and analysis that will be most useful in assisting the CMA in its investigation.

3. Having said that, the new process could also introduce some risks, particularly in the latter stages of Phase 2. As Figure 1 below illustrates, under the proposed new process:

    a. The CMA will no longer publish Working Papers ("**WPs**") or an Annotated Issues Statement ('**AIS**'), which in our experience have often proven helpful in providing an insight into the Case Team and Inquiry Group's evolving thinking;

    b. The Main Parties' Hearing ("**MPH**") will now occur later in the process, following the publication of an Interim Report ("**IR**") that sets out the CMA's provisional findings, in contrast with the current framework, where the CMA publishes its Provisional Findings report ("**PFs**") after the MPH; and

    c. There is no default provision for any further interim publication following the hearing – while the CMA may choose to publish a supplementary interim report, it is under no obligation to do so, meaning that there is no equivalent of the PFs today.

4. The net result is that the new process will replace two sets of written publications in which the CMA shares its developing thinking (i.e. the WPs and AIS before the MPH and the PFs afterwards) with a single written publication before the MPH. In place of the PFs (which often run to hundreds of pages), there will now be an 'update call' following the MPH in which the CMA will communicate its thinking verbally. To our thinking, this creates two related risks:

    a. First, there will be fewer opportunities for the parties to review and respond to the CMA's evolving thinking in the more advanced stages of the investigation.

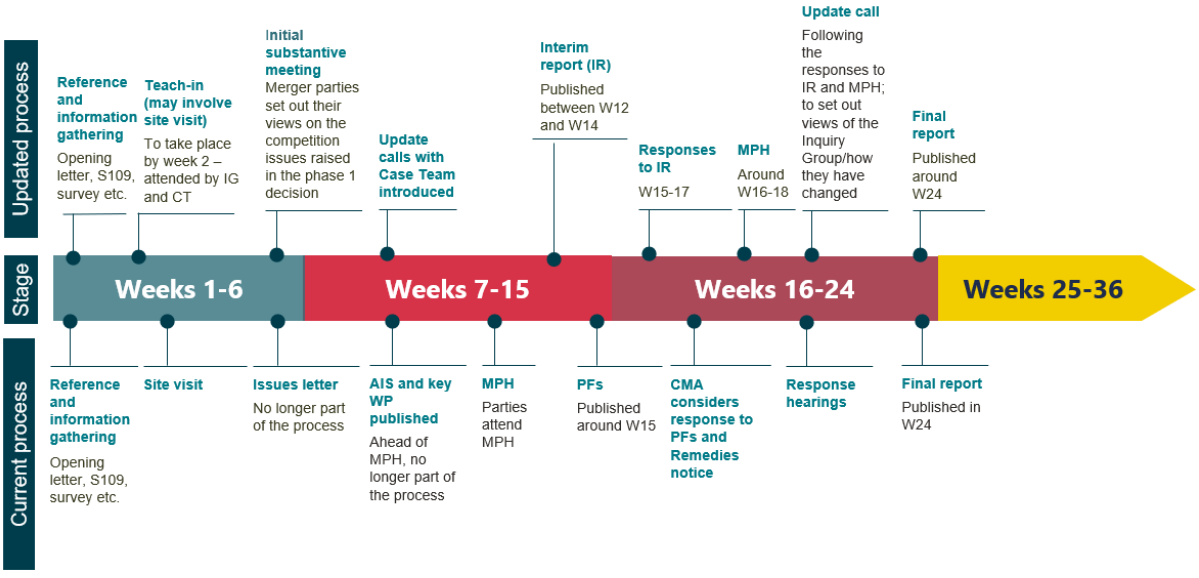
    b. Second, the CMA should be mindful of the risk that the early publication of the its provisional decision encourages unconscious bias at the MPH. Under the current proposals, the CMA would only need to publish a supplementary IR after the MPH if its thinking "fundamentally evolves" following the MPH. In this scenario, there is a risk that the IR becomes the equivalent of the PFs report, which – under the current process – provides the blueprint for the CMA's final decision, save in exceptional circumstances where new evidence comes to light. It would be wrong for the IR to form an equivalent blueprint before the MPH, given the importance of the MPH as a means for the CMA and merging parties to discuss and explore the substantive issues.

5. We recognise that there is value in the CMA setting out its provisional thinking before the MPH so as to provide the merging parties with a direct opportunity to respond to this. We also note, while the positive changes to the early stages of the Phase 2 investigation process may help the CMA to identify and articulate the key issues more quickly, the CMA expects that the IR will be more provisional than the PFs are today and that consequently it may end up substantively updating its IR findings more frequently. While we welcome and agree with this thinking, we would encourage the CMA to take the following steps to help address the potential risks we have identified above:

   a. The CMA should make the most of its proposed update calls, as well as working-level meetings with the merging parties and/or their advisors, to allow for an open and productive dialogue and to ensure that there are sufficient opportunities for two-way engagement throughout the investigation.

   b. The CMA should publish a second IR (or at least an annotated version of the original IR) between the MPH and its final decision, even if its overall thinking remains unchanged. This would enable the first IR to set out the CMA's developing thinking like the AIS and WPs do today, with the second IR setting out a blueprint for the final decision.

Figure 1 CMA Phase 2 review timeline – comparison between current and revised process



Source: Frontier Economics based on the current version of CMA's guidance, available here, and the Draft Revised Guidance, available here. The timeline depicted above focuses on key changes to the process, rather than aiming to include all steps of the Phase 2 merger review. Note that this timeline does not cover the milestones for the remedies process (on which we do not comment in this paper).

2 Opportunities for increased engagement

6. In our response to the CMA's Call for Information,[3] we noted that in some of the Phase 2 investigations we have recently been involved in:

   a. The CMA appeared to have limited time to explore some of the key economic questions;

   b. The merging parties had few opportunities to engage with the CMA to understand its thinking on the economic analysis they had submitted before the CMA published its PFs; and

   c. As a consequence of this, the merging parties and their advisers were unclear as to how they could best engage with the Inquiry Group and the Case Team on the substance of the case.

7. In our experience, this was at times resulting in:

   a. Too much time being spent on tenuous theories of harm and not enough time being devoted to what we considered to be the key economic concerns;

   b. The merging parties often lacking clarity on whether their arguments had been heard and what evidence was going to be most helpful in addressing the CMA's concerns; and, as a result; and

   c. A degree of frustration and a lack of trust by the merging parties as to the extent to which transactions would be assessed fairly.

8. Against this background, we welcome the steps that the CMA has taken in the Draft Revised Guidance to increase opportunities to engage with the CMA Case Team and the Inquiry Group throughout the Phase 2 review and the shift towards greater focus on economic analysis, as set out below.

2.1 Increased engagement throughout the process

9. We support the steps in the Draft Revised Guidance to introduce more opportunities, through formalised teach-ins and the ISM, for the merging parties to engage with the Case Team and the Inquiry Group early on in the process. We think that making appropriate use of the following milestones will be particularly helpful in ensuring that the CMA conducts an efficient and thorough investigation:

[3] See https://assets.publishing.service.gov.uk/media/6557860f046ed4000d8b9b2c/Frontier_Economics.pdf

a. **The Teach-in the first two weeks of the investigation.** We believe that this early engagement will allow the merging parties to respond directly to initial questions from the Inquiry Group and the Case Team on key areas such as (i) the functioning of the markets in which the parties operate, (ii) the competitive landscape and (iii) rationale for the merger. This – in combination with the site visit – should help the CMA identify the key theories of harm and key questions it needs to explore, which will be important facilitating an efficient and productive Initial Substantive Meeting.

b. **Initial Substantive Meeting.** This milestone will provide a valuable opportunity for the merging parties to play back their understanding of the primary competition concerns put forward by the Inquiry Group in the Phase 1 decision. We also welcome the CMA's proposal to have both the Case Team and the Inquiry Group present at the ISM. This will enable the merging parties to achieve as much clarity as possible at the outset of the Phase 2 investigation regarding the competition concerns that the Inquiry Group is planning to explore, as well as establishing a constructive open dialogue. This in turn will help the merging parties focus their efforts on pulling together the types of evidence and analysis that will be most useful in assisting the CMA in its investigation.

c. **Other engagement.** We welcome the CMA's plans to make more frequent use of other initial meetings (e.g. data meetings) at the outset of the Phase 2 investigation. In our experience, these meetings offer a good opportunity for the Case Team to clarify the work plan and timelines, as well as data requirements. We would encourage the inclusion of both the CMA's economists and the merging parties' economic advisers in these early conversations where appropriate. Where mergers involve complex markets and/or are likely to involve survey evidence or quantitative analyses, early economist-to-economist discussions will be particularly useful. We discuss this point in further detail below.

2.2 Increased engagement on the economic evidence

10. The Draft Revised Guidance provides helpful additional guidance on the role of economic evidence and economist calls in a Phase 2 merger investigation.[4] We particularly welcome the CMA's aim to strengthen interaction and dialogue with the merging parties and their economic advisers in this area. As set out in our response to the CMA's Call for Information,[5] we believe that greater engagement could assist the CMA in managing its own resource constraints by outsourcing work that can be more productively carried out by the parties' economic advisers. It should also enable the merging parties to allocate their own resources in a way that will be most productive for the investigation. This will be

4 Draft Revised Guidance, paragraphs 11.29 to 11.34, available here.

5 See https://assets.publishing.service.gov.uk/media/6557860f046ed4000d8b9b2c/Frontier_Economics.pdf

especially beneficial for smaller businesses with limited resources, for whom Phase 2 investigations can be financially burdensome.

11. We agree that economist-to-economist calls will be particularly relevant where the theories of harm being considered are novel or complex and/or where the CMA or merging parties are considering undertaking complex quantitative or technical analysis. Direct dialogue in this context should ensure that the right issues are considered and that the economic evidence that is developed is as useful as possible for the CMA's investigation, for example by:

    a. Discussing the value and feasibility of the economic analysis that can be conducted (this may be especially useful for the CMA early in Phase 2, when the parties' economic advisers will likely have more familiarity with the available data and the suitability of such data for the types of analyses that the CMA is considering);

    b. Agreeing a common programme of economic analysis and who will lead each exercise (for example in some cases the CMA's economists may wish to lead the analysis themselves, whereas in other cases they may conclude it is more efficient to outsource work to the merging parties and their economic advisers);

    c. Examining the results of this economic analysis and discussing how to interpret them in the context of the specific market dynamics in which the parties operate; and

    d. Evaluating potential sensitivities and/or refinements to the analysis that the CMA might wish to consider, and which the parties' economic advisers can help implement.

3 Potential risks introduced by the Revised Guidance and key recommendations

12. While we welcome the moves to introduce greater engagement in the early stages of the Phase 2 process, we believe that the new process could also introduce some risks, particularly in the latter stages of Phase 2 where – as outlined in paragraph 3 – there appear to be fewer opportunities for formal engagement than under the current process. In particular, we note that:

    a. The CMA will no longer publish WPs or an AIS, which have often proven helpful in providing an insight into the Case Team and Inquiry Group's thinking at a stage when it is still evolving;

    b. The MPH will now follow the publication of an IR (meant to set out the CMA's provisional findings), in contrast with the current framework, where PFs are published after the MPH; and

c. There is no default provision for any further interim publication following the hearing.

These changes to the ordering of the second half of the Phase 2 investigation proves create two related risks.

13. First, **there is a risk that the new process results in less engagement between the Parties and the Inquiry Group/Case Team in the later stages of the Phase 2 process**. In particular, the CMA should be mindful of the following:

    a. The removal of the AIS and WPs could limit the opportunities that the merging parties have to understand the CMA's developing thinking at the mid-point of its Phase 2 investigation. In addition to providing a helpful insight for the merging parties, the WPs allow the CMA to road-test specific hypotheses without pressurising it into expressing a provisional conclusion about the overall impact of the merger on competition before it has properly interrogated the evidence with the parties at the MPH.

    b. Under the new process, the PFs will be replaced by an IR, published earlier in the process ahead of the MPH. We understand that the reasoning behind this is that, by bringing forward the publication of the IR, (i) the Inquiry Group and Case Team will have more time to consider the parties' responses to the substantive issues ahead of the MPH, and (ii) the parties will be able to focus the MPH discussion on the key issues as set out in the IR. We agree that these are both sensible reasons for the CMA to share its provisional thinking ahead of the MPH. However, we have some concerns regarding the following:

        i. In practice, the IR will be published only a couple of weeks earlier than the PFs are typically published in the current Phase 2 process (see Figure 1above). At the same time, we understand that the MPH will now take place later in the process than has historically been the case. This means that if substantive new insights come to light from the discussions at the MPH, the CMA will have less time to consider the implications of these insights, not more.

        ii. We also understand that in place of the full PFs report, there may only be an 'update call' following the MPH in which the CMA will communicate its thinking verbally. This may make it more challenging for the parties to review and respond to the CMA's thinking after the MPH and ahead of the Final Decision. We understand that the CMA may publish a supplementary IR on some occasions, but that it will typically only do so if its thinking has changed significantly following the MPH. In contrast with the situation today, this means that if the CMA continues to harbour significant concerns about the merger following the MPH, the parties may not be able to review the CMA's reasoning for this in full until the CMA publishes its final decision.

14. Second, while we recognise the value of the CMA setting out its provisional thinking ahead of the MPH (as discussed above), **the CMA should be mindful of the risk that the early publication of the provisional decision could lead to unconscious bias at the MPH.** Under the current proposal, the CMA would only need to publish a supplementary IR after the MPH if its thinking "fundamentally evolves" following the MPH. In this scenario, there is a risk that the IR becomes the equivalent of the PFs report, which provides the blueprint for the CMA's final decision, save in exceptional circumstances where new evidence comes to light. We think it would be wrong for the IR to form an equivalent blueprint before the MPH, given the importance of the MPH as a means for the CMA and merging parties to discuss and explore the substantive issues.

15. In the worst-case scenario, the new process could inadvertently lead to confirmation bias at the MPH and in the decision-making process. With limited time left to run on the clock (with the MPH now taking place later in the process) and having already publicly consulted on the provisional findings in the IR, there is a risk that the MPH serves as an exercise for to gathering information to confirm existing beliefs rather than to explore the substantive issues with an open mind.

16. As noted above, there is no automatic and formal provision for any further interim publication following the hearing. As such, while the CMA *may choose* to publish a supplementary interim report, it is under no obligation to do so, meaning that there is no equivalent of the PFs today. While it is historically been challenging to overturn the PFs, it is not impossible when new evidence comes to light (as notably illustrated by the recent *Copart/Hills Motors* investigation). We consider high risk having no formal requirement for the CMA to share or consult on its updated thinking between the MPH and the Final Decision.

17. In order to mitigate these risks, we would encourage the CMA to take the following steps:

    a. First, the CMA should make the most of its proposed update calls and ad hoc working-level meetings with the parties alongside the 'set-piece' publications and interactions such as the IR and MPH. As discussed above, meetings and calls of this nature could allow the CMA to agree a common workplan with the merging parties early in Phase 2 and to maintain a productive and open dialogue during the later stages of the investigation.

    b. Second, and in order to adhere to the aspiration of the IR being a provisional document and facilitate this in practice, the CMA should publish a second IR (or at least an 'annotated' version of the original IR) following the MPH, even if its overall thinking remains unchanged. This would enable the first IR to set out the CMA's evolving thinking like the AIS and WPs do today, while the second IR setting out a blueprint for the final decision.