Response to the CMA's Consultation on proposed updates to its Guidance on the CMA's jurisdiction and procedure in merger investigations

Macfarlanes LLP

We welcome the opportunity to comment on the CMA's consultation on the draft "*Mergers: Guidance on the CMA's jurisdiction and procedure*" document published on 20 November 2023 (the "**Draft Revised Guidance**").

In general terms, we consider that the Draft Revised Guidance is sufficiently clear and helpful and goes some considerable way to dealing with a number of the concerns raised during the CMA's call for information on Phase 2 merger investigations. In particular, the proposals on increased and earlier engagement, both during Phase 2 and in relation to remedies, have moved in the right direction, although we consider that there is room for additional improvement. By contrast, whilst we understand the CMA's confidentiality concerns and the balance that the CMA is aiming to strike between different parties' interests, we consider that the CMA's current position on access to file is too restrictive and not consistent with facilitating better and more effective engagement during Phase 2 investigations. This objective will not be fully achieved if merger parties are not given greater access to third-party evidence to engage in informed discussions with the Inquiry Group. We have addressed these points in further detail below.

Engagement

We welcome the CMA's approach to early engagement in order to facilitate meaningful discussions and establish a fruitful dialogue between the CMA (and in particular the Inquiry Group) and merger parties during Phase 2 investigations. We endorse the CMA's ambitions to make this process more effective by enabling parties to address the CMA's concerns as and when they arise, which is likely to lead to improved outcomes for business and consumers.

Response to Phase 1 Decision

The CMA's proposal to invite responses to the Phase 1 Decision as a starting point for a Phase 2 inquiry (instead of the production of a separate Issues Statement) is welcomed. This will help to ensure that the Inquiry Group has access to both sides of the arguments from the outset and understands the key points of difference between the merger parties and the CMA Phase 1 case team. These differences can subsequently be explored further during the new "initial substantive meeting" which the CMA is proposing to conduct at the beginning of Phase 2. This will also help to crystallise the key issues at the outset of a Phase 2 investigation.

Initial Teach-In

The proposal for an interactive teach-in session at the outset of a Phase 2 investigation, (which may also include a site visit where appropriate) is a sensible one and will set the tone for better engagement with both the Inquiry Group and the CMA case team.

Since the CMA merger control regime covers a very broad range of sectors, a teach-in will often assist the Inquiry Group in developing a better understanding of the relevant businesses and the competitive dynamic of the markets in which they operate at the start of the inquiry. A teach-in would also be expected to assist the Inquiry Group in appreciating the merger parties' perception of the issues, paving the way for a collaborative working relationship during the investigation.

If a site visit is not arranged at the same time as a teach in, we suggest that the case team and Inquiry Group should keep an open mind as to whether, as the investigation develops, a site visit at a later stage might nonetheless be helpful.

Informal Update Calls

The use of informal update calls can in principle create more transparency around the CMA's emerging thinking and provide an opportunity for the merger parties to consider what additional evidence may be provided to assist the Inquiry Group.

However, in order to maximise the utility of these calls, the CMA must be forthcoming in its views as well as those of the Inquiry Group, which may of course differ. While we recognise that the merger parties will be unable to rely on any views expressed during such calls, the CMA must be willing to be transparent and open about its thinking. Otherwise, such calls will not achieve their intended purpose and risk failing to create a valuable opportunity for parties to engage with the CMA collaboratively, since it will be difficult - without a sufficiently detailed understanding of the issues that are being explored by the CMA - to identify and provide the Inquiry Group with the relevant information throughout the process that will assist the making of an informed decision.

Accordingly, while we welcome the CMA's suggestion to utilise informal update calls, we suggest that this process is monitored and reviewed after a defined period and if, in practice, the calls do not provide a genuine opportunity for the merger parties to engage constructively with the CMA, then the working papers process should be re-visited, and steps taken to improve that process.

Interim Report

The introduction of an earlier interim report is also a positive step and is likely to equip the merger parties with a better understanding of preliminary views of the Phase 2 decision-makers early in the process. This will also give the parties a better opportunity to address and explore ways to resolve the CMA's preliminary concerns though direct engagement with the Inquiry Group (including at the Main Party Hearing) before the investigation is too far advanced and those concerns become entrenched.

Case Team

In the interests of procedural fairness, the Phase 2 investigative process should enable the merger parties to engage with the Inquiry Group with a clean slate. This is why we welcome the changes which the CMA is proposing to make to the Phase 2 process because the Inquiry Group will be armed at the outset with the parties' response to the Phase 1 decision and will be given the opportunity at an early stage to engage with the parties and obtain a detailed understanding of their activities through the teach-in process. In light of these changes, we question whether it is necessary to retain members of the Phase 1 case team during the Phase 2 investigation. Not retaining members of the Phase 1 case team would ensure that the assessment of the Inquiry Group begins with a truly clean slate in which the issues identified in Phase 1 can be explored without any perceived bias or preconceptions. This would enhance the procedural fairness of the merger review process and is also likely to result in more effective and constructive engagement between the merger parties and the CMA during Phase 2 investigations.

Access to file

We welcome the CMA's efforts to improve procedural fairness, increase transparency, and facilitate greater engagement with the parties during Phase 2 investigations. These objectives could, however, in our view be further enhanced by improving access to file during Phase 2 investigations.

A more expansive and consistent approach to the disclosure of the evidence and analysis that underpins the CMA's case and the Inquiry Group's emerging thinking would increase transparency and foster better and more efficient engagement between the CMA and the merger parties. The fact that there is no general right of access to file in CMA merger investigations, and that the CMA is only required to disclose the "gist" of its case, does not mean that the CMA cannot provide the merger parties with greater access to the evidence and information that has been obtained from third parties.

The Inquiry Group relies, at least to some degree, on the case team for the assessment of the evidence (including members of the case team that have been involved in the Phase 1 investigation) and, in such circumstances, there is value in the merger parties providing the Inquiry Group with their own assessment of the evidence based on their expertise and knowledge of the market, especially when a case involves complex and potentially conflicting evidence. Enabling the merger parties to review the information obtained by the case team would enable the Inquiry Group to test the robustness and reliability of third-party evidence, which can often be critical to the outcome of an investigation. It would also enable the merger parties to have informed discussions and more effective engagement with the Inquiry Group whilst further enhancing the transparency and fairness of Phase 2 investigations.

A more expansive level of disclosure would be in line with the European Commission's practice of sharing key documents with merger parties following the opening of a Phase 2 investigation and providing them with access to its file when it issues a statement of objections. We recognise that the CMA has to balance the need for disclosure with the need to protect confidential information and conduct its investigations efficiently and effectively. But then, so does the European Commission, which routinely uses confidentiality rings, data rooms, and other tools (for example anonymisation) to disclose third-party evidence to the merger parties (or at least to their external advisors).

Access to file should moreover not be limited to a single point in time but should be structured as an ongoing and flexible process to enable merger parties to engage effectively with the CMA throughout the Phase 2 investigation. We therefore encourage the CMA to adopt a proactive and transparent approach to sharing the evidence and submissions obtained from third parties and engage at an early stage. This is particularly important when the evidence evolves and/or new evidence is obtained to enable the merger parties to respond to and to address any emerging concerns.

Remedies

We understand that many of the changes proposed in the Draft Revised Guidance with respect to remedies represent an attempt to balance the feedback received by the CMA that merging parties are often unwilling to approach the CMA regarding remedies early in Phase 2 for risk of compromising their position on the substantive SLC assessment with the need to ensure that the CMA has sufficient time to consider remedy proposals when they are put forward.

Early Interaction on Remedies

In general, we welcome the CMA's proposal for earlier interactions on remedies such that they can be properly considered within the Phase 2 timetable. We also welcome the CMA's confirmation that without prejudice discussions on remedies will not impact the substantive assessment at Phase 2, though it will be important to see this play out in practice. However, the CMA must be forthcoming with its theories of harm and set out its concerns and the evidential basis for these, in sufficient detail to allow the merger parties to identify an effective and suitable remedy.

Unless the CMA is able to set out its (or the Inquiry Group's) concerns prior to the interim report, it will be very difficult for the merger parties to consider, let alone engage in, remedies discussions before the publication of the report (on informal calls or otherwise). While the Draft Revised Guidance suggests that (where appropriate) the merger parties should submit a Phase 2 Remedies Form no more than 14 calendar days following the publication of the interim report, this will be difficult to achieve if this is the first time that the merger parties obtain a full understanding of the CMA's concerns. Moreover, such difficulties could be compounded if the underlying evidence on which the CMA relies is not disclosed to the merger parties, particularly where the theory of harm relates to future or dynamic competition and/or the remedy is likely to involve behavioural commitments which the CMA will need more time to consider.

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