RESPONSE TO CMA CONSULTATION

Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers, draft revised merger notice and draft revised template waiver

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1. INTRODUCTION AND GENERAL COMMENTS

1.1 This response represents the views of Allen & Overy LLP (**A&O**) on the Competition and Markets Authority (**CMA**)'s consultation on its draft revised guidance on the CMA's jurisdiction and procedure (**Draft Revised Guidance**), draft revised merger notice (**Draft Revised Merger Notice**) and draft revised template waiver (**Draft Revised Template Waiver**) dated 20 November 2023 (the **Consultation**).

1.2 Our views are based on A&O's experience advising clients on the application and process of UK merger control and feedback received from our clients that have participated in CMA phase 2 investigations.

1.3 We welcome the opportunity to respond to this Consultation and the CMA's readiness to engage closely with stakeholders about how the UK merger control process, and in particular phase 2, could be improved. We would be happy to discuss any of the points made in this response if the CMA would like to do so.

1.4 Overall, we welcome the CMA's proposals. We note that they address many of the key points about how the phase 2 process could be improved as set out in our response dated 25 August 2023 to the CMA's call for input on its phase 2 merger investigations process dated 29 June 2023 (**CFI Response**).

1.5 Our view is that the proposed changes to the phase 2 process as reflected in the Draft Revised Guidance should help to ensure that merging parties have greater and earlier opportunity for meaningful engagement with the Inquiry Group and senior CMA officials within the case team on substantive issues.

1.6 We also welcome the other proposed updates to the Draft Revised Guidance, including to reflect CMA practice at both phase 1 and phase 2 and recent judgments of the Competition Appeal Tribunal. These updates, together with the proposed changes to the Draft Revised Merger Notice and Draft Revised Waiver, provide merging parties and their advisers with greater transparency and clarity about the CMA's approach to its merger control reviews in practice.

1.7 In line with our general observations above, we have only limited specific comments in response to the Consultation. These are set out below by CMA draft document. Our comments on the Draft Revised Guidance are organised sequentially with respect to the phase 2 process.

2. DRAFT REVISED GUIDANCE

(a) Phase 2 process

2.2 We welcome the CMA's proposed changes to the phase 2 process and think that the Draft Revised Guidance generally provides a clear and helpful description of those changes.

2.3 We think that the proposal to provide for a teach-in by the merging parties for the Inquiry Group early in the phase 2 process is a positive development which should assist the Inquiry Group in understanding how the relevant businesses and markets work while helping the parties to feel "heard" on important issues from the outset.

2.4 The CMA notes in the Draft Revised Guidance that the teach-in will "potentially [be] in the form of a site visit" (Table 2) and may be "appropriate in light of the nature of the businesses involved" (paragraph 11.10). It would be useful to have additional guidance on the circumstances in which the CMA considers a site visit teach-in will and will not be appropriate, so that merging parties can better understand and plan for this stage of the revised phase 2 process.

2.5 We also welcome the CMA's proposal to hold an "initial substantive meeting" after the parties' responses to the phase 1 decision (Table 2). The CMA suggests in the "key stages of a typical phase 2 enquiry" that this meeting could be an alternative to the teach-in ("and/or") (Table 2). Our view is that the CMA's stated aim of achieving greater engagement between merging parties and the Inquiry Group would be more readily achieved if the CMA provided for both a teach-in and an initial substantive meeting as standard in all phase 2 cases (as implied by paragraph 11.13 of the Draft Revised Guidance), unless the CMA and merging parties all agree that this is not necessary or appropriate in a given case.

2.6 The CMA also states in the Draft Revised Guidance that a key milestone in the revised phase 2 process will be the "Response to phase 1 decision (typically expected within 14 calendar days of referral)" (Table 2). In line with our CFI Response, we think that the proposal to abolish the issues statement and replace it with the phase 1 decision as the starting point for the key issues which the CMA will consider during phase 2 to be an effective way to streamline the beginning of the phase 2 process. In practice the content of an issues statement adds limited further value for the merging parties as they rarely go beyond the phase 1 Decision.

2.7 However, the events listed next to the "Response to phase 1 decision" item mentioned above only specifies possible initial meetings, videoconferences and calls. To avoid ambiguity, the CMA may wish to consider referring expressly to the submission of written responses (as well as responses gathered during initial meetings, videoconferences and calls) by the merging parties in the events specified in this section to provide additional clarity about the expected sequencing of those responses and the initial interactions between the CMA and the merging parties in the first couple of weeks of the phase 2 process.

2.8 We think that the CMA's proposal to make greater use of informal update calls will be particularly welcome to merging parties and their advisers. In addition to providing greater transparency, it should help to ensure that merging parties can tailor their representations effectively to reflect the CMA's emerging views and priorities at the relevant stage of the inquiry.

2.9 We agree with the CMA's proposal to replace the provisional findings with an interim report, which will be issued in advance of the main party hearing. We think this will be a positive change which will enable merging parties to understand the CMA's "direction of travel" and the likelihood of one or more substantial lessening of competition (SLCs) earlier in the process.

2.10 We also think that the proposal to change the format of the main party hearing to provide merging parties with greater opportunity to make representations on the interim report and exchange views with the Inquiry Group will improve the quality of engagement between merging parties and the CMA.

2.11 We note that the CMA states in the Draft Revised Guidance that the interim report will be published "around weeks 12-14" (Table 2). While we appreciate that the CMA may wish to retain some flexibility in the timings of the interim report, we would encourage the CMA to publish the interim report closer to 12 weeks wherever possible. If the CMA issues the interim report at 14 weeks as standard, this would represent only a minimal shift to earlier disclosure of the CMA's emerging thinking as compared to the provisional findings, which are currently issued in week 15. We think this is particularly important in circumstances where the CMA is proposing to remove the formal issuance of working papers and the annotated issues statement while retaining the flexibility and discretion to share additional underlying analysis only where it considers it appropriate to do so.

2.12 In streamlining the documents produced during phase 2 to focus on the new interim report, it will also be important to ensure that merging parties do not receive less information overall than in the current process, and in particular that the interim report contains sufficient evidence and adequately detailed analysis about the CMA's views for merging parties to fully understand the CMA's reasoning and be in a position to make informed, targeted representations in response.

2.13 We agree with the CMA's proposal to invite external adviser and business representatives from merging parties (where necessary) to enter a confidentiality ring to view the interim report.

2.14 Finally, we welcome the CMA's proposed revisions to the phase 2 process to ensure that third parties also have greater opportunity to engage with the CMA and to present their views to the Inquiry Group earlier in the process.

(b) Remedies

2.15 In relation to remedies, we welcome the CMA's proposals to introduce more flexibility into the remedies process and encourage earlier "without prejudice" remedy discussions, including through the introduction of informal check-ins and a template phase 2 Remedies Form (Draft Form) (Table 2, Draft Revised Guidance). The Draft Form provides welcome additional guidance for merging parties and their advisers about the information the CMA considers should be included in a remedies proposal.

2.16 However, we note that the Draft Form is relatively lengthy and think that it would run counter to the goal of encouraging earlier and more informal engagement on remedies if merging parties were required to provide extensive detail about a potential remedy at the outset and before they have had the opportunity to test with the CMA whether such a remedy is likely to be viable. We also think that it would provide useful flexibility if the Draft Form provided for the possibility of presenting more than one variation of a remedy, rather than requiring the submission of a separate form for each remedy proposal in every case, as currently proposed.

2.17 In our CFI Response, we noted that to encourage early "without prejudice" discussion of remedies, the CMA could consider adding more detail in its guidance on the processes it would typically put in place to ensure that early remedy discussions are not prejudicial to an SLC finding.

2.18 We note that the CMA does not currently provide for this in the Draft Revised Guidance, which retains the current language (at paragraph 9.42) that the CMA will consider "on a case-by-case basis whether additional procedural safeguards are necessary" for this purpose. We would respectfully urge the CMA to consider doing so. The CMA is proposing to make several changes to encourage merging parties to submit potential remedy proposals early in the phase 2 process, and other plans to publish a non-confidential summary of remedy proposals as part of a public invitation to comment. In these circumstances, we think it is particularly important for the CMA to provide merging parties with additional guidance and comfort on this topic. Without this, we think that there is a risk that merging parties may continue to be dissuaded from raising potential remedies early in the phase 2 process, and therefore that the CMA's stated aims as set out in the Consultation may not be realised.

2.19 As set out in our CFI Response, such safeguards could include the discussions being led by a director of the remedies, business and financial analysis team who is otherwise not involved in the inquiry process. This would be useful as there are several important mechanistic and 'in principle' issues that could be worked through on a potential remedy proposal ahead of such a remedy being proposed to the Inquiry Group.

3. DRAFT REVISED MERGER NOTICE

3.1 We welcome the CMA's proposed updates in the Draft Revised Merger Notice to reflect more closely the CMA's approach to the substantive merger analysis as set out in other relevant guidance documents.

3.2 We hope that these proposed changes will provide additional clarity for merging parties about the information the CMA is likely to require for its analysis and enable the production of greater information upfront, thereby reducing the volume of information required by subsequent requests for information.

3.3 While we agree with the CMA that it is important to consider whether a merger could have an impact on potential or dynamic competition, we note that the CMA's proposed additions to the Draft Revised Merger Notice on this topic are relatively extensive. In particular, our view is that the CMA's proposal to require merging parties to provide internal R&D documents has the potential to capture a significant volume of material, thereby increasing the burden on merging parties. We would respectfully encourage the CMA to show flexibility in the information it requires on this topic, especially where R&D is not an important aspect of the merging parties' business.

4. DRAFT REVISED TEMPLATE WAIVER

4.1 We agree with the CMA's proposed amendments in the Draft Revised Template Waiver to reflect the changes to the current template confidentiality waiver which have been proposed by merging parties and their advisers in practice. We have no specific comments on the proposals.

Allen & Overy LLP
8 January 2024