The City of London Law Society

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

Submission from the City of London Law Society

1. Introduction and summary

1.1 The City of London Law Society ("**CLLS**") welcomes the opportunity to respond to the CMA's consultations on: (a) changes to CMA's guidance on jurisdiction and procedure (CMA2) in relation to merger control; and (b) new draft guidance on mergers: exceptions to the duty to refer.

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent both complainants and those companies under investigation by regulators.

1.3 The individuals responsible for the preparation of this response are:

(a) **Nigel Parr**, Ashurst LLP

(b) **Nicole Kar**, Linklaters LLP (Chair)

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(d) **Ian Giles**, Norton Rose Fulbright LLP (Vice Chair)

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1.4 We welcome the opportunity to respond to the CMA's consultations and set out below our comments. These are based on our members' significant experience and expertise in advising on the application of the Enterprise Act 2002 in relation to a wide variety of transactions. Our comments build on our Committee's response to the CMA's "call for information" on Phase 2 merger investigations published on 29 June 2023.[1]

1.5 The CMA's consultation on changes to CMA2 comprises ten questions. We set out our responses to those questions on which we had a contribution to make, in Sections 2 to 4 below.

1.6 Our summary thoughts are as follows:

(a) We welcome the CMA's approach to improving the quality of engagement between the CMA and the businesses involved in Phase 2 merger investigations. We are pleased that many of the suggestions made in our response to the CMA's call for information form part of the consultation draft.

[1] Our response to the earlier call for information is available on the CMA's website at: https://assets.publishing.service.gov.uk/media/655785bd046ed400148b9b26/City_of_London_Law_Society.pdf

(b) Whether these changes will make a meaningful difference to the quality of engagement in Phase 2, will of course depend on their implementation in practice. For example, the revised Main Party Hearing is dependent on Interim Report being sufficiently developed to allow the merger parties to engage with and respond to the key issues at hand.

(c) The Draft Revised Guidance indicates that the CMA can take a case-specific approach when applying the guidance (e.g. when deciding whether merger parties should have both a teach-in and an initial substantive meeting). However, when the Draft Revised Guidance is first adopted, we would encourage the CMA to take a broadly consistent approach for an initial interim period to provide businesses certainty with respect to its application and to allow working practices to develop.

(d) The Committee continues to believe that a world class merger regime requires transparent and timely disclosure of evidence, data and analysis upon which the agency seeks to rely, as well as meaningful and timely engagement with the merging parties. We would encourage the CMA to provide greater access to evidence that underpins its Interim Report (e.g. using confidentiality rings) at an earlier stage in the Phase 2 process. This is not only important for the parties' rights of defence, but to ensure that the CMA reaches a robust and appropriately tested decision in the time available. The CMA's current approach can limit the merger parties' ability to engage with the underlying material in the Interim Report in a timely fashion and make meaningful submissions that engage with the substance of the CMA's case.

Consultation on changes to CMA's guidance on jurisdiction and procedure (CMA2) in relation to merger control

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

2.1 As noted above, we are broadly supportive of the Draft Revised Guidance which proposed meaningful changes that are capable of improving the current process for the benefits of all stakeholders. Subject to the additional amendments and refinements proposed in this submission, we think the Draft Revised Guidance is sufficiently clear and helpful.

3. What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

3.1 As noted above, we are broadly supportive of the proposed changes in the Draft Revised Guidance, but consider that the following clarifications are necessary:

(a) **Teach-in:** the Draft Revised Guidance suggests that there are certain cases where a teach-in may not be necessary (e.g. where the CMA has prior experience in the sector). Although the Draft Revised Guidance is unclear on this point, we assume that it is currently proposed that the CMA will make this decision; however, given the importance of this initial set-piece for the merger parties, we believe it should be at the parties' discretion (taking account of any feedback from the CMA) as to whether they want to forgo the teach-in; i.e a teach-in session should be the default.

Even where the CMA has prior experience of the sector, this may not be the case for all members of the Inquiry Group, and there may have been important more recent (or indeed forthcoming "pipeline") developments in the market. Forgoing the teach-in would mean the parties lose the opportunity for early engagement at Phase 2 with the Inquiry Group and the Inquiry Group would similarly lose the opportunity to learn about the specifics of the parties' businesses.

(b) **Informal meetings with the case team**: we welcome the CMA's proposal to make greater use of informal update calls throughout its inquiry. We suggest that the CMA should make greater use of these calls prior to the issuance of material RFIs or S.109 requests (such as the First Day Letter). The purpose of these calls would be to discuss sources of evidence; proposed analysis and to help the CMA to refine its request so that it not asking for unnecessary or a disproportionate amount of information. These calls would be in the interests of both the CMA and the merger parties.

(c) **Third-party submissions**: Paragraphs 9.15 and 9.16 in the Draft Revised Guidance state that while the CMA understands that parties may want to engage with third parties (such as their customers) regarding any merger control review, and broadly welcomes parties encouraging third parties to engage with the CMA, parties (and their advisers) "should not seek to influence the content of third-party submissions in any way". We understand this content has been added to address the concerns the CMA identified in the *Copart/Hills Motors* case which led to the CMA publishing an open letter regarding "customer outreach".[2] The wording "in any way" is broad and we consider could catch legitimate conduct (e.g. a party sending a communication to customers to explain why it believes the merger is beneficial for them and encouraging recipients, if they agree with those benefits, to engage with the CMA and express their support for the merger). We think it would be helpful for the revised guidance to set out examples of specific conduct that would be inappropriate (e.g. using pressure or threats to require customers to make specific submissions to the CMA).

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

4.1 We consider that the following further amendments ought to be made to the Current Guidance:

(a) **Duration of set-pieces:** in line with our response to the CMA's initial consultation, the Committee is supportive of: (i) the CMA's proposal to have both a teach-in and an initial substantive meeting at the start of the Phase 2 process; and (ii) the structure / content of the revised Main Party Hearing. However, the Draft Revised Guidance should provide further clarity on the expected duration of these three set pieces. Whilst this will inevitably be case specific and depend on the complexity of the CMA's review, we would suggest that there should be a working assumption that the merger parties will each have at least one day with the Group across the teach-in and initial substantive meeting and a further day at the Main Party Hearing.

[2] See: Open letter to Copart, Inc (publishing.service.gov.uk)

(b) **Internal challenge within the CMA at Phase 2:** as noted in our response to the CMA's request for comment, whilst we acknowledge that bringing case team members from Phase 1 to Phase 2 brings about efficiencies, there is also a greater risk of confirmation bias. One suggestion is to formalise the role of the Devil's Advocate in Phase 2 and ensure the role is afforded sufficient resource / support / time to be in a position to effectively advocate the "other side" to the case team.