

## **CMA Consultation: Changes to CMA mergers guidance – Euclid Law comments**

Euclid Law welcomes the CMA’s proposed changes to its mergers guidance and related documents, which mostly reflect the feedback received from Euclid Law and other third parties during the CMA’s call for information. As noted during our response to the call for information, Euclid Law believes that, in many cases, the existing process is not working well and that meaningful engagement with the Inquiry Group is limited. The proposed changes seek to address this point.

Whilst the proposed changes are commendable, given the additional time commitment required by the Inquiry Group, as noted in our response to the call for information, we consider it would be beneficial to ‘professionalise’ the panel by reducing the number of members and increasing the expectation of time devoted to inquiry work. Without these changes, we are concerned that many of the positive proposals (in particular those that are not formalised into the process) will not occur due to lack of availability.

In addition, the CMA’s rejection of the proposal put forward by many, including Euclid Law, to give merging parties access to file in Phase 2 mergers is disappointing. Access to file is built into phase 2 processes in other jurisdictions that work to similar timelines to the UK, and the robustness of the CMA process would benefit significantly from providing parties with direct access to the underlying evidence reviewed by the CMA. We urge the CMA to reconsider its position on this point.

Our comments are set out in greater detail below, followed by responses to the consultation’s questions for consideration.

### **Updates to the phase 2 merger process**

#### *Early engagement*

Euclid Law welcomes the suggested changes to the evidence gathering stage of the inquiry and in particular (i) the early ‘teach-in’ within the first two weeks of the inquiry, possibly including a site visit<sup>1</sup> and (ii) the initial substantive assessment within the first six weeks. These will be accompanied by the response to the Phase 1 decision to be submitted within the first two weeks of the inquiry.

As indicated previously, we consider that early meaningful interaction will improve the efficiency of the inquiry as it will help the Inquiry Group understand the businesses and the parties’ case much earlier in the process. For example, we note that in the LSEG/Quantile Phase 2 merger inquiry, the site visit did not take place until the end of week 5. Similarly, in Copart/Hills, the site visits did not take place until week 6.

Euclid Law also welcomes the streamlining of the early submissions, with focus now given to the response to the Phase 1 decision, a practice that is already largely in place, whilst abolishing the Issues Statement and response, which have become repetitive and largely meaningless both for the merging parties and the CMA.

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<sup>1</sup> See paras 11.10-11.12 Draft Revised Guidance.

### *Ongoing engagement*

Euclid Law also welcomes the CMA's desire to increase the use of informal update calls throughout the inquiry. Our recent experience shows that practice varies between inquiries on their use of update calls.

We note that the Draft Revised Guidance<sup>2</sup> stresses that the update calls are discretionary and, whilst possible touchpoints are included, the guidance does not formalise the need for these. Given the CMA's own view in its consultation document that "*this greater engagement will enable improved focus on key areas, provide more transparency over emerging thinking, and facilitate more targeted submissions*", we consider it would be helpful to set a more prescriptive approach to these calls to ensure that they are used consistently across Phase 2 inquiries.

### **Interim report and main party hearings**

The feedback received by the CMA (including from Euclid Law) was that the provisional findings came too late in the process and therefore effectively formed a draft decision. The CMA proposes addressing this by publishing an earlier interim report and having the main party hearing after this report rather than before it, as is currently the case. Euclid Law agrees with this proposal, although we note that in Table 2 of the Draft Revised Guidance, the interim report would be published in weeks 12-14 whilst in the Current Guidance the provisional findings are published around week 15. There is therefore a risk that the interim report would not be published much earlier than is currently the case, leading to all the same issues that exist currently. In order to truly address the feedback that "the case 'against'" parties comes too late in the process to allow meaningful engagement with the Inquiry Group<sup>3</sup>, we suggest that the interim report should be published around week 12. The absence of a formalised annotated issues statement and working papers should facilitate this earlier publication. This earlier publication would also ensure that there is sufficient time to publish a supplementary consultation, should one be necessary, without the need to resort to an extension. Finally, publication of the interim report around week 14 would result in any remedy process being very rushed and arguably would undermine meaningful engagement in the CMA's new proposed remedy process.

Whilst we note the CMA's decision not to respond to the feedback from some parties around timing of publication of the provisional findings<sup>4</sup>, we note our previous feedback that transparency as to the Inquiry Group's thinking should not be compromised by the fact that the interim report will be made public, in particular as it is likely that working papers will no longer be provided to the parties. This also makes even more critical the formalisation of regular "update calls" with the parties.

### **Remedy process**

Euclid Law considers the proposed changes in the Draft Revised Guidance relating to remedies to be a helpful addition. In particular, the possibility of an early remedies-focused meeting or call prior to the interim report is likely to be a very useful addition to the parties in understanding provisional views on any possible remedies proposal.

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<sup>2</sup> See paras 11.41 – 11.45 Draft Revised Guidance.

<sup>3</sup> Feedback noted in paragraph 3.19 Consultation.

<sup>4</sup> See paras 3.14 and 3.21 Consultation.

We note that instead of the current response hearing, the Draft Revised Guidance proposes “*at least one meeting with the Inquiry Group*”<sup>5</sup>, which will be either in-person or remote, depending on the circumstances of the case. We would caution against the proposed changes leading to reduced engagement with the Inquiry Group, rather than the desired increased engagement.

### **The CMA’s rejection of the feedback on access to file**

Euclid Law finds it disappointing that the CMA has chosen to reject the feedback from “most respondents”<sup>6</sup> calling for full access to the third-party evidence relied on by the Inquiry Group.

The reasons provided by the CMA for continuing with its current approach are unconvincing, principally because access to file is used successfully in other jurisdictions, including by the European Commission and a number of European national competition authorities. We are not aware of any suggestion (or indeed evidence) that third parties are less likely to comment in these procedures than they are to the CMA. Confidential third party information can be redacted as required, and documents anonymised where necessary and requested by the third party concerned.

Instead of access to file, the consultation proposes formalising the CMA’s more recent practice of making available certain documents in unredacted form to external advisers via a confidentiality ring. As noted in the Draft Revised Guidance<sup>7</sup>, the merger parties are “*provided with sufficient information in order to be able to make informed submissions in response to the CMA’s interim report*” (i.e. the ‘gist of the case’). This does not go far enough to address the concerns expressed in response to the call for information. Not only does access to file enable parties to address third party evidence head on (both ‘inculpatory’ evidence on which the CMA has placed weight and ‘exculpatory’ evidence on which it has not), it also reduces the risk of confirmation bias that Euclid Law identified as a potential risk in its response to the call for information, making the process more robust. In particular, the CMA’s more limited proposal does not enable parties to test third party submissions earlier in the process (and therefore address these in their own submissions) or review important pieces of evidence in their entirety, such as the responses to third party questionnaires, on which the CMA typically relies.

Whilst we agree that the changes to the process suggested by the CMA will be a welcome improvement, they do not address this critical issue, that goes to the substance of the CMA’s case and, arguably, the parties’ rights of defence. We urge the CMA to reconsider its position on this important issue.

### **We respond to each of your questions briefly below:**

#### ***Draft Revised Guidance***

1. *Overall, is the Draft Revised Guidance sufficiently clear and helpful?*
  - Overall, the Draft Revised Guidance is helpful and incorporates much of the feedback from the call for information.
  - As noted above, we consider that the following should be clarified / amended:

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<sup>5</sup> See Table 2 Draft Revised Guidance and para 3.28 Consultation.

<sup>6</sup> See para 3.31 Consultation.

<sup>7</sup> See paras 17.15 et seq Draft Revised Guidance.

- The 'update calls' should be formalised within the guidance rather than being left to the discretion of the case team to ensure consistency.
  - The interim report should be published around week 12 rather than weeks 12-14 to ensure the benefit of early publication and not result in a 'rushed' second half of the inquiry.
  - The feedback from the majority of respondents to the call for information in relation to access to file should be taken into account and reflected.
2. *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.*
- See the response to Q1 above.
3. *Are there any other amendments which you consider ought to be made to the Current Guidance?*
- See the response to Q1 above.
4. *Are the requirements of the Phase 2 Remedies Form sufficiently clear? Are there any comments you wish to make on the proposed Phase 2 Remedies Form?*
- The Phase 2 Remedies Form is based substantially on the Phase 1 Remedies Form for offers of undertakings in lieu of reference, with which parties will already be familiar. It is helpful in providing a framework for engaging with the CMA and Euclid Law has no specific comments on it.

### ***Draft Revised Merger Notice***

5. *Are the proposed amendments to the Current Merger Notice sufficiently clear?*
- The proposed changes are clear and helpfully reflect the latest changes to the Merger Assessment Guidelines.
  - We note that the draft merger notice deletes questions relating to both the merged entity's buyer power (current Q17), as well as countervailing buyer power (current Q23). Whilst it may be true that there are a limited number of mergers in which the merger parties' buyer power is relevant<sup>8</sup>, the same cannot be said about countervailing buyer power. Nevertheless, countervailing buyer power can be addressed within other sections of the merger notice.
6. *Are the proposed amendments to the Current Merger Notice appropriate in order to provide the CMA with the necessary information to conduct an initial assessment of a merger in line with the Merger Assessment Guidelines?*
- The Merger Notice gives the parties sufficient flexibility to submit information that they may wish to provide, as well as ensuring that the CMA possesses the information necessary to carry out the required assessment.
7. *Are there any other amendments you consider ought to be made to the Current Merger Notice to bring it in line with the current Merger Assessment Guidelines?*
- See responses to Q5 and 6.
8. *Do you have any other suggestions for additional or revised content of the Current Merger Notice you would find helpful?*

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<sup>8</sup> See para 4.9(b) Consultation.

- No, see responses to Q5 and 6.

***Draft Revised Template Waiver***

9. *Are the proposed amendments to the Current Template Waiver sufficiently clear?*

- Yes, Euclid Law has no specific comments on the proposed amendments to the Current Template Waiver.

10. *Are there any other amendments which ought to be made to the Current Template Waiver?*

- See responses to Q9.

**Euclid Law Limited**