EVERSHEDS SUTHERLAND

Response to the CMA's consultation on revised mergers guidance and associated documentation

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1. Introduction

1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation document on its "*Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers, draft revised merger notice and draft revised template waiver*", as published by the CMA on 20 November 2023 (the "**Consultation**"). The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

1.2 Our response reflects our extensive experience in advising merging parties, as well as third parties, on a number of CMA Phase 2 investigations and on equivalent investigations in similar jurisdictions.

1.3 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website to the extent necessary.

2. Executive summary

2.1 We are pleased to see that the CMA has taken account of a number of the points we raised in (i) the various stakeholder meetings that we have attended, and (ii) our Response to the CMA's Call for Information on Phase 2 Merger Investigations dated 25 August 2023 (the "**Call for Information Response**"), in the Consultation.

2.2 We welcome a number of the proposed changes made by the CMA to Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised) to form the draft new guidance on the CMA's jurisdiction and procedure (the "**Proposed New Guidance**").

2.3 In particular, we consider the additional engagement which the Proposed New Guidance provides with the Inquiry Group, including in relation to update calls, teach-ins, the initial substantive meeting and the revised main party hearing, to be positive enhancements to the Phase 2 process and will allow for the issues at-hand to be identified more quickly and discussed/assessed in greater detail.

2.4 We consider that the opportunity provided by the Proposed New Guidance to present directly to the Inquiry Group both before and after seeing the CMA's provisional views in the interim report will help address the concern that merging parties do not have sufficient opportunity to make oral representations on the substance of the case. We expect that the changes in the Proposed New Guidance will also result in the adoption of a more discursive approach in that hearings will be less focused on information gathering and more interactive than is currently the case.

2.5 Our comments in this response are therefore focussed on those areas where we consider that some amendments to the Proposed New Guidance will provide further benefits for the Phase 2 process. In particular, we consider that:

2.5.1 it would be helpful for the Proposed New Guidance to make clear that holding an introductory teach-in will be the CMA's default or usual approach and that the CMA will discuss this (and the contents of the teach-in) at the outset of Phase 2 with the merging parties. In particular, where the CMA considers that a teach-in may not be helpful in a particular case, we propose that the Proposed New Guidance should clarify that this will be discussed with the merging parties and their views (including their experience of the markets in question) are taken into account before any decision is reached by the CMA as to whether a teach-in will be held. We also consider that there would be benefit for maintaining a separate site visit in most cases and that the Proposed New Guidance should provide for

some additional flexibility around the timeframe within which the initial teach-in meeting is to be scheduled;

2.5.2 it would be important to include additional language in the Proposed New Guidance clarifying the level of detail to be included in the interim report, reflecting the approach outlined in the CMA's consultation document;

2.5.3 the Proposed New Guidance should explicitly provide for the opportunity for merging parties to comment on all section 109 notices / information requests in draft before they are issued;

2.5.4 if the CMA considers that a "full" access to file process is not appropriate for Phase 2 then the Confidentiality Ring process should be expanded so that the key evidence upon which the CMA relies is provided in full to the merging parties' advisers (rather than simply extracts or descriptions); and

2.5.5 additional guidance on when the CMA's Mergers Intelligence Committee would consider the application of the *de minimis* exception in the context of a briefing paper would be helpful.

3. Recommended changes to further enhance the Phase 2 process

(a) Engagement with the Inquiry Group

3.1 We welcome the fact that paragraph 11.10 of the Proposed New Guidance formalises a 'teach-in' which will give the merging parties an opportunity to explain how their business works, and inform the Inquiry Group and members of the case team about the markets at issue at an early stage of the Phase 2 process.

(i) Default that an introductory teach-in will take place

3.2 As per our Call for Information Response, we consider that formally providing for initial teach-in(s) at the beginning of the Phase 2 process in the Proposed New Guidance will substantially enhance the way in which the Phase 2 process operates and will provide efficiencies both for the CMA and for merging parties. We understand that this is also reflected in other feedback which the CMA received to its Call for Information.

3.3 In this regard our view is that the Proposed New Guidance should make clear that a teach-in will take place as a standard part of any Phase 2 process (i.e. it will be the default approach and that only in exceptional circumstances would a teach-in not take place).

3.4 Currently, the wording of the Proposed New Guidance provides an Inquiry Group with substantial leeway as to whether a teach-in takes place. Paragraphs 11.10 and 11.12 of the Proposed New Guidance provide that the CMA "*may*" arrange an initial teach-in and that an initial teach-in "*may not be necessary where the markets at issue are not complex or whether the CMA has previous experience of the sector*". It does not make clear that the teach-in will take place as default.

3.5 We therefore propose that the wording of Paragraph 11.10 should be amended such that it reads "*… the case team shall arrange an initial 'teach-in' meeting*".

3.6 With regards to Paragraph 11.12, even where the markets at issue in a transaction are not complex or are markets which the CMA has assessed previously, there are likely to be specific issues about the transaction in question and the competitive dynamics which would make a teach-in equally as valuable as cases in markets which the CMA has not assessed before or which are more complex. Markets or parts of the market also evolve quickly and

merging parties will have an accurate view and will be best placed to assess whether the markets at issue have changed since a previous CMA decision in the sector. With this in mind, we are of the view that Paragraph 11.12 of the Proposed New Guidance be amended so as to ensure that an initial teach-in meeting is not erroneously determined as unnecessary within the Phase 2 process. We propose the following "*Companies should expect that an introductory teach-in will form a part of the Phase 2 process as standard. The CMA will discuss at an early stage when an introductory teach-in will take place and what topics it will cover. To the extent that the Parties or the CMA consider that an introductory teach-in may not be necessary, for example because the CMA considers that the markets at issue are not complex or because the CMA has previous experience of the sector, then this will be discussed between the CMA and the Parties at the outset and the CMA will give due consideration to the Parties' views and experience of the markets in question before deciding whether an introductory teach-in would be appropriate.*"

(ii) Retaining the site visit (irrespective of teach-ins)

3.7 We note that the initial teach-in meeting "*may also involve a site visit where appropriate in light of the nature of the businesses involved*".[1]

3.8 We consider that the site visit is a particularly helpful and important part of the Phase 2 process. It enables merging parties to provide an in-person explanation of their products / services and the market(s) in which they operate. In most cases we would expect this to provide additional benefit alongside the introductory teach-in (and initial substantive meeting) and we propose that the Proposed New Guidelines reflect this and provide a greater steer that a site visit (additional to the teach-in) should be expected to take place in the early stages of Phase 2.

(iii) Ensuring the Inquiry Group / staff have flexibility around the timeframe within which the initial teach-in meeting is to be scheduled

3.9 Paragraph 11.10 of the Proposed New Guidance proposes that the initial 'teach-in' will take place during the first two weeks of the Phase 2 process and that an introductory teach-in meeting will typically not be held where a suitable date cannot be found within these first two weeks.[2]

3.10 We appreciate that any teach-in will need to be held early in the Phase 2 process to maximise its benefit. We also consider that in some, if not most, cases it will be possible to organise the teach-in within this time period. However, we are concerned that the wording of the Proposed New Guidance could unnecessarily prevent a teach-in from taking place where it would remain beneficial to the CMA and the merging parties (even after the initial two weeks).

3.10.1 In some cases, issues which would merit a teach in may emerge in the early stages of Phase 2 but not necessarily in the first two weeks. For example, as the Inquiry Group / case team reviews merging parties' responses to the Phase 1 decision or once the merging parties or third parties have submitted responses to the CMA's first set of s109 notices / information requests.

3.10.2 For some clients, particularly those where the relevant business persons who would lead a teach-in are located overseas or which have smaller teams and/or where there is one or a small number of business people who would be best placed to speak to the issues to be discussed at the teach-in (and who are likely

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1 Proposed New Guidance, paragraph 11.10.

2 Proposed New Guidance, paragraph 11.12.

also to be dealing with the CMA's First Day Letter, administrative meeting and accompanying markets and financial s109 notices / information requests as well as their normal day-to-day work), there may be challenges to organise this type of meeting within this time period. We note that the CMA suggests that merging parties should consider the availability of the key commercial and operational staff who would attend a teach-in meeting during the window within which such a meeting might take place prior to any reference being confirmed.[3] And in some cases this may well be possible. However, for some clients, putting in place restrictions on the availability of business people (often senior business people) for a teach-in which is framed in the Proposed New Guidance only as a possibility rather than the default position may be challenging (and impose an unnecessary burden on clients) particularly in circumstances where a Phase 2 reference may not be certain.

3.11 With this in mind, it would be helpful for the Proposed New Guidance to allow for some flexibility around this two-week deadline to afford all types of business the opportunity to schedule an effective and informative teach-in meeting with the CMA.

3.12 We consider that this approach would generate efficiencies for the CMA as all types of businesses will be able to organise and present comprehensive and insightful teach-in sessions to the Inquiry Group and case team. By ensuring all of the key commercial and operational staff can attend the teach-in meeting, it is also more likely that companies will be able to answer all of the CMA's questions, thereby allowing the CMA to gain a greater practical understanding of the merging parties' businesses and the products/services that they offer.

3.13 This, in turn, will allow the CMA to further focus and streamline its subsequent information requests given that the CMA will have the opportunity to engage with and learn more about the merging parties and their businesses earlier on in the process.

(b) "Core information" included in the interim report

3.14 We welcome the fact that a number of stages in Phase 2 will happen at an earlier stage in the process under the Proposed New Guidance. We also understand the CMA's reasoning for moving the interim report from "around week 15" to weeks 12 to 14 of the Phase 2 process and we welcome the CMA's proposals that merging parties will be able to see the 'case against' (if that is the CMA's provisional findings) at an earlier stage in the process. We also welcome the CMA's acknowledgement that this process may result in merging parties being able to present further evidence after the interim report is published which may lead to supplemental interim reports.

3.15 We also welcome that the CMA's consultation document states that the interim report "*will provide a clear and detailed articulation of the Inquiry Group's provisional assessment*". We note, however, that this wording is not reflected in the Proposed New Guidance and that the CMA proposes that the requirements for the interim report are different to those of the current provisional findings in that there is no requirement for the interim report to include "*a full explanation of the CMA's reasoning in reaching its provisional findings*" (which is a current requirement for provisional findings). We propose either retaining the existing wording (providing a full explanation) or including the wording set out in the consultation document to help provide clarity to all parties as to what level of information will be included in the interim report. This would be consistent with the CMA's statements that the

[3] Proposed New Guidance, footnote 228.

provisional assessment set out in the interim report will be "*sufficiently developed to satisfy the CMA's statutory duty to consult on its proposed decision*".[4]

(c) Assessing Phase 2 investigation with a "fresh pair of eyes"

3.16 We agree with the CMA's proposal to remove the annotated issues statement from the start of the Phase 2 process. In our view, the issues statement is an unnecessary procedural step in the Phase 2 process and could save the CMA, merging parties and interested third parties valuable time if removed.

3.17 We understand that, as a result of this change, the CMA's Phase 1 decision will become the starting point to identify the key issues in Phase 2 and that merging parties will be invited to provide comments on the Phase 1 decision at the outset of Phase 2.

3.18 Whilst such proposals are certainly welcome, it is our view that it is important for the merging parties' cases to be treated and assessed on a "clean slate" at the beginning of Phase 2, and that the CMA assesses any new information presented by merging parties throughout the Phase 2 assessment period with a "fresh pair of eyes".

(d) Enhanced engagement on potential remedies

3.19 We appreciate the CMA's proposed alterations in relation to its existing approach to remedies in an attempt to encourage earlier *without prejudice* remedies discussions (which was a key point raised in our Call for Information Response).

3.20 Specifically, we welcome the: (i) increased transparency and feedback from the Inquiry Group in relation to without prejudice remedies discussions, (ii) a new remedies form that seeks to provide more clarity around what information will be required to assess any proposed remedies, and (iii) greater engagement with the CMA about remedies throughout Phase 2 – including holding at least one remedy meeting and a greater number of information discussions at an earlier stage.

3.21 However, as the CMA recognises in paragraph 3.27 of the Consultation, there have been a number of cases where merging parties have expressed concern about whether such discussions would, in fact, be without prejudice. Despite advising such clients that this is within the capabilities of the Inquiry Group, we find that companies still generally remain hesitant to engage in such discussions with the decision makers if they still believe clearance of the deal is achievable.

(e) *De minimis* exception

3.22 We welcome the Consultation's proposed changes in relation to the CMA's *de minimis* exception, including increasing the threshold beneath which it may deprioritise a merger from £15 million to £30 million.

3.23 In light of the wide degree of discretion the CMA has when implementing the *de minimis* exception, we would be keen to ensure that the application of this exception is exercised on a consistent basis to provide merging parties with even further clarity and predictability around when the exception is likely to apply in any given case. It would, therefore, be helpful to provide some additional guidance, in the form of examples, as to when the CMA considers that the changes to the *de minimis* exception would capture transactions which previously would not have fallen within the exception.

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4 Consultation, paragraph 3.19.

3.24 In addition, it would be helpful for legal advisers to receive further information on the circumstances under which the CMA will take the application of the *de minimis* exception into account in the context of a briefing paper.

(f) Opportunity to comment on section 109 notices / information requests in draft before they are issued

3.25 We note that, as part of its Phase 2 opening letter, the CMA invites the merging parties to participate in a data meeting to discuss what (if any) relevant additional or updated data, internal documents and other information sources, not already drawn on during the phase 1 investigation, may be available to the merging parties to help the CMA to focus subsequent information requests.

3.26 In our experience, we have found it very helpful when the CMA circulates draft section 109 notices / information requests to the merging parties before being finalised. Our view is that it would prove more efficient if *all* information requests were sent to the merging parties and their advisors in draft form and then discussed on a call with the CMA before they are then finalised and issued to the merging parties.

3.27 We consider that it is important to engage in this way – both in writing and as needed on calls – to ensure that the internal documents and data being requested are (a) capable of being complied with by the business and (b) useful and informative for the CMA's investigation. This is particularly because these types of information requests are typically costly and resource intensive for clients to respond to.

(g) Access to file

3.28 We understand from the Consultation that the CMA does not intend to introduce a "full" access to file process.

3.29 Whilst the earlier disclosure (via confidentiality ring) in advance of the main party hearing is very welcome, as is the CMA offer in appropriate cases to provide merging parties with more detail of complaints, we note that other administrative process jurisdictions (including the EU) do allow parties to see all relevant underlying documents. Furthermore, we believe that the current approach limits the merging parties' ability to make informed submissions and engage with (and where appropriate, challenge) the CMA's thinking in a timely fashion.

3.30 Should the CMA not wish to include a "full" access to file process, we propose that the CMA should, as standard, broaden the disclosure it includes in the confidentiality ring. Rather than limiting the disclosure within the confidentiality ring to, for example, extracts from CMA documents which are confidential to third parties (e.g. extracts from provisional findings/interim report) we propose that the CMA discloses the underlying evidence which the CMA has gathered and which is material to the CMA's findings. For example, if the CMA relies on concerns raised by specific customers about a transaction, the merging parties' advisers should – subject to the requirements of the confidentiality ring – have the opportunity to review the underlying evidence provided by those customers in full in order to ensure the merging parties right to reply.

3.31 Furthermore, in our experience, third party evidence has typically only been made available to merging parties after publication of the provisional findings. We consider that it would be more effective for merging parties to be given access in the early stages of Phase 2 to allow engagement and response to the CMA's case.

3.32 We would, therefore, encourage the CMA to reconsider its approach in the Consultation on these reforms. It is an area of crucial due process in which there is a risk that merging

parties feel they cannot fully address and respond to CMA's findings if they are not aware of the evidence the CMA has been provided or gathered.

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