CONSULTATION ON 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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Freshfields Bruckhaus Deringer

RESPONSE TO THE CMA'S CONSULTATION ON DRAFT REVISED GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE IN RELATION TO MERGERS, DRAFT REVISED MERGER NOTICE AND DRAFT REVISED TEMPLATE WAIVER

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to respond to the Competition and Markets Authority's (***CMA***) consultation of 20 November 2023 (***Consultation***) on:

(a) Draft revised guidance on the CMA's jurisdiction and procedure in relation to Mergers (***Revised Guidance***);

(b) The new draft Phase 2 Remedies Form;

(c) The draft revised Merger Notice; and

(d) The draft revised Template Waiver (***Revised Template Waiver***).

1.2 The Consultation follows the unveiling of a number of proposals from the CMA to improve operation of Phase 2 merger investigations, in particular, through greater engagement with the Phase 2 decision-maker and by offering clearer opportunities for early engagement on remedies (the ***Phase 2 Proposals***).[1]

1.3 In the following we set out our comments on the Phase 2 Proposals as a whole, including relevant aspects of the Revised Guidance and the Revised Template Waiver, together with – as requested by the Consultation – suggestions as to additional amendments where necessary to further enhance the effectiveness of the CMA's Phase 2 investigation process. We would be happy to discuss any of our comments in more detail and contribute to any further thinking or analysis on these issues.

1.4 Please note that this response does not represent the position of any of our clients or any individual partner in our Firm.

2. The Phase 2 Proposals

2.1 Freshfields welcomes the Phase 2 Proposals and would like to take this opportunity to reiterate its thanks to the CMA for listening to respondents, and we are grateful to see that many of our suggestions in our response to the CMA's Call for Information[2] have been recognised by the CMA and addressed in the amendments to the Phase 2 process and reflected in the draft Revised Guidance. In particular:

(a) *Reorganisation of the initial information gathering stage*

2.2 Removing the Issues Statement and the Annotated Issues Statement and using the Phase 1 decision as the starting point for the substantive assessment at Phase 2 should make this phase of the investigation process more efficient and effective. Likewise, ensuring that a site visit and teach-in sessions occur early in this information gathering stage (within weeks 1 to 6) – and in any event before the CMA publishes any initial substantive findings (in the form of the new Interim Report) – is an important early opportunity for the merging parties to

[1] At a CMA Event: *UK Merger control in the post-Brexit era*, 20 November 2023.
[2] Of 29 June 2023.

provide their views on the key issues of substance in addition to any technical issues relating to the parties' businesses.

(b) *Opportunities for merging parties to have direct access to, and proper engagement with, the Inquiry Group during the Phase 2 assessment*

2.3 As set out in our response to the Call for Information, the CMA's assessment process would materially improve if the Phase 2 case team were empowered to engage with the merging parties on substance or if 'State of Play' meetings – at which the merging parties are provided with a substantive update on the CMA's emerging thinking – were introduced. We therefore welcome as part of the Phase 2 Proposals the introduction of the "initial substantive meeting" with the Inquiry Group. This should provide merging parties with the opportunity to present their views on the substantive competition issues set out on the Phase 1 decision, in-person, to the Inquiry Group, well in advance of the CMA's provisional decision (in the form of the new Interim Report, on which see further below). In addition, the CMA's intended use of update calls, in particular after the initial substantive meeting and the main party hearing, in order to give merging parties a better understanding of the progress of the investigation, facilitate relevant submissions and assist them with preparing any remedy proposals, should be helpful to show the CMA's emerging thinking.

2.4 We also welcome the replacement of the Issues Statement and the Annotated Issues Statement by the new Interim Report, intended to be published around weeks 12-14 (and so earlier than the existing Provisional Findings), providing a "*clear and detailed articulation*"[3] of the Inquiry Group's provisional assessment on key statutory questions and a description of the evidence on which this is based. This should allow merging parties more time to engage and respond to the CMA's substantive assessment. Provision of an unredacted version of the Interim Report to merging parties' advisers within a confidentiality ring will be important.

2.5 We further agree with the significant proposal to 'revamp' the main party hearing, with a view to providing a *"full hearing on the merits"*[4]. This ability for merging parties to present their response to the Inquiry Group's provisional assessment (as set out in the Interim Report) in-person and directly, and to have a meaningful, interactive exchange with the Inquiry Group will significantly enhance the quality of the CMA's investigation and overall decision-making, as well as facilitate greater mutual understanding between the CMA and the merging parties.

(c) *Sufficient time to address the substantive assessment before moving onto the discussion of remedies*

2.6 Provision for a more sequenced distinction between the merging parties' representations on the Inquiry Group's substantive assessment and its preliminary decision as to feasible remedies goes some way to disentangling these two issues. This should, in theory, assist merging parties to engage more meaningfully on the substance at a time before the Inquiry Group has fully transitioned to considering remedies. We would hope that this will help mitigate any actual or perceived tendency of the Inquiry Group to be less open to further consideration of the substantive issues at this stage.

2.7 The Revised Guidance, to the extent it reflects the above changes, is helpful and welcome. As noted below, the success of these proposals, in practice, will depend on the degree to which there is a cultural change in the operation of CMA panels and case teams to facilitate greater

[3] Paragraph 3.19 of the CMA's Consultation document, 20 November 2023 (***Consultation Document***).
[4] Slide presentation, UK Merger control in the post-Brexit era, 20 November 2023.

openness and substantive discussion. However, there are some points arising out of the Phase 2 Proposals that we consider deserve further reflection:

(a) *Access to file*

2.8 Regrettably, the Phase 2 Proposals do not resolve the issue raised by "*most respondents*"[5] to the Call for Information, who suggested that merging parties should be granted full access to the third party evidence relied on by the Inquiry Group.

2.9 On the contrary, the Consultation notes that the CMA considers that "*there is currently no evidence of systemic failings in the existing* [access to file] *process*"[6], relying on the fact that the Competition Appeal Tribunal (***CAT***) has confirmed that the current process for the disclosure of evidence is sufficient to ensure procedural fairness. Moreover, the CMA refers to its track record before the CAT when its practice regarding the disclosure of evidence has been challenged, stating that the CAT has consistently given the CMA's practices a "*clean bill of health*", with no suggestion that the CMA "*withholds, distorts or otherwise fails to adequately provide the gist of the evidence appropriately*"[7], or that merging parties are unable to "*respond sufficiently to the case against them*"[8]. Accordingly, under the Phase 2 Proposals, the CMA considers it sufficient that external advisers are given full access to confidential versions of documents produced by the CMA through a confidentiality ring and that such access will be granted earlier in the Phase 2 process, at the time of the new Interim Report.

2.10 It is disappointing that the CMA has not taken the opportunity afforded by the Consultation to reform its approach to access to file. Respectfully, the CMA's proposal to avoid making any changes to the access to file procedure on the basis that the CAT has found no problems with parties *not* having access to file, does not form a sound basis for maintaining the *status quo* and for rejecting the proposed improvements identified by many, including Freshfields, in responding to the Call for Information.

2.11 That the CAT has not found the CMA's procedures to be unlawfully unfair is not a compelling reason to conclude that the CMA's approach to dissemination of third party evidence works well or that it should not be improved. Quite the opposite. In an increasingly global regulatory landscape, the CMA's present process for disclosing third party evidence falls short of international best practice and the processes followed by the CMA's international peers. Indeed, we again note that other jurisdictions (for example the EU) are able to operate their access to file processes in such a way so as to allow merging parties the opportunity to see all relevant underlying documents, including exculpatory material, with appropriate safeguards for the protection of legitimate third party business secrets. We continue to consider that the introduction of a robust and universal access to file process as part of the CMA's Phase 2 procedure would significantly improve the ability of merging parties to respond effectively to the CMA's substantive assessment. There does not appear to be any compelling reason for the CMA's processes to compare unfavourably to those of other authorities in this respect. It would also further guard the CMA against the possibility of a successful future challenge alleging that the summarisation undertaken by the CMA has been insufficient or misleading.

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5 Paragraph 3.31 of the CMA's Consultation Document.
6 Paragraph 3.36 of the Consultation Document.
7 *Ibid*.
8 *Ibid*.

2.12 We therefore encourage the CMA to re-consider its position in this respect.

(b) *Panel engagement*

2.13 The CMA articulated its clear commitment to moving the CMA's Phase 2 investigation process from a largely inquisitorial one to a more discursive format[9], which is reflected in the draft Revised Guidance. However, the CMA has also accepted that taking the decision to undertake the Phase 2 Proposals is one question; turning those proposals into a concrete reality and implementing them in practice is very much another.[10] Indeed, the Consultation makes it clear that the Phase 2 Proposals "*will also require merger parties and their advisers to engage constructively with the revised process*".[11]

2.14 Whilst we recognise the importance of external advisers' and businesses' engagement with the Phase 2 Proposals, full realisation of the potential benefits of the enhancements will require an equally important cultural change among panel members and senior members of the CMA staff, particularly in order to enable the meaningful two-way dialogue that is being proposed. Anything the CMA can say about how it plans to make that cultural change in order to bring about the changes under the Phase 2 Proposals would undoubtedly demonstrate to businesses the CMA's commitment in this respect and likely encourage the reciprocity the CMA seeks on the part of merging parties. We would encourage the CMA to consider how this could be incorporated into the Revised Guidance.

(c) *Starting remedies discussions earlier in the Phase 2 process*

2.15 The Revised Guidance now includes a statement that merging parties are encouraged to engage with the CMA case team on possible remedies from an early stage during the Phase 2 investigation on a "without prejudice" basis. The CMA considers that its increased use of informal update calls throughout its inquiry, including before the publication of its Interim Report, will further assist with such "early stage" remedies discussions by giving merging parties earlier insight into the CMA's emerging thinking on the substance and thereby allowing them more understanding of the issue(s) the remedy is intended to "fix". Further, under the Phase 2 Proposals, the CMA will hold at least one remedy meeting with the merging parties to discuss the remedies proposal and provide the Inquiry Group's feedback with the aim of further developing an acceptable remedy proposal.

2.16 These important procedural steps – provided they are consistently adhered to in practice by the CMA case teams – are welcome adjustments to the Phase 2 remedies process and in combination with the clearer separation (in terms of timing) between the CMA's provisional substantive decision (in the new Interim Report) and its new Interim Report on Remedies, should allow for more constructive remedies discussions.

2.17 However, there remain a number of practical challenges that will need to be overcome in order to ensure the palpable success of such early engagement on remedies:

(a) *Ensuring that merging parties have a full understanding of the CMA's concerns before being required to enter into remedies discussions.* Merging parties' lack of appetite to discuss remedies with the CMA is not going to be resolved if the Phase 2 Proposals outlined above as regards more effective engagement with the Inquiry Group are not

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[9] Martin Coleman, UK Merger control in the post-Brexit era, 20 November 2023

[10] *Ibid*.

[11] Paragraph 2.9 of the CMA's Consultation Document.

fully adhered to in practice. Sensible discussions about remedies will still not be initiated if merging parties do not know the direction of the CMA's investigation and, crucially, which specific competition issue or issues may need to be remedied. Direct access to and proper engagement with the Inquiry Group on the substance of the case at the outset of the Phase 2 process will be critical to the success (or failure) of early remedies discussions.

(b) *Ensuring early remedies discussions are not prejudicial to a finding of a substantial lessening of competition (**SLC**).* Hesitancy on the part of merging parties to engage in early remedies discussions is to some extent related to confidence as to whether such discussions are genuinely "without prejudice". There will undoubtedly be an element of wariness on the part of merging parties that engagement on possible remedies will in some way undermine the CMA's appetite to assess the strength of any substantive arguments refuting the existence of an SLC. Again, the proof will be in how the new process operates in practice, and only if the CMA demonstrates to merging parties that early remedies engagement is not prejudicial to the SLC outcome, will they be likely to believe this to be the case and commit to the process.

Merging parties might be further encouraged to engage in without prejudice discussions if the Revised Guidance contained more detail on the processes the CMA will put in place to ensure that early remedy discussions are not prejudicial to an SLC finding. In its current form, the draft Revised Guidance provides that the CMA will consider what "*additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC decision*".[12] However, Chapter 12 of the draft Revised Guidance dealing with the Phase 2 remedies process does not contain any information on the nature of any such safeguards. For example, early remedies discussions could be led by a Director of the Remedies, Business and Financial Analysis team who is not involved in the substantive investigation process. This could facilitate the discussion of initial 'in principle' or hypothetical issues in order to advance to a more thorough remedies proposal, which could subsequently be put to the Inquiry Group. Involving dedicated experts in such discussions is likely to increase their attractiveness to merging parties.

(c) *Ensuring a remedies dialogue*. The efficacy of early remedies discussions will also very much depend on the extent to which merging parties receive feedback on their remedies proposal. The Consultation Document states that while the remedies process will become more interactive, the CMA's guidance will make it clear that merging parties will be expected to put forward a credible offer at the outset of their engagement with the CMA, as the practical constraints imposed by the statutory timetable are not consistent with the process becoming an iterative negotiation.[13] As referred to above in section 2, full realisation of the benefits of early remedies discussions will require a degree of cultural change on the part of the CMA – while not a negotiation, in order to become a credible option for merging parties, the CMA will need to be more receptive to providing ongoing feedback, with at least some 'back and forth' discussion on the remedies being proposed. It will equally be important that the CMA team tasked with progressing remedies discussions have a working appreciation of business realities and practicalities. This could be achieved by ensuring team members have business

[12] See Paragraph 6.19 and footnote 126 in relation to potential remedies discussion in pre-notification and paragraph 9.42 of the Revised Guidance in relation to Phase 1.

[13] See Paragraph 3.28 of the Consultation Document.

experience, which could be gained from a range of backgrounds – including advisory/consulting as well as industry experience. Approaching remedy discussions from a purely theoretical perspective can sometimes lead to overemphasis of theoretical, but very unlikely, risks.

(d) *Ensuring an openness to remedy type*. Setting aside the procedural changes to facilitate early remedies discussions, the CMA's existing remedies policy more generally inhibits merging parties' willingness to engage in such discussions, and without a more flexible approach towards non-structural and/or complex remedies, merging parties may still consider there is limited benefit from discussing remedies early, especially if remedies were offered, but ultimately rejected in Phase 1. A more broad-minded approach to remedy type and a greater willingness on the part of the CMA to consider and accept non-structural remedy options are particularly important in the context of global merger transactions, where merging parties may be co-ordinating remedies in parallel with a number of competition authorities.

(e) The CMA could consider joint remedies discussions with other authorities in appropriate cases.

3. Revised Template Waiver

3.1 We welcome the CMA's willingness to consult on the Revised Template Waiver and engage on whether any additional amendments to those proposed ought to be made. In this respect we note the following:

(a) *Inconsistent practice and a general reluctance from case teams to accept template modifications*

3.2 Despite the existence of a standardised and transparent waiver template, it is recognised that circumstances sometimes justify modification of that standard. Indeed, a high quality and effective confidentiality waiver template should not be so inflexible as to impede its purpose. In our experience the CMA's approach to accepting amendments or modifications to the existing template waiver has varied. In some instances case teams have been willing to accept certain amendments to the template waiver, whereas in other (more recent) transactions case teams have outright refused similar amendments, often with no explanation other than it is not the CMA's standard practice. Such uncertainty and arbitrariness are unsatisfactory, not only for advisers who prepare such waivers, but particularly for merging parties who – understandably – fail to understand why certain wording is accepted in one transaction yet is considered unacceptable in a subsequent one.

(b) *Amendments to the Revised Template Waiver to align it with templates in other jurisdictions*

3.3 The appropriate response to the point mentioned above is not, as is often suggested by the CMA, to refuse to accept any amendments to the template text.

3.4 In our experience, most of the amendments to the template waiver sought by merging parties are simply to align the CMA's waiver with reasonable and proportionate provisions which are consistently approved in waivers given to investigating authorities in other major jurisdictions. There are certain safeguards that are routinely agreed to by other authorities that do not appear in the CMA's waiver template. As such, modifications intended to place all confidentiality waivers – which ultimately seek to achieve the same objective – on an equal footing should be

understood and accepted by the CMA. Failure to include provisions that are otherwise 'standard' in other jurisdictional waivers (or failure to exclude provisions that are not) creates scope for confusion about the extent of approvals given to different authorities – both for the merging parties and for the relevant authorities. Given the complex differences in procedure and legal privilege protection between the major investigating jurisdictions, the additional complexity caused by differences in waiver language is very unwelcome and has the potential to lead to errors or unintended disclosures of material that would otherwise legitimately benefit from protection from disclosure.

3.5 Accordingly, there are several amendments that could be made to the CMA's Revised Template Waiver that would bring it more into line with those of other major merger control authorities, including the European Commission (***Commission***) and the US Department of Justice (***DoJ***). In particular:

(i) Extending the CMA's confidentiality obligation in paragraph 2 of the Revised Template Waiver to cover proprietary material received from the entity giving consent, which is used in the CMA's own internal analyses;

(ii) Explicitly caveating in paragraph 3 of the Revised Template Waiver that the waiver is granted only with respect to disclosures to the receiving entity or entities and that it does not constitute a waiver with respect to protection against the direct or indirect disclosure of information by the CMA to any other third party;

(iii) Expressly noting that the waiver is limited to information obtained by the CMA in relation to its review of the specific transaction in question and does not apply to information obtained in the course of any other review of any other transaction; and

(iv) Clearly delineating the conditions subject to which proprietary confidential information can be used, both by the CMA and by the entity or entities receiving such confidential information.

3.6 All of the above amendments are included in the template confidentiality waivers to both the Commission and to the DoJ, and we respectfully submit that none of these amendments would limit the CMA's ability to use the information received during its merger review to perform its statutory duties effectively. Accordingly, we urge the CMA to consider making such amendments so as to align the CMA's Revised Template Waiver more fully with those the merging parties will be asked to make in multi-jurisdictional merger investigations. Suggested text to reflect these amendments is set out in **Annex 1**.

3.7 We remain at your disposal to discuss any of the points raised in this response and look forward to further engagement on these issues.

Freshfields Bruckhaus Deringer LLP

January 2024

Annex 1 – Proposed text for the CMA's Revised Template Waiver

CMA's amendments to the Revised Template Waiver shown in blue.

Freshfields' suggested amendments to the CMA's Revised Template Waiver shown in red.

[TITLE OF CASE]

[entity giving consent] [This should include all relevant entities: where appropriate this should explicitly include the parent company, the notifying party and its subsidiaries / affiliates, if the documents to be disclosed belong to one of the subsidiaries affiliates], hereby gives its consent in accordance with section 239 of the Enterprise Act 2002 (the **Act**) to the disclosure of information which would otherwise be subject to the restrictions on disclosure set out in Part 9 of the Act. It also waives its rights under any other applicable laws restricting disclosure by the Competition and Markets Authority **(CMA)** of confidential information obtained from [entity giving consent] in connection with [acquirer's] [proposed] acquisition of [target] (the **Transaction**) and consents to the disclosure of such information subject to the qualifications set out below.

Specifically, [entity giving consent] agrees that the CMA may share with the [receiving entity] documents, statements, data, and information supplied by [entity giving consent], as well as the CMA's own internal analysis that contain or refer to [entity giving consent's] materials and received or prepared exclusively for the purpose of the Transaction, the disclosure of which would otherwise be prohibited by the laws mentioned above.

[This paragraph can be deleted for waivers from third parties and waivers in respect of disclosures to other UK government departments or regulatory bodies] This waiver is granted only with respect to disclosures to the [receiving entity]. This letter does not constitute a waiver by [entity giving consent] of its rights with respect to protection against the direct or indirect disclosure of information by the CMA to any third party, other than the receiving entity. If statutory filings are made with other competition authorities in the future, [entity giving consent] ~~shall notify the CMA of this and~~ will be willing to discuss extension of this waiver to permit disclosure to such other competition authorities.

This waiver is limited to information obtained by the CMA in relation to its review of the Transaction and does not apply to information obtained in the course of any other review of any case either now or in the future.

[Entity giving consent] acknowledges that this waiver is without prejudice to the CMA's powers to disclose information under Part 9 of the Act without the consent of the person providing the information. or the person carrying on the business to which the information relates. [For waivers in respect of disclosures to other UK government departments or regulatory bodies, include the following additional language: 'and any powers which [government department]/ [regulator] may have to disclose information under Part 9 of the Act or otherwise'].

This authorisation does not constitute a waiver of legal privilege in relation to any materials which in proceedings in the High Court or the Court of Session would be protected from disclosure on grounds of legal privilege provided that [entity giving consent] has notified the CMA in writing that it wishes to assert legal privilege over such materials prior to any disclosure being made by the CMA to the [receiving entity].

If the [entity giving consent] notifies the CMA in writing of inadvertently produced information which is legally privileged under the laws of the nations of the UK, the CMA will not provide the [receiving entity] with copies of such information or will request that such information ~~are~~ be returned, destroyed or otherwise rendered inaccessible, as appropriate.

Use of Information by the [receiving entity]

For the avoidance of doubt, information transmitted pursuant to this waiver may be used by the [receiving entity] only for the purposes of conducting its investigation into the Transaction and for no other purpose. Disclosure is made openly on the basis and subject to the express condition that such information remains confidential to the [receiving entity] and may not be disclosed to any third party. It is understood and agreed that failure by the [receiving entity] to comply with the foregoing does not engender any liability on the part of the CMA.

Use of Information by the CMA

This waiver is subject to the following conditions:

- the CMA shall itself maintain the confidentiality of the information and/or documentation provided to the [receiving entity] by [entity giving consent] and which is subsequently obtained from the [receiving entity], and shall treat such information as if it had been obtained directly from [the entity giving consent];
- the CMA shall consider all information and/or documentation obtained directly from the [receiving entity] pursuant to this waiver as confidential information or business secrets unless it is clearly identified as having been obtained from a publicly accessible source;
- the CMA shall not make any information and/or documentation obtained from the [receiving entity] available to any third party including competitors, customers and suppliers of [the entity giving consent];
- the information and/or documentation obtained directly from [the entity giving consent], or from the [receiving entity], shall be used only for the purposes of the CMA's review of the Transaction and for no other purpose;
- in the event that the CMA is provided by the [receiving entity] with information or documentation which is legally privileged, the CMA will not use that privileged information or documentation and will return such information or documentation to [the entity giving consent]; and
- ~~It is understood~~ that the CMA shall not disclose to [receiving entity] any information or documentation obtained from [entity giving consent] in relation to which [entity giving consent] has asserted a claim of legal privilege in [the jurisdiction in receiving authority] and that is clearly identified as being subject to such client/attorney privilege. It is understood and agreed that [entity giving consent] is responsible for informing the CMA of the existence of such privileged information prior to any disclosure being made by the CMA to the Receiving Authorities.

A copy of this letter is being sent to the [receiving entity].

The signatory hereby confirms that he/she is duly authorised to sign this waiver.

[Entity giving consent] has, to the extent required, obtained the consent of its affiliates to the sharing of their documents and info produced by [entity giving consent] on the same conditions as above.

SIGNED BY .....

AS DULY AUTHORISED SIGNATORY FOR AND ON BEHALF OF…….