HERBERT SMITH FREEHILLS

CMA CONSULTATION ON PHASE 2 REFORM – DRAFT REVISED GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE

HERBERT SMITH FREEHILLS RESPONSE

1. INTRODUCTION

We welcome the opportunity to respond to the Competition and Markets Authority (**"CMA"**) consultation on its draft revised guidance on jurisdiction and procedure in relation to mergers (**"Draft CMA 2"**). We note that the CMA is proposing to make a number of changes to the current guidance to reflect wider changes to the CMA's practice, recent judgments and legislative changes, but for the purpose of this response we have focused on the proposed changes to the Phase 2 merger process following the CMA's June 2023 Call for Information.

Our comments are divided into the following three categories:

- The Phase 2 assessment process (Chapter 11)
- The Phase 2 remedy process (Chapter 12)
- Access for the merger parties to third party evidence (Chapter 17)

We confirm that nothing in this response is confidential and that we would be happy to be contacted by the CMA in relation to our response. The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

2. THE PHASE 2 ASSESSMENT PROCESS - CHAPTER 11

This section provides our views in respect of Chapter 11 of Draft CMA 2 save in respect of remedies, which is addressed in section 3 below.

2.1 As a general point, we welcome many of the proposals set out in Draft CMA 2. We believe that it will be beneficial to the Phase 2 process to enhance engagement and provide merger parties with greater visibility of the Inquiry Group's possible competition concerns at an early stage of a Phase 2 inquiry. We therefore focus our feedback on setting out several ways in which Chapter 11 of Draft CMA 2 can be amended to further achieve these two goals.

Burden on merger parties after referral

2.2 Draft CMA 2 anticipates that several key milestones will take place in the very early stages of the CMA's Phase 2 investigation as follows:

Procedural step	Timing in Draft CMA 2	Draft CMA 2 paragraph
Information requests	With opening letter and/or as soon as practicable after the start of Phase 2	Para 11.8(c) Para 11.16
Joint case management meeting	Not specified	Para 11.8(f)(i)
Data meeting(s) with merger parties	Not specified	Para 11.8(f)(ii)
Teach-in meeting (including possible site visit)	During first two weeks of Phase 2	Para 11.10
Merger parties' initial submission on Phase 1 decision	No longer than 14 calendar days from referral	Para 11.13

Initial substantive meeting	Within first six weeks of Phase 2	Para 11.13

2.3 We fully recognise that the CMA needs to progress its Phase 2 inquiry efficiently given the 24-week statutory timeline, extendable by 8 weeks. At the same time, there is a risk that the revised Phase 2 process will place considerable pressures on the merger parties at the early stages of the inquiry. In our experience, each of: (i) responding to CMA information request(s) ("**RFIs**"), (ii) preparing for a teach-in meeting and/or a site visit, and (iii) preparing a response to the Phase 1 decision, will typically involve considerable work for the merger parties and their advisers. This is particularly the case where any RFI is broad in scope, requires the production of documents following an eDiscovery exercise and/or the production of complex datasets.

2.4 The current Draft CMA 2 anticipates that these three steps could all take place more or less simultaneously. Meeting these milestones will be highly challenging for even the most well-resourced merger parties, but may be practically impossible for merger parties with fewer resources (e.g. SMEs).

2.5 It is in the shared interests of the CMA case team, the Inquiry Group and the merger parties for the merger parties to have sufficient time to adequately prepare for key milestones. This will ensure that any engagement with the CMA is effective and that the information which is most relevant to the inquiry is identified and provided to the Inquiry Group.

2.6 We would therefore recommend that Draft CMA 2 be further revised to stagger the requirements on merger parties during these early weeks. For example, any teach-in meeting (with or without a site visit) could take place following (and therefore benefit from) the merger parties' submission on the CMA's Phase 1 decision (e.g., in weeks 3 to 4). In addition, the CMA could issue and set the deadlines for any RFIs after it has had the benefit of the teach-in and considered the merger parties' initial submission. Of course, engagement on the proposed scope of any RFIs could take place prior to this, for example as part of the joint case management meeting and/or any data meeting.[1]

Ensuring effective transparency in every case

2.7 Regular engagement between the case team and the merger parties as part of the Phase 2 process will facilitate the effective and efficient conduct of an inquiry.

2.8 It is helpful therefore that the CMA is proposing to make greater use of informal update calls as part of a Phase 2 investigation. However, we note that paragraphs 11.41 to 11.45 of Draft CMA 2 set out a general discretion on the part of the CMA as to whether and, if so, when informal update calls take place. In addition, the draft guidance sets out categories of information which the CMA *may* provide to the merger parties, without any commitment on the part of the CMA to do so.

2.9 We would welcome a firmer commitment from the CMA on its use of update calls and the information disclosed on such calls. For example, Draft CMA 2 should include a general commitment to hold update calls and to disclose certain information to the merger parties (e.g. further evidence being required, procedural issues, whether the CMA has decided not to pursue certain concerns or to consider additional ones) unless the specific circumstances of case make it inappropriate to do so.

2.10 Without a firmer commitment, it is possible (as is the case currently) that the level of engagement and transparency could vary significantly from case to case in practice, depending on the case team and/or Inquiry Group. In certain cases, the revised process could even result in less transparency than the current process if update calls are not used. Of course, case-specific reasons may mean that more or less engagement via update calls is appropriate, but clearly defining the level of engagement and transparency expected in a

[1] Generally speaking, we would welcome additional engagement from the CMA on RFIs prior to their issue given that, in our experience, they can be unnecessarily broad in scope (requiring the production of information that may not be used by the CMA in its investigation) and often require information to be produced within a very short deadline.

typical case would best ensure the goals sought through revising CMA 2 are achieved in every case.

2.11 For the same reason, we would welcome a firmer commitment from the CMA relating to disclosure of evidence and analysis to the merger parties set out in paragraphs 11.23 and 11.24 of Draft CMA 2, e.g. a commitment to do so unless the circumstances of the case make it inappropriate to do so. This will ensure that merger parties receive a consistent level of transparency in every case and allow them to engage effectively with the CMA. This is particularly important in circumstances where the CMA proposes to remove formal opportunities for the parties to make submissions to the CMA in response to the Annotated Issues Statement and various Working Papers.

3. THE PHASE 2 REMEDIES PROCESS – CHAPTER 12

3.1 In general, we welcome the proposed revisions to Chapters 11 and 12 of the Guidance relating to the Phase 2 remedies process. We consider that these will assist, particularly in complex cases, with ensuring that there is sufficient time for the CMA and merging parties to engage on remedies proposals. However, there are a few comments regarding the proposed amended process that we wish to draw to the CMA's attention for further consideration.

Encouraging remedies discussions at an early stage

3.2 Paragraphs 11.46 to 11.50 of Draft CMA 2 encourage the merger parties to engage with the CMA on a "without prejudice" basis on remedies at an early stage. In addition, Draft CMA 2 envisages that prior to the interim report such discussions typically will be led by the case team, with the possibility that the Inquiry Group may also attend those discussions.

3.3 We agree that there should be sufficient time to discuss remedies in the Phase 2 process. However, we have concerns that many merger parties will be reluctant to engage in such discussions with (i) the CMA team members who are in parallel assessing whether there is an SLC, and (ii) members of the Inquiry Group, which ultimately must determine the statutory question relating to any SLC. It may be practically impossible to allay merger parties' concerns that any early discussion on remedies will not undermine the strength of arguments being put forward as to why there is no SLC.

3.4 In order for early remedies discussions to be genuinely encouraged, as a minimum we would strongly recommend that members of the Inquiry Group not be involved in early remedies discussions without the merger parties' consent. However, a more appropriate alternative would be to amend Draft CMA 2 to state that:

3.4.1 early discussions on remedies will take place with members of CMA staff who are not involved in the day-to-day management, evaluation and analysis of the case; and

3.4.2 any such discussions are only fed back to the case team and/or the Inquiry Group with the merger parties' consent.

3.5 While the CMA will be best placed to determine which of its staff are best qualified to have such discussions, it is possible that individuals in the CMA's Remedies, Business and Financial Analysis team who are not working on the inquiry might be suitable.

Confirmation of whether a completed Phase 2 Remedies Form will be submitted

3.6 Paragraph 12.5 of Draft CMA 2 indicates that "*Merger parties should confirm to the CMA case team whether they intend to submit a completed Phase 2 Remedies Form as soon as possible after the publication of the CMA's interim report and in any case within three working*

days of publication of the CMA's interim report". The anticipated benefits of this step are not clear from the draft guidance or consultation document.

3.7 Whilst the proposed timeline may be less problematic for merging parties in more complex cases that have already been discussing remedies with the CMA, it may not be feasible in other cases for merging parties to provide this confirmation within three working days of the publication of the interim report. Before merging parties can determine whether to provide this confirmation, the interim report (which may be lengthy if it follows the same approach as Provisional Findings reports) will need to be assessed in detail. Merging parties may also require approval at the highest senior level (either internally or at shareholder level) before confirmation can be given to the CMA that a remedy proposal will be submitted, which they may not be able to obtain at such short notice.

3.8 We would therefore suggest that the CMA revisit whether this step is necessary or whether the time period for confirmation to be provided could be extended.

Timing for submission of Phase 2 Remedies Notice Form

3.9 Paragraph 12.3 of Draft CMA 2 sets out that parties that wish to put forward remedies for consideration should submit a completed Phase 2 Remedies Notice Form (or an updated Phase 2 Remedies Form where a version was submitted earlier in the process) as soon as practicable but in any event no more than 14 calendar days following the interim report.

3.10 We agree that in cases of particularly novel or complex remedies, engagement early in the process will be beneficial insofar as it enables the CMA to consider the proposal more fully. However, we see a risk that the timeline set out in the draft guidance may not strike the right balance in other cases as between allowing appropriate time for remedies discussions and enabling parties sufficient time and scope to understand and contest the CMA's position on SLC(s) as set out in the interim report.

3.11 The timeline set out in Draft CMA 2 means that merging parties will effectively need to prepare a detailed Phase 2 Remedies Notice Form[2], alongside preparing a response to the interim report. This is precisely the situation that merging parties find themselves in under the current process (where responses are due to both the Provisional Findings and Remedies Notice over a similar timeframe), and can detract from their ability or resources to engage meaningfully and effectively with one or both of these documents.

3.12 We are conscious that the statutory deadlines in a Phase 2 inquiry are short and that it is in the interests of both the CMA and merging parties for there to be sufficient time and opportunity for the CMA to consider the merging parties' remedies proposals. However, we encourage the CMA to consider whether the deadline in the draft guidance for the Phase 2 Remedies Notice Form could be moved to later in the process or, at the least, whether there might be additional flexibility where the merging parties are not considering novel or complex remedies. For example, in less complex remedies cases, there may be efficiencies in running these processes sequentially so that merging parties submit the Phase 2 Remedies Notice at a later stage, e.g. following the main party hearing. This would enable the merging parties to tailor the remedies proposals to a greater extent, having had the opportunity to discuss the provisional SLC finding(s) with the Inquiry Group and to take account of any feedback provided following the hearing. Indeed, some merging parties may not be able to readily obtain internal senior approval for submission of the Phase 2 Remedies Notice Form until this stage.

We consider that this change could be introduced alongside the draft guidance continuing to encourage merging parties to engage at an earlier stage to the extent possible or if they

[2] Although paragraph 12.6 of the draft guidance explains that "*Merger parties are not obliged to complete all aspects of the Phase 2 Remedies Form*", it also notes that completing the form "*so as far as possible and relevant will enhance the CMA's ability to assess, and consult on, the merger parties' remedy proposal effectively*." Paragraph 3.28 of the consultation document also notes "*While the remedies process will become more interactive, the CMA's guidance will make it clear that merger 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*."

consider any remedies might be novel or complex (noting that it will be in merging parties' own interests to do so).

4. ACCESS FOR THE MERGER PARTIES TO THIRD PARTY EVIDENCE (CHAPTER 17)

4.1 We welcome the CMA's proposed amendments to the guidance to ensure that parties have sufficient information to make informed submissions in response to the CMA's interim report. This will clearly be facilitated by having a confidentiality ring in place at the time of the CMA's interim report.

4.2 While we agree that 'gist' of the case is clearly 'context-sensitive' and note the CMA's view that there is no general right of 'access to file', it may be important (in certain circumstances) to not just disclose the unredacted version of the interim report but, as the CMA is clearly contemplating (based on paragraph 3.44 of the Consultation Document and the drafting of 17.20 of Draft CMA 2) to disclose key pieces of the evidence underlying its findings. In our experience, where particular reliance is placed on third party evidence summarised in the interim report, it can be very valuable for advisers to have visibility of the key underlying evidence itself so they can properly understand the context of the evidence and give the CMA as full a response as possible to the case against the transaction that merger parties need to meet. In this regard, we note that the usefulness of the unredacted version of the Provisional Findings can be significantly limited by the fact that the underlying information relied on by the CMA is not also provided. These disclosures will ensure that the merger parties and their advisers can properly understand the evidence which has informed the CMA's conclusions on a particular point.

4.3 We would also welcome the CMA giving clearer guidance as to the circumstances in which it believes it may be appropriate for it to disclose more than just the unredacted version of the interim report. While we recognise that, at present the CMA does not propose to formalise this process, it would be useful if the CMA were to give further clarity as to the circumstances in which it may exercise its discretion to disclose such information into the confidentiality ring and how it will determine what material such additional disclosure should comprise.

4.4 Whether or not key third party evidence is disclosed into the confidentiality ring, the recognition by the CMA that, in assessing what information is disclosed into the confidentiality ring, it will consider whether individuals from the merger parties should be included in the confidentiality ring is very welcome. In our experience, only permitting advisers to have access to the unredacted interim report or the third party evidence on which the CMA places reliance can create significant difficulties for advisers and their clients. Where individuals from the parties are not included in the confidentiality ring, not only is it very difficult for parties' advisors to make proper and informed submissions on this material (as merger parties will often know their business and the relevant markets best) but it can be challenging to seek or obtain meaningful instructions from clients. Similarly, without involving individuals from the merging parties, it can also be challenging to obtain sufficiently timely and informed input on proposed confidentiality redactions on the interim or final reports. It is therefore helpful that the revised guidance suggests that the CMA will, where appropriate, consider adding individuals from the merger parties to the confidentiality ring.

4.5 Finally, in our experience, the confidentiality obligations required by the CMA in Phase 2 cases have been unduly restrictive, which further limits effective use of the information which is disclosed. For example, the CMA's confidentiality ring terms typically:

4.5.1 require redactions to confidential information be pre-approved by CMA prior to disclosure to the merger parties

4.5.2 do not include an express carve out for advisers' IT or secretarial staff to access information, making advisers' management of disclosures burdensome;

4.5.3 prohibit advisers having more than one hard copy of the disclosed information; and

4.5.4 require the return or destruction of all confidential information following conclusion of the case save in very limited cases, noting it can be difficult to expunge electronic records.

4.6 Although we recognise that the CMA needs to be cautious about the treatment of third-party confidential material, these restrictions far exceed confidentiality ring obligations in other contexts, such as in proceedings before the Competition Appeal Tribunal. As such, we would welcome the CMA publishing and consulting on its standard confidentiality ring agreement.

Herbert Smith Freehills LLP
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