Linklaters

Guidance on the CMA's jurisdiction and procedure in relation to mergers

Linklaters' Response

8 January 2024

1 Introduction

(1) We are pleased to respond to the Competition and Markets Authority's ("**CMA**") consultation on draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers ("**Draft Guidance**").

(2) We welcome the CMA's willingness to engage with practitioners and other stakeholders on improvements to the UK merger control process. The CMA's initial consultation on the Phase 2 process was, in our view, an extremely useful process, and we are pleased to see that many of the recommendations that we and others made during that process are reflected in the Draft Guidance. We believe the Draft Guidance incorporates important changes that if appropriately implemented will improve the current process to the benefit of all stakeholders.

(3) As we set out in this response, there remain some areas where we consider that the CMA could go further to ensure robust and fair decision-making. There are also some sections of the Draft Guidance that we consider would benefit from greater clarity and / or detail.

(4) In this response, we comment in particular on:

(i) aspects of Phase 2 information gathering;

(ii) the substantive aspects of the interim report and the structure of the main party hearings;

(iii) access to third-party evidence; and

(iv) remedies.

2 Phase 2 information gathering

(5) The proposed changes to information gathering during the Phase 2 process represent a material improvement to the existing procedure, and in large part we welcome these. However, we consider that there is scope for further refinement to ensure that the benefits envisaged in the proposals can be fully realised.

2.1 Teach-in / initial substantive meeting

(6) As noted in our response to the CMA's call for information, it is vital that the members of the CMA Inquiry Group, as decision makers, hear both sides of a case from the outset. We therefore welcome the CMA's proposal to split the existing 'Site Visit' set piece into two separate meetings: (i) a 'teach-in' held at the beginning of the Phase 2 process where the parties have the opportunity to present their businesses and the broader industry context of the case; and (ii) an initial substantive meeting where the parties can present their case for clearance and respond to the CMA's reference decision.

(7) To ensure this change achieves its objectives, we believe the Draft Guidance could further clarify a number of points, and we urge the CMA to take the following points into account as it finalises the Draft Guidance:

(i) **Duration:** The Draft Guidance provides no indication or guidance on the proposed duration of either the teach-in or initial substantive meeting, or the level of exposure and engagement that merger parties will have with the Inquiry Group during these meetings. We appreciate that certain cases may require more or less time depending on their complexity. However, we would strongly favour a working assumption that each merger party will have at least one day (split across both set pieces) with the Inquiry Group, with the ability to opt for less time if not required or to request more time (with reasons) if required (e.g. if significant travel is required or the complexity of the case requires more time). A shorter default duration risks undermining the CMA's intention to "*provide merger parties with greater visibility of the Inquiry Group's possible concerns at an earlier stage of the inquiry*".[1]

(ii) **Parties should be provided with a teach-in opportunity by default, regardless of market complexity or prior CMA experience:** the Draft Guidance suggests that there may be cases where a teach-in is considered unnecessary "*where the markets at issue are not complex or where the CMA has previous experience of the sector*". It is not clear in the Draft Guidance whether the parties or the CMA would make this judgement. In our view, the parties should be entitled to a teach-in as of right, and it should be for the parties to "opt out" of a teach-in, rather than for the CMA to decide one is not necessary in a specific case. In our experience, business leaders have a deep understanding of their own markets that comes from daily immersion over many years. The value of sharing their unique perspective with the Group (even in cases involving "simple" markets) should not be underestimated. As each merger inquiry is focused on the competitive dynamics between the merging parties, insight from the business in a teach-in will provide a different perspective than the CMA has from previous investigations into the same markets. In addition, markets often quickly evolve and merger parties may be able to present the CMA with fresh and current perspectives. While we fully appreciate the challenges in ensuring Inquiry Group availability, we would also encourage the CMA, where possible, to ensure flexibility when scheduling a teach-in (given the intention that this will happen in the first two weeks of the Phase 2 process and will require senior business presence at short notice).

(iii) **Third-party initial substantive meetings should be dealt with transparently:** the Draft Guidance indicates that the CMA may also hold initial substantive meetings with key third parties. It is important that merger parties are promptly provided with clarity about which parties the CMA has invited to have such meetings, together with a full summary (or preferably a transcript) of their discussion with the Inquiry Group (if necessary redacted for commercially sensitive information). Third-party evidence is often crucial in CMA merger inquiries and the absence of such information limits merger parties' ability to make informed submissions and engage with the CMA's thinking in a timely fashion. This is particularly crucial where third parties are engaging with the Group at the start of Phase 2 and therefore playing a critical role in the Inquiry Group and case team's evolving views.

(iv) **Disclosure of Parties' materials should be communicated to Parties:** We note the reference in the Draft Guidance that "*where appropriate the CMA may disclose to other parties non-confidential versions of material presented to it*". To our knowledge this is not reflective of current practice and it would be helpful if the Draft

[1] Consultation document, para. 3.11.

Guidance could set out (i) the circumstances in which this might be considered appropriate, (ii) that the Parties would be given the opportunity to make representations on confidentiality of documents (as is normal practice) before they were disclosed and on whether disclosure is necessary at all; and (iii) that in such circumstances the CMA would confirm to the Parties that it has shared such information (and with whom). Finally, as detailed further below, it is critical that disclosure of submissions is reciprocal so that merging parties can understand the case against the merger in a timely fashion, allowing them to respond to allegations and improve the rigour of the CMA's analysis.

(8) Finally, we note that the approach outlined in the Draft Guidance places increased importance on the Phase 1 decision – which will be the main document that the merger parties respond to in the early stages of the Phase 2 process. In certain cases – e.g. in Fast Track references – it may be more challenging for the CMA to produce a developed Phase 1 decision and/or the CMA may prioritise key theories of harm to satisfy itself the test for reference is met. We would encourage the CMA to provide more guidance on its intended approach in these situations. In practice, such cases may require more active engagement and cooperation between the CMA and the parties than might otherwise be the case in a Fast Track Phase 1.

2.2 Information gathering

(9) We note the CMA's revisions to the Draft Guidance concerning information requests, and the importance of complying with such requests.

(10) In our experience, issuing detailed information requests in draft form with a short window for the parties to provide comments on e.g. the availability of data in the format requested, or to seek clarifications on particular questions, has been a useful development in practice that has assisted both the CMA and merger parties in promoting efficient and effective information gathering. We would recommend that this practice is reflected in the Draft Guidance.

2.3 Informal discussions with the case team

(11) We welcome the CMA's proposal to make greater use of informal discussions between the case team and external advisors throughout the Phase 2 process. In particular, we think it is important that there is an open dialogue between merger parties' economic advisors and the CMA economist team to avoid the parties' and the CMA's economic work being "ships in the night".

(12) Paragraph 11.32 of the CMA's Draft Guidance lists potential topics for these informal meetings and we would suggest that "*discussions with respect to the scope and content of draft RFIs / data gathering*" is included. Extensive RFIs and S.109 Notices are often features of Phase 2 processes and we believe there is scope for greater efficiency as well as more effective risk management for merger parties if they are discussed in advance of being formally issued. This would potentially allow the merger parties to identify and flag relevant sources of information to help inform the CMA's questions and potentially narrow the scope of the questions to focus on the most relevant content.

2.4 Formation of the case team

(13) As noted in our response to the CMA's original call for information, it is now increasingly common for many key members of the Phase 1 case team – often including the Project Director – to move to Phase 2. This marks a departure from the previous approach where

the Phase 2 team within the Competition Commission was often entirely different to the Phase 1 team within the Office of Fair Trading.

(14) The downside of this approach is that it increases the risk of (Phase 1) confirmation bias during the Phase 2 process. However, we recognise that there are both organisational and substantive efficiencies that come from having a similar or consistent team across both Phase 1 and Phase 2. We consider the risk of confirmation bias to increase for more senior members of the Phase 1 case team, and to be particularly acute for the Project Director who makes the decision on whether the case goes to a case review meeting and has – in practice – primary responsibility for delivery of Phase 1 and will in many cases have an unavoidable sense of ownership of the Phase 1 decision, notwithstanding that they were not the decision maker. Therefore, we suggest that the guidance provides that the Project Director role is given to a new individual in Phase 2. This approach allows for operational efficiency while ensuring that senior individuals within the CMA case team approach the case with a truly fresh pair of eyes.

3 Interim report and main party hearing

(15) As noted above, we welcome the CMA's proposals with respect to the interim report and main party hearing, which closely follow those suggested in our and others' initial consultation responses. Our hope is that these changes will provide the merger parties with a greater opportunity to engage with and respond to the crux of the CMA's substantive case at an earlier stage of the process.

(16) In order to realise the CMA's intentions for these changes, the interim report will need to provide sufficient detail on the CMA's (preliminary) analysis of the case. For example, we would expect the CMA's interim report to be closer in terms of content to a Provisional Findings decision than existing working papers. An incomplete or inchoate interim report will significantly hinder the merger parties' ability to constructively engage with the CMA. Similarly, the proposal for an effective revised main party hearing is dependent on the merger parties having access to a sufficiently developed interim report to which they can respond.

(17) The Draft Guidance does not provide any indication of how long the main party hearing will typically last. As with the teach-in and initial substantive meeting, it is critical that the merger parties have sufficient time with the Group to discuss potential concerns and engage in extensive Q&A. At a minimum we would expect each merger party to have at least half a working day with the Group and in many cases a full working day will be appropriate for each party. Whilst there is no one-size fits all length for a hearing, an indication in the Draft Guidance will provide a useful starting point for both merger parties and the CMA.

4 Access to third-party evidence

(18) We welcome that – in line with the CMA's current practice – the Draft Guidance now provides for the CMA to disclose confidential information, including confidential third-party information, where it forms part of the 'gist' of the case, and generally agree with the safeguards proposed to protect such information. We also welcome that confidentiality rings described in the Draft Guidance expressly provide for individuals from the merger parties to be included in appropriate circumstances.

(19) We acknowledge that while there is no general right of 'access to file' provided for in the Enterprise Act for CMA merger control proceedings,[2] it is common ground that parties' rights of defence require disclosure to parties of the 'gist' of the case against them. This is not only important for the parties' rights, but is also to the benefit of the CMA, because it allows informed and timely challenge of the evidence on which the CMA seeks to rely, and would lead to more robust decision-making. We remain concerned that the current approach limits the Parties' ability to make informed submissions, engage with and (where appropriate) challenge the CMA's thinking in a timely fashion, and ultimately hampers the CMA's ability to carry out informed decision making at the Phase 2 stage.

(20) We believe these concerns could be addressed by:

(i) providing a minimum level of disclosure covering the evidence underpinning the interim report on which the CMA intends to rely; and

(ii) providing disclosure at an earlier stage in the process.

Further detail on these two points is provided below.

4.1 The CMA's existing interpretation of the 'gist' of third-party evidence is unduly narrow

Ensuring a robust decision-making process

(21) We recognise that the CAT has confirmed that the CMA has a wide margin of appreciation in deciding what the 'gist' of the case is[3] and that the 'gist' of third-party evidence can evolve throughout the case,[4] including after the interim report is made. We are also aware that in determining what information to disclose to third parties the CMA must also be mindful of its obligations under Section 244 of the Enterprise Act.

(22) However, in order to protect merger parties' right to defence and to ensure that they have a proper opportunity to examine the evidential basis of the case against them, they need access, at a minimum, to all the facts on which the CMA is relying in its interim report. In order to evaluate the weight of the evidence, it is also important that the parties can assess whether the CMA has asked the right questions of the right third parties. In practice, this in our view means that the 'gist' should include anonymised and/or non-confidential versions of third-party questionnaire responses, written third-party submissions and transcripts of calls which are used by the CMA when preparing the interim report.

(23) The CMA's current approach provides the merger parties with only a partial 'gist' of the evidence supporting the CMA's case. By withholding disclosure of the underlying information outlined above, the CMA is ultimately undermining the ability of merging parties to respond fully to any putative "case for SLC" and in turn hampering the integrity and robustness of its Phase 2 merger review process.

(24) We therefore remain of the view that, in order for merger parties to understand the true 'gist' of the case against them, there should be a more fulsome disclosure of the underlying evidence that makes up the CMA's Phase 1 decision. Such an approach would still be compatible with the CMA's balancing obligations under Section 244, whilst better ensuring the merger parties' right of defence.

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[2] *BMI Healthcare Ltd v. Competition Commission* [2013] CAT 24 at para 4.

[3] See Draft Guidance at 9.34 and *Meta Platforms Inc v Competition Markets Authority* [2022] CAT 26, para 148(4).

[4] See Draft Guidance at 11.70.

Alignment with international standards

(25) Such an approach would also be in line with international standards and peer agencies, where a more fulsome disclosure of third-party evidence is viewed as a fundamental part of preserving procedural fairness. For example, in the EU merger control process, access to file is "*intended to enable the effective exercise of the [parties'] rights of defence against the objections brought forward by the Commission*".[5]

Ensuring valuable engagement from third parties

(26) We acknowledge the need to balance the need for a robust decision-making process and due process concerns against the need to encourage engagement from third parties (so as to ensure the information the CMA receives is as fulsome as possible).

(27) However, limiting disclosure of third parties' confidential information to a confidentiality ring (which would include some individuals from merger parties, such as in-house legal, where appropriate), and providing only anonymised or non-confidential third-party information to parties should not disincentivise third parties from engaging fully and openly with the CMA's information gathering process (which continues to be supported by the CMA's ability to issue mandatory notices to gather the information it requires).

(28) Rather, allowing the parties to view the CMA's underlying evidence, or at least view a non-confidential version of third-party submissions, would mean that third parties would be aware that the submissions they are making are open to scrutiny and challenge. This would likely increase the probative value of such contributions and help ensure that the information the CMA is being provided by customers and competitors is reliable.

4.2 Access should be given earlier in the process, before the interim report is published

(29) We remain of the view that only disclosing confidential and third-party evidence when the interim report is published may curtail the ability of merging parties to properly respond to the claims being made at a sufficiently early stage before the CMA's thinking begins to crystallise. Late disclosure means that the CMA is reaching its initial conclusions without allowing the parties to respond to any key issues raised by third parties. This undermines robust decision making, particularly as historically the CMA has rarely altered its conclusions between the provisional and final report stage where it has initially made a finding of SLC.

(30) Earlier access to underlying information (for example, at the issues letter stage in Phase 1 in some cases,[6] or at least prior to the publication of the interim report in Phase 2) would enable merging parties to better understand the rationale for and context of the CMA's concerns, and therefore mean they are able to respond appropriately. This would also promote more effective engagement on remedies earlier in the process. We do not consider that this would negatively impact the CMA's timetable, given confidentiality rings can be set up swiftly.

5 Remedies

(31) We welcome the amendments to the guidance to make clear that the CMA is open to commencing discussions on remedies earlier in the Phase 2 process than tends to be the

[5] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54, and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07).

[6] As noted in our submission of August 2023, in cases where important third-party evidence has been gathered at Phase 1 and is being relied upon, the CMA should consider providing access even earlier.

case currently. We agree that more regular state of play calls during the early stages of a Phase 2 investigation will in principle assist in this. We are also supportive of the revised remedy process that is envisaged following the Interim Report, and consider that the additional engagement that is contemplated will be beneficial to all stakeholders.

(32) While we note the comment in the consultation paper that it is within the Inquiry Group's capability to engage in remedy discussions that are without prejudice to its substantive findings, we remain of the view that it would be beneficial for both the CMA and the Parties if separate CMA team members were available to engage in remedy discussions. In this respect, we note that the Draft Guidance proceeds on the basis that in Phase 1 cases the decision maker will not be involved in any discussions concerning undertakings in lieu ("**UILs**") until the decision on the existence and scope of SLC(s) has been made (consistent with current practice) other than in exceptional circumstances. In our view the same approach could apply in Phase 2.

(33) As we noted in our comments on the CMA's initial request for inputs, an alternative option would be to have resource from the Remedies, Business and Financial Analysis Group assigned to each Phase 2 case soon after reference. The CMA might also consider appointing a Director from its Mergers team to be available to any remedies workstream. The inclusion of team members for the specific purpose of discussing potential remedies at the outset would also alleviate the resource constraint that inevitably exists in any attempt to informally "dual-track" SLC and remedy discussions.

(34) We note the proposed introduction of a standard remedies form. We have no specific comments on the content of the form (though note that it might require a flexible approach in certain cases).

6 Conclusion

(35) As noted above, we welcome the CMA's willingness to engage with practitioners with respect to its Draft Guidance and believe that the proposed changes have the potential to deliver material benefits and efficiencies to the Phase 2 procedure going forward.

(36) However, we believe there is scope for the Draft Guidance to be further improved in the areas outlined above. In particular, we remain of the strong view that a more extensive disclosure of third-party evidence is compatible with the CMA's statutory obligations and Phase 2 timetable, and is essential to protect merger parties' rights of defence. We would urge the CMA to reconsider its approach on this issue in particular.

Linklaters LLP – 8 January 2024