Skadden

Response of Skadden to the CMA's Consultation on Changes to the Phase 2 Merger Processes

Introduction

1. Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) welcomes the opportunity to comment on the Competition and Markets Authority's (CMA) consultation dated 20 November 2023 on changes to the Phase 2 merger processes.

2. Our response focuses on the revised draft Guidance on the CMA's jurisdiction and procedure (CMA2). This response contains Skadden's own views, which reflect our substantial experience in advising merger parties on recent Phase 2 investigations in different jurisdictions. The comments set out in this response should not be attributed to any of our clients.

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.

Preliminary remarks

4. Overall, we welcome the package of suggested reforms to the UK's Phase 2 merger processes put forward by the CMA. The proposals signal the CMA's willingness to increase engagement on both substance and remedies throughout the Phase 2 process, including at an early stage in the investigation, and introduces a process with more participation and transparency for merger parties. We believe that these changes will encourage greater understanding between the CMA and the merger parties, which is likely to lead to a more efficient process and promote better CMA decision-making.

5. In this response, we comment on two aspects: the need to (i) increase transparency further by providing merger parties with full access to file; and (ii) ensure that the increased avenues for engagement with the Phase 2 decision-makers (the Inquiry Group) and the case team are effective and consistent across cases.

Access to file

6. The CMA does not propose to grant merger parties a right of access to file in Phase 2. The CMA considers that its current approach of setting out the 'gist' of the case that the merger parties have to answer, together with disclosing unredacted versions of documents into a confidentiality ring where necessary, is sufficient to enable the parties to respond to the case against them. The CMA does however propose to establish a confidentiality ring for external advisers (and, where necessary, business representatives) at the time of the proposed earlier interim report. The CMA also plans to share evidence more flexibly with the merger parties throughout the Phase 2 process, which includes the possibility of sharing a version of a significant submission received from a third party.

7. While earlier disclosure via a confidentiality ring is welcome, as a matter of good public administration, we would urge the CMA to reconsider its position not to introduce a full access to file process as part of the Phase 2 procedure. This process should also include the disclosure of the CMA's questionnaires to third parties and their responses, any transcripts of calls or hearings with third parties, survey results and documentary evidence. Or, the CMA should at least adopt a more expansive position on what counts as the 'gist' of a case.

8. We believe that providing the merger parties with full access to file, rather than select extracts or summaries, would enable the parties to respond more effectively to the proposed interim report (particularly as the interim report will be less developed than the current provisional findings), and lead to a more open and constructive dialogue at the main party hearing(s).

9. Providing the merger parties with access to the CMA's file is essential given:

   (a) The CMA retains a wide discretion as to what can be disclosed to provide the 'gist' of its case. Yet the CMA increasingly attaches significant weight to third party evidence; the views of customers and competitors can indeed be critical to the CMA's final decision. Such evidence should be open to proper scrutiny and challenge at the administrative stage, not only to preserve procedural fairness, but also because merger parties may – from a business perspective – adopt a different interpretation to that of the CMA on the documentary evidence and views submitted by third parties. This is particularly pertinent in cases where a dynamic assessment is being made, and different views as to likely future developments and outcomes are expressed. We therefore consider that providing access to file would further enhance the quality of the CMA's decision-making.

   (b) Inquiry Group members should have the opportunity to test any weaknesses in the evidence base with the merger parties, particularly as the compressed Phase 2 timelines do not always offer the Inquiry Group the opportunity to familiarise themselves with all of the detail in the evidence base. Merger parties should also be offered the opportunity to identify any exculpatory evidence that the CMA has not included in the proposed interim report, particularly given the narrower judicial review standard of any appeal to the Competition Appeal Tribunal (CAT).

   (c) The CMA's approach is out of line with the practice of other competition authorities, such as those in the EU and the U.S. (in relation to litigated cases). This contrast is made clear in the context of parallel reviews, as there have been occasions when the CMA and the European Commission have reached different views in light of third party evidence received on the same markets.

10. The CMA has put forward a number of reasons against providing access to file.

   (a) While we recognise the importance of protecting confidentiality and encouraging third parties to participate in merger investigations, we note that jurisdictions which provide full access to file do not dissuade third parties from providing frank views on mergers under review. Nor do the enhanced disclosure provided by appeals to the CAT. In this context, we welcome the CMA's increased use of its mandatory information gathering powers to collect information from third parties. Furthermore, third parties are aware that their feedback may in any event be visible via parallel proceedings, or in proceedings before the CAT. Any third party concerns can in any event be addressed by removing confidential information from and, if necessary, anonymising the evidence in the same way as is carried out in the context of competition investigations conducted under the Competition Act 1998.

   (b) We consider that an access to file procedure can be accommodated within the current statutory timeframes. Our view is that allowing access to file would introduce yet further efficiencies into the timetable, by enabling merger parties to better understand the context of the interim report and respond more appropriately to the CMA's concerns, potentially reducing the likelihood of supplementary interim reports. The CMA notes that regimes

that offer fuller access to file often have more flexible powers to 'stop the clock', resulting in materially longer merger investigations. However, we note that the stop the clock mechanism is not designed to facilitate the access to file process, and other jurisdictions do not necessarily extend the Phase 2 deadline for this purpose nor have longer merger investigations as a result of access to file. There will, nevertheless, be further scope for the CMA to extend its Phase 2 timelines if the Digital Markets, Competition and Consumers Bill is passed into force in its current form, which includes a provision under which merger parties and the CMA may mutually agree to stop the clock during a Phase 2 investigation.

(c) Finally, whilst we acknowledge the precedent on the requisite standard of CMA disclosure, we do not consider that this in itself is a sufficient justification not to recognise the growing importance of third party evidence in many merger reviews and to introduce further improvements to the Phase 2 procedure. This is particularly so with theories of harm that are forward looking, and so rely on more subjective assessments of third party intentions rather than empirical data on the pre-merger situation.

Ensuring effective engagement

11. **Ongoing engagement with the Inquiry Group**. We welcome the CMA's proposals to open-up further direct and meaningful channels of communication between the merger parties and the Inquiry Group in relation to the substantive assessment of a merger and (where relevant) potential remedies. This important set of proposals should be implemented effectively to encourage an open and constructive dialogue. For example, Inquiry Group members (or at least the Inquiry Group Chair) should remain sufficiently flexible and available during the course of the Phase 2 investigation to attend additional meetings.

12. **Main party hearing**. The revised structure of the main party hearing is particularly welcomed, and the duration of such hearings should accommodate a more extensive presentation from the parties and follow-on discussion. To encourage a fluid discussion at the hearing, it is hoped that the Inquiry Group will be willing to put forward views on the points put forward by the merger parties during the hearing and in the response to the interim report (and, where relevant, the remedies form), so that parties can better understand the Inquiry Group's emerging views.

13. **Ongoing engagement with the case team**. We similarly welcome the CMA's suggested reforms that are designed to increase the collaborative interactions and engagement between the merger parties and the case team, including the economists, throughout the Phase 2 process. In our experience, the case team's approach to engagement can vary from case to case, and we note that the draft revised Guidance on the CMA's jurisdiction and procedure gives each case team discretion to arrange any update calls on both substance and procedure. To address this cultural change, and to ensure consistency across the case teams, it would be useful to incorporate an assumption of at least 1 or 2 meetings with the case team at Phase 2 both (i) ahead of the main party hearing stage and again (ii) following the main party hearing(s). While the CMA's approach can of course by adapted as required on a case-by-case basis, we consider that there is particular value in building in a more consistent approach which also offers an indication of what the merger parties can expect in the Phase 2 process.

8 January 2024