Slaughter and May response to CMA consultation
Proposed changes to the CMA's Guidance on jurisdiction and procedure (CMA2) and associated documents

1. Executive summary

1.1 We welcome the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on proposed updates to the CMA's guidance on jurisdiction and procedure (CMA2) (the **Guidance**) (as amended by the CMA's draft updates, the **Draft Revised Guidance**).

1.2 We are supportive of the CMA's initiative to revise its Guidance and other associated documents so that the UK merger control process operates more effectively and efficiently. In particular, we welcome the CMA's focus on improving the quality and frequency of the engagement between the CMA and the merging parties involved in Phase 2 investigations.

1.3 However, our most important observation is that the Draft Revised Guidance continues to deny the merging parties an adequate access to file process, with serious consequences for the parties' rights of defence. We are particularly concerned that this aspect of the Phase 2 process, which leaves the merging parties largely in the dark about the evidence being used to support an adverse finding, remains unaddressed in the changes proposed by the CMA.

1.4 In our response below, we provide specific comments on the key updates proposed in the Draft Revised Guidance and associated documents. We also include our comments on omissions which we suggest the CMA should address in the Draft Revised Guidance, as to which we also refer the CMA to our initial response to the CMA's call for information.[1]

2. Changes to the Phase 2 merger process

Increased engagement between the CMA and the merging parties

2.1 Overall, we welcome the CMA's focus on increasing engagement between the CMA and merging parties throughout the Phase 2 investigation. As noted in our response to the initial call for information, for effective engagement to be possible, it is critical for the merging parties to have more regular and consistent access to both the case team and the inquiry group throughout the process. We consider that the amendments proposed in Chapter 11 of the Draft Revised Guidance generally represent a step in the right direction.

2.2 In particular, we welcome the CMA's codification of the practice of holding a "teach-in" and site visit session at the outset of the Phase 2 investigation, and the introduction of a new "initial substantive meeting" for the merging parties to have an early opportunity to present their case and for the inquiry group and CMA staff to ask questions on the merging parties' case. We also believe that the proposal to streamline the starting point for the

[1] Slaughter and May response to the CMA's call for information on its Phase 2 process, dated 25 August 2023.

Phase 2 investigation, using the Phase 1 decision instead of the issues statement, should avoid duplication and help provide clarity at an earlier stage on the key issues that the inquiry group is considering at the outset of the Phase 2 investigation. We also appreciate the CMA's clarification that, "*where at the outset of a phase 2 investigation the Inquiry Group intends to investigate theories of harm that differ from those on which the CMA determined at phase 1 that the statutory test for reference was met"*, the CMA will make clear which theories of harm the inquiry group intends to investigate.[2]

2.3 However, we believe the Draft Revised Guidance should go further and specify more clearly how the engagement will be conducted in practice; in particular, by setting out certain minimum requirements and standards that should be adhered to except in exceptional circumstances. Specifically:

(i) The Draft Revised Guidance does not provide sufficient clarity on the expected duration of the teach in session / site visit. While we appreciate that flexibility is required depending on the specific facts of a case, the Draft Revised Guidance would sensibly set out a working assumption that each party would be given at least a full day (with breaks) to present to the inquiry group as part of their site visit. Should this time not be needed, it of course does not need to be taken but repeated experiences of the CMA case teams challenging the duration of site visits (and even the length of individual sessions within a site visit) leaves a strong impression of minds already being closed to the parties' arguments at the earliest stages of Phase 2.

(ii) The Draft Revised Guidance also provides that, during the first two weeks of the Phase 2 inquiry, the "*case team may arrange an initial 'teach-in' meeting, attended by the Inquiry Group and members of the case team. A 'teach-in' may be an 'in-person' event or by videoconference and may also involve a site visit where appropriate in light of the nature of the businesses involved*."[3] In our view, the Draft Revised Guidance should clearly set out an expectation that all members of the inquiry group will attend site visits in person absent exceptional circumstances. The availability of Panel members and the likely weeks of these sessions are known to the CMA at the time of the appointment of the inquiry group. Parties should not discover that their case is being decided by someone they have never met, nor had the chance to speak to. Our comment equally applies to the attendance of Panel members at the proposed initial substantive meeting and at the main party hearing.

2.4 We welcome the CMA's proposed codification of the practice of update calls (as set out in Chapter 11 of the Draft Revised Guidance). We understand that the CMA intends that these calls will give the merging parties a better understanding of the progress of the investigation, facilitate relevant submissions, and assist the merging parties in preparing any remedy proposals.

[2] Paragraph 11.6 of the Draft Revised Guidance.

[3] Paragraph 11.10 of the Draft Revised Guidance.

2.5 In practice, as suggested in the Draft Revised Guidance, the CMA should take these calls as an opportunity to be transparent in sharing its emerging thinking on whether it is minded not to pursue certain concerns, or alternatively to clarify if new concerns not previously raised with the merging parties are being considered by the CMA. The proposed update call to be held after the main party hearing to set out the current views of the inquiry group should also represent a valuable opportunity for the merging parties to understand and address the inquiry group's views on their remedies proposals. For this purpose, it will be important for the update calls not to be purely administrative calls, but rather, a genuine avenue through which the emerging thinking of the panel and the case team is in fact delivered. In particular, there should be a clear expectation that the case team will be able to explain on those calls their expectations regarding upcoming requests for information, the timing of those requests and the underlying reasoning for the questions being sent to the merging parties.

2.6 We offer the following additional comments:

(i) The Draft Revised Guidance contemplates that "*the CMA may, at its discretion, arrange update calls with the merger parties at appropriate points of the inquiry*".[4] In our view, the Draft Revised Guidance should specify more clearly when the parties can expect update calls to take place, and there should be a working assumption that update calls will take place (as a minimum) at each of the following milestones: during the initial information gathering stage, after the initial substantive meeting, before and after the publication of the interim report, and after the main party hearing (in addition to any meetings that may take place to discuss remedies).

(ii) Beyond scheduled "update calls", and as stated in our response to the CMA's initial call for information, we also believe that, at the working level, it should be a minimum requirement that all directors and equivalents be available by phone. It is not appropriate that often only the PCO's telephone number is made available to the merging parties.

2.7 We welcome the CMA's proposals to increase dialogue between the CMA case team economists and the economists of the merging parties, by holding discussions on particular evidence or aspects of the CMA's analysis.[5] However, in this context, we consider that an open exchange of views can only occur when the discussions between economists take place on a full without prejudice basis. The Draft Revised Guidance should be amended to make this clear. We also disagree with the CMA's statement that economists calls tend to be most productive where participation is limited to the merging parties' economic consultants. We would like to emphasise the importance of external legal advisers being allowed to attend at the very least in an observational capacity (as is currently contemplated in the Draft Revised Guidance).

[4] Paragraph 11.41 of the Draft Revised Guidance.

[5] Paragraphs 11.32 onwards of the Draft Revised Guidance.

Interim report and redesigned main party hearings

2.8 We welcome the replacement of the provisional findings stage with an interim report that the CMA would release earlier in the statutory timetable. We are hopeful that the proposal to release the interim report at an earlier stage will help address our concern that the merging parties only hear the case against them too late in the statutory timetable to allow them to engage meaningfully with the inquiry group on the substance of the assessment. This benefit will, of course, materialise on the condition that the interim report sets out a clear and detailed articulation of the inquiry group's provisional assessment, both on whether a relevant merger situation has arisen or will arise and on the SLC assessment itself, as well as a description of the evidence upon which the CMA's position is based. We would also expect the interim report to be genuinely provisional, with real evidence of movement by the CMA in practice.

2.9 Similarly, we are supportive of the CMA's redesigned main party hearing and welcome the proposal for that hearing to provide an opportunity for the merging parties to respond fully on the substance of the interim report (in addition to making written submissions), without the focus of the hearing being on remedies. We particularly welcome the proposal for the hearings to be less focused on information gathering and to be more interactive in nature than is currently the case.

2.10 We would, however, offer the following comments in relation to the second part of the hearing ("*the second part of the hearing will be led by the Inquiry Group who, together with the case team, will test evidence and explore issues that either were not addressed in the first part of the hearing, or that they wish to explore in more detail*"):[6]

(i) Our experience of main party hearings to date has been that the pre-hearing agenda provided by the CMA is often lacking in detail, to the detriment of the parties' rights of defence. Given the large number of documents provided to the CMA during the course of an investigation, it is unreasonable and procedurally unfair to expect individuals representing the parties to be able to answer questions on the spot in relation to internal documents which they may have never seen before, or which they may have been granted very little notice to consider.

(ii) We would therefore recommend that the CMA codify in its Guidance its practice of providing the parties with a comprehensive list of documents that it plans to refer to in its questioning, with as much advance notice as practicable, as well as a clear indication of which elements of such documents the CMA wishes to discuss. For instance, providing a list of (at least the bulk of) documents that the CMA intends to refer to a minimum of a week in advance and signposting to the relevant extracts (where applicable) would give the individuals an opportunity to familiarise themselves with the documents and their context prior to the hearing, making discussions more fruitful, and protecting parties' rights of defence. Exceptional amendments could then be made up to 72 hours in advance.

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[6] Paragraph 11.63 of the Draft Revised Guidance.

Changes to the Phase 2 remedies process

2.11 Overall, we welcome the CMA's proposal to facilitate engagement on possible remedies at an early stage of the Phase 2 investigation, and more generally to provide additional opportunities for "two-way" discussions on remedies both before and after the interim report. Making the remedies process more interactive should result in a more efficient CMA process, provided that the CMA is willing to be open about its developing views during the update calls and other meetings contemplated by the Draft Revised Guidance.

2.12 We offer the following comments:

(i) The Draft Revised Guidance states that "*the constraints imposed by the CMA's statutory timetable may mean that, where merger parties do not engage in sufficiently early discussions (or make significant modifications to remedy proposals at an advanced stage of the process), the CMA would typically not have sufficient time to satisfy itself that the proposed remedy has an acceptable risk profile and can therefore be considered effective*."[7] While we recognise the benefits in the merging parties engaging in early remedies discussions with the CMA where appropriate, merging parties should not be penalised for following what should be the default position, i.e. where parties discuss remedies only after the CMA has reached a negative conclusion. The Draft Revised Guidance should be amended to make this clear.

(ii) The CMA notes that "*the practical constraints imposed by the statutory timetable are not consistent with the [remedies] process becoming an iterative negotiation*".[8] However, we consider that, within reason, some flexibility is required for reasons of effective administration – in particular to coordinate a remedies package where a merger is subject to parallel reviews in many different jurisdictions. It would, therefore, be sensible for the CMA to show sufficient flexibility to engage in remedies discussions in a less rigid manner, most notably where remedies may or will also be discussed with other competition agencies. In our view, the statutory timetable does not prevent this.

Merging parties' access to third party evidence

2.13 The absence of any robust access to file process for the merging parties is a key flaw in the UK merger control process. Many respondents to the CMA's initial call for information have already highlighted that this shortcoming of the process is in clear need of redress.[9]

2.14 We are therefore concerned that the CMA has not addressed this serious deficiency in the Draft Revised Guidance. We strongly disagree with the CMA's view that "*there is*

[7] Paragraph 12.2 of the Draft Revised Guidance.

[8] Paragraph 3.28 of the CMA consultation document

[9] In addition to our own response to the CMA's initial call for information, please see, e.g., submissions made by the City of London Law Society, Cleary Gottlieb Steen & Hamilton, Clifford Chance, Euclid Law, Freshfields Bruckhaus Deringer, the International Bar Association, Latham & Watkins, Linklaters, White & Case and Ashurst (available on the CMA's website).

currently no evidence of systemic failings in the existing process".[10] On the contrary, the reasons for providing an access to file process are compelling.

2.15 In circumstances where the Phase 2 process does not include a meaningful access to file process, parties cannot have a genuine opportunity to respond to the allegations that have been made against them and to express their informed views on the CMA's interim conclusions. This results in inefficiencies and misunderstandings that seriously affect the soundness and fairness of the CMA's process. We note the CMA's reference to the body of case law from the Competition Appeal Tribunal (**CAT**) on the standard of disclosure of evidence and the existing process for that disclosure. We do not consider that these CAT precedents form an adequate basis for the general proposition that a robust access to file process is not necessary for procedural fairness, or indeed for the CMA's suggestion that there is no substantiated reason to believe that the CMA would fail to adequately provide the 'gist' of the required evidence.

2.16 The merging parties are unable to determine whether the CMA has summarised materials accurately and fairly without having access to the underlying evidence. An access to file process would therefore provide an important check, and a necessary one given the significant weight that the CMA attributes to the evidence provided by third parties. We disagree with the CMA's assessment that an access to file process would be detrimental to the CMA's engagement with third parties. On the contrary, such a process would encourage the submission of higher quality third party evidence.

2.17 In its consultation document, the CMA also notes that it is "*conscious of the additional burden that managing access to underlying third-party evidence would create*"[11] for the CMA. This fails to consider that CMA's approach is at odds with the practice of many other competition authorities, including the European Commission, where access to the competition authority's file is a fundamental procedural guarantee to protect parties' rights of defence. The principle of equality of arms should not be compromised on for workload reasons. Moreover, the other efficiencies being proposed in the Draft Revised Guidance (including the streamlining of the process and discontinuing the issues statement and working papers) should mean that the CMA is better positioned to provide an access to file process going forward. Please see also our suggestions below on streamlining the put-back process at paragraph 3.3.

2.18 To bring the Draft Revised Guidance in line with international standards, merging parties should be able to properly scrutinise the inculpatory and exculpatory evidence on the CMA's file and how the CMA has approached the questions it has put to third parties. We acknowledge that the recent use of confidentiality rings to disclose certain key evidence, as well as the proposal in the Draft Revised Guidance to have the confidentiality ring in place earlier in the statutory timetable and in advance of the main party hearings, represent an improvement on not being able to scrutinise evidence at all. However, we do not consider that this practice would be sufficient to safeguard the parties' rights of defence. Our view is that the use of confidentiality rings should remain the exception and not the norm, particularly given how burdensome they are to put in place and implement

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[10] Paragraph 3.36 of the CMA consultation document.

[11] Paragraph 3.41 of the CMA consultation document

successfully (with, e.g., members of the confidentiality ring on occasion receiving multiple and/or erroneous versions of the same document from the CMA).

2.19 Similarly, the CMA's statement that there "*may, however, be scope to formalise the disclosure of limited key pieces of evidence pre-PFs (eg, in a vertical case particularly influenced by a third-party complaint […]*)"[12] does not provide sufficient comfort and certainty that the merging parties' procedural rights will be respected. We consider that access to the file is an integral part of the parties' right to be heard, and that the Draft Revised Guidance should treat it as such.

2.20 As noted in our response to the initial call for information, the CMA's approach is also at odds with the evidence that must be provided by the CMA under its duty of candour in the course of proceedings before the CAT. There is no reason why the disclosure of relevant inculpatory and exculpatory evidence should be limited to such appeals before the CAT, and we would urge the CMA to offer that evidence upfront at the administrative stage. Failure to disclose that evidence without a judicial process reduces trust in the CMA proceedings and increases the risk of appeals in order for the merging parties to be able to gain access to the evidence held by the CMA, in circumstances where this could have been easily avoided by an access to file process upfront.

3. Changes to other merger processes

3.1 We note the CMA's proposed inclusion of examples drawn from its decisional practice throughout the Draft Revised Guidance. As a general observation, in the interests of good administration, where the CMA proposes to refer to its own decisions it should make clear where the relevant decision has not been tested in court, whether in the relevant aspect or in full.

3.2 As regards the notification process and the merger notice, we have the following general comments:

(i) We suggest that the CMA should show more flexibility when granting waivers in respect of information requested in the merger notice. Our experience has been that the CMA's reluctance to grant waivers generates inefficiencies in the notification process. Should the circumstances change or the CMA require the information later down the line, the CMA can request the information from the merging parties on an ad hoc basis if necessary.

(ii) In addition, the pre-notification process should be limited to completing the merger notice without the parties having to provide responses to extraneous requests. The current burdens of the pre-notification stage are at odds with the rationale for having such a process in place in the first place; the pre-notification stage should not be duplicative of the formal investigation process.

3.3 As for the publication of materials by the CMA and the put-pack process, for efficiency reasons, we suggest that the CMA should dispense with the publication of all bar the key

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[12] Paragraph 3.44 of the CMA consultation document.

decisions in the investigation (i.e. the Phase 1 and Phase 2 decisions) and a summary of the relevant stages of the investigation. This would materially alleviate the burdens associated with the current put-back process, which is resource-intensive and time-consuming. In our view, agreeing redactions with the merging parties on a summary for publication would be a much better and more fruitful use of resources.

3.4 As regards the CMA's revised confidentiality waiver template, we suggest that the CMA should show more flexibility when considering proposed changes to the template to accommodate, where appropriate, the specific circumstances of a case. In particular, with reference to the new paragraph 7 of the template, there may be circumstances where the parties do not consent to the CMA disclosing materials that are legally privileged under the laws of a jurisdiction other than that of the 'receiving authority'. The template does not currently contemplate this.

3.5 Finally, we reiterate our suggestion that the CMA should adopt a clearer position on the prioritisation of evidence, and properly codify its position in the Guidance and other relevant CMA guidelines.[13] There is considerable legal uncertainty on the CMA's position, with statements made by merging parties or their representatives under penalty of criminal sanction sometimes being ignored in favour of the CMA case team's interpretation of discrete sentences in internal documents. This should be addressed as a matter of good public administration.

3.6 In our response above, we have commented on the key updates proposed in the Draft Revised Guidance and associated documents. Our comments are not intended to be exhaustive, and the absence of comments on specific revisions should not be construed as an endorsement or agreement with the CMA's proposed changes.

4. Concluding remarks

4.1 In many respects, the CMA's Draft Revised Guidance represents a move in the right direction. We welcome the CMA's proposals to increase dialogue and two-way engagement between the merging parties and the CMA (and the inquiry group in particular).

4.2 However, we would urge the CMA to reconsider its position on the merging parties' access to the file. While the Draft Revised Guidance goes some way towards addressing other issues that impair the effectiveness of the Phase 2 process, the lack of adequate access to file rights for the merging parties continues to be a serious deficiency in the CMA's process. This issue was raised by many respondents to the initial call for information and yet has not been satisfactorily addressed by the CMA.

4.3 If you would like to discuss this submission or have any questions, please feel free to contact:

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[13] See our response to the CMA's initial call for information.

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