Weil

Response to the CMA's Consultation on Changes to CMA Mergers Guidance (CMA2) and associated documents

January 8, 2024

I. Introduction and executive summary

(1) Weil, Gotshal & Manges (London) LLP ("**Weil**") welcomes the opportunity to respond to the CMA's consultation opened on 20 November 2023 (the "**Consultation**") on the proposed changes to the Guidance on the CMA's Jurisdiction and Procedure (CMA2) (the "**Revised Guidance**") and associated documents.

(2) Based on our recent experience of some of the complex cases that have helped to shape many of the changes codified and/or introduced in the Revised Guidance, we provide our responses below to the following Consultation questions:

- **Section I.A.:** Overall, is the Draft Revised Guidance sufficiently clear and helpful?
- **Section I.B.:** What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.
- **Section I.C.**: Are there any other amendments which you consider ought to be made to the Current Guidance?
- **Section I.D.:** Are the requirements of the Phase 2 Remedies Form sufficiently clear? Are there any comments you wish to make on the proposed Phase 2 Remedies Form?
- **Section II**: Are the proposed amendments to the Current Merger Notice sufficiently clear?

(3) We appreciate the CMA's willingness to increase the opportunities for formal and informal engagement throughout the Phase 2 process, especially within the limits of the existing statutory framework provided by the Enterprise Act 2002 (as amended). We consider the CMA's proposed changes to the Phase 2 process an important and necessary step towards greater predictability and transparency for merger parties, in particular regarding remedies. If implemented effectively, these changes should lead to more mutually positive outcomes for all relevant stakeholders, especially for mergers requiring approvals in multiple jurisdictions.

(4) Whilst undoubtedly a critical step in the right direction, we provide some suggestions below for further important improvements which we hope the CMA will consider ahead of finalising the Revised Guidance. Specifically, we propose improvements to the CMA's assessment of remedy proposals and access to third-party information, which we consider are in the spirit of the Revised Guidance and will further improve the current system.

II. Proposed amendments contained in the Draft Revised Guidance

A. Overall, is the Draft Revised Guidance sufficiently clear and helpful?

(5) Overall, we welcome the inclusion of changes to reflect developments in the CMA's evolving practice and case law of the proposed reforms to the Phase 2 process, given that they are helpfully designed to increase substantive engagement on the merits of the case and provide increased opportunities for merger parties to interact directly with the CMA's Inquiry Group. This addresses a number of limitations of the current system. If implemented effectively, this is a key set of proposals that should allow merger parties to better understand the potential case against their transaction and, in theory, the types of evidence that may be helpful to the CMA in conducting its review. For merger parties engaged in parallel reviews with multiple global regulators, this set of proposals should also (in principle) increase the ability to coordinate strategy and understand the CMA's line of thinking earlier than was previously possible.

(6) The proposal to abolish the Issues Statement, making the Phase 1 decision the starting point for the Phase 2 assessment brings greater continuity between Phase 1 and Phase 2 cases. As echoed by many responses to the CMA's Call for Information in June 2023,[1] if the role of the Issues Statement has effectively evolved to becoming a summary of the Phase 1 decision, it is questionable how much value the Issues Statement continues to bring to the process (both for the Inquiry Group and merger parties). We have no objection to using the Phase 1 decision as the starting point for responses to a reference to Phase 2.[2]

(7) Much like the European Commission's (the "**Commission**") State of Play Calls, the introduction of an initial substantive meeting with the Inquiry Group following the merger parties' response to the Phase 1 decision gives the merger parties the opportunity to make their case to decision-makers earlier on in the process. Under the current process, merger parties' interactions with the Inquiry Group are limited to one-way interactions at set-piece stages of the inquiry. These limited interactions often do not lend themselves naturally to a substantive discussion or allow merger parties the chance to gain clear insight into the Inquiry Group's substantive thinking (and to influence it) until it is too late.

(8) The CMA's proposal to formalize the practice of teach-ins and site visits early on in Phase 2 is also a positive development, as it gives the CMA more opportunities to hear from businesses directly about how their industries work, and their rationale for pursuing a deal. Likewise, we also welcome the CMA's proposal to encourage a greater number of economist-to-economist meetings throughout the process. Greater access to the CMA's economist team will be crucial for cases where data analysis is central to the CMA's investigation. Codifying this practice will also be beneficial for identifying and obtaining the relevant evidence that the Inquiry Group may need to perform its function. As the CMA is aware, these practices are already well-established in other global regimes.

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1 Call for Information: Phase 2 merger investigations, responses published on 20 November 2023 (link available here).

2 To the extent the CMA considers new issues in Phase 2 beyond those included in the Phase 1 decision, it would be incumbent on the CMA to keep the merger parties informed.

a) Interim Report

(9) The introduction of a new Interim Report to replace the current Annotated Issues Statement, Working Papers and Provisional Findings is an important and helpful development. Currently, the Annotated Issues Statement and Working Papers are the first meaningful opportunity to understand the Inquiry Group's emerging thinking on key issues. But they only provide limited insight and more often than not they are inconclusive. Indeed, it has always been unclear how much merger parties are able to respond to these documents prior to the Provisional Findings in a way that could truly impact the Inquiry Group's thinking. In the same vein, although the Provisional Findings currently serve as the main indicator as to how a case will be decided, they are published fairly late in the process and, in the vast majority of cases, there are only limited occasions on which the CMA changes its provisional conclusion after their publication.[3]

(10) The proposed changes could positively transform the Phase 2 system in the following ways:

i. Earlier disclosures of evidence (including to external advisors via a confidentiality ring) will create a less formulaic process and provide greater opportunities to engage with the Group prior to their final decision. In theory, this should remove the inflexibility of the Annotated Issues Statement and Working Papers, and give merger parties a more detailed level of reasoning of the case against them by addressing specific concerns earlier in the process.

ii. The issuance of the Interim Report at an earlier stage in the process will give merger parties earlier insight into the Inquiry Group's emerging thinking. If implemented effectively, this reform should help remove the sense that merger parties only hear the case against the merger once it is too late and once the Inquiry Group's opinions have already formed. Considering the Interim Report will be published prior to the revamped Main Party Hearing, merger parties should have a clearer sense of the issues that they need to address directly with the Inquiry Group.

(11) We note, however, that earlier publication of the Interim Report may mean that the Phase 2 process may be even more front-loaded for merger parties and the case team than it already is. Similarly, the shorter window for case teams and Inquiry Groups to provide their emerging thinking may result in Interim Reports that are less detailed or conclusive than the Provisional Findings. However, this will not be problematic as long as the CMA remains open-minded to new evidence and is willing to continue engagement with merger parties, for example through the issuance of a supplementary addendum to its Interim Report as appropriate. This is already established practice as shown in a number of cases (most recently Copart/Hills Motors, Hitachi/Thales, Microsoft/Activision Blizzard and Amazon/Deliveroo), where the submission of new evidence after the Provisional Findings influenced the CMA's initial thinking and ultimately led it to drop specific concerns after the Provisional Findings.

[3] Although the CMA may have the opportunity to discuss further during informal touchpoints with the merger parties, given the CMA's reliance on internal documents, there may be merit in the CMA considering on a case-by-case basis the possibility of sharing a "Working Paper" (or equivalent) of its contextual analysis of the merger parties' internal documents with the merger parties prior to the Interim Report.

b) Main Party Hearings

(12) Currently, the Main Party Hearing serves as a key part of the CMA's evidence gathering ahead of the Provisional Findings. Although it provides merger parties with an opportunity to speak to the Inquiry Group, the format often leaves businesses feeling as if they are subject to a number of formulaic questions, without getting to the important issues of the specific merger. Main Party Hearings have often resembled an interrogation, rather than an interactive and constructive discussion between businesses and the CMA designed to flush out the CMA's concerns and attempt to address them.

(13) It is therefore beneficial that the CMA has proposed to make the Main Party Hearing an interactive discussion and to give merger parties the opportunity to make direct presentations to the Inquiry Group while engaging in substantive, two-way discussions based on the Interim Report. Again, we see this proposed reform as a welcome and constructive step towards greater engagement and transparency.

c) Remedies

(14) Compared with other regulators, for example the European Commission, the current CMA process is fairly inflexible and opaque, with limited opportunities to have meaningful discussions with decision-makers. Following the introduction of the fast-track system in 2021, in most cases merger parties either have to concede on the merits, or be afforded substantive discussions on often complex remedies only late in the process once the CMA has identified a problem. This often leaves merger parties feeling "in the dark" about whether their remedy proposal will ultimately be accepted as sufficient to address the CMA's concerns.

(15) We consider it a positive development that the Revised Guidance codifies the CMA's position that it encourages early discussions on remedies without prejudice. It will only prove helpful that the CMA's Revised Guidance envisages opportunities for the merger parties to propose draft submissions and hold early discussions with the Inquiry Group – and crucially, obtain feedback on remedies proposals – ahead of the Interim Report. This will be particularly helpful in complex multi-jurisdictional cases where merger parties are required to design credible remedies capable of satisfying the concerns of multiple regulators. This proposal therefore presents the potential opportunity for merger parties to have meaningful merger discussions with multiple regulators – and therefore a greater convergence of final outcomes.

(16) We also welcome the CMA proposal to replace the Remedies Working Paper with an Interim Report on remedies following the Main Party Hearing. Whereas previously merger parties were required to wait until the Final Report before understanding the Inquiry Group's view, in theory this should provide an additional milestone at which merger parties will know whether a remedy will be acceptable and if any modifications are required. The CMA envisages a continuation of informal discussions after this point, together with a "final remedies call". The proposed process on remedies will therefore be more transparent in view of the increased touch points. More time to collaborate with the CMA on finding a solution that works for the CMA and other regulators – including clearer feedback on the CMA's position – is critical.

B. <u>What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.</u>

(17) **Timing and requests for information.** Overall, we hope that the CMA does not see these reforms as merely perfunctory, and that this should lead to a system that is more transparent and responsive. As a starting point, we recognise that these changes might initially signify a temporary increased workload for the Inquiry Group and case teams as they try to navigate through these new milestones within the CMA's 24-week timetable. It would therefore be helpful if the CMA is as transparent as possible with merger parties on timing and expectations around requests for information and section 109 requests during update calls (*see* paragraph 11.41 of the Revised Guidance).

(18) **Public interest mergers.** It would also be beneficial if the CMA could clarify the likely impact of the new Phase 2 process on public interest mergers (Section 14 of the Revised Guidance), and how the interaction with the Secretary of State and the merger parties would be structured.

(19) **Joint case management meetings and economist-to-economist meetings.** Further, we note that paragraph 11.8(i) of the Revised Guidance provides for a "joint case management meeting" which is only limited to the merger parties' legal advisers, while in economist-to-economist calls legal advisers may attend in an observational capacity (paragraphs 11.33 – 11.34 of the Revised Guidance). It would be helpful if there were an option, which the CMA could accept at its discretion, for merger parties (or at least in-house legal counsel) to also attend merely as observers during such economist-to-economist calls.

(20) **Third-party participation in main party hearings.** Finally, paragraph 11.66 of the Revised Guidance notes that the CMA may also wish to hear from relevant third parties, for example customers, either separately, or as part of a joint hearing with the merger parties. Some third-party complainants may seek to unduly exaggerate the merger parties' position for their own commercial benefit. It would therefore be helpful if the CMA could provide greater clarity and guidance as to what is expected pursuant to this reform where joint meetings are envisaged (for example, if merger parties will be provided with a summary of issues raised by third-parties and/or the right to reply to specific complaints made at the main party hearings).

(21) **Invitation to Comment on Remedies.** The CMA will publish an Invitation to Comment on Remedies in order to consult with the merger parties and other parties, including customers, competitors and any relevant sectoral regulator, on possible remedies to address the SLC (or SLCs) that the CMA has provisionally identified (paragraphs 12.6 and 12.8 of the Revised Guidance). When publishing its Invitation to Comment on Remedies and the merger parties' responses to it on the case page (paragraph 12.9 of the Revised Guidance), the CMA should have regard to any appropriate redactions and confidentiality requirements, particularly where remedy proposals are being considered in parallel by other regulators (and may not be made public).

C. Are there any other amendments which you consider ought to be made to the Current Guidance?

(22) It is encouraging that the CMA has provided for the opportunity to formalize the disclosure of (limited) key pieces of evidence pre-Interim Report (*e.g.*, in a vertical case particularly influenced by a third-party complaint, the CMA could share that complaint or economic analysis at an early stage with the merger parties).[4] This is a marked improvement on the CMA's current practice of sharing third-party evidence only after the publication of the Provisional Findings, which is too late in the process to allow for proper engagement.

(23) However, there remains more room for the CMA to move towards a more transparent and open system in relation to the disclosure of third-party evidence. There should be greater disclosure of the evidence underpinning the CMA's analysis rather than select extracts. Despite CAT precedent endorsing the CMA's position (*Meta*, *BMI* and *Eurotunnel)*, overwhelming feedback from respondents to the CMA's Call for Information on Phase 2 mergers of June 2023 is that disclosure via access to file would facilitate a more informed, meaningful discussion on the substantive case and enhance procedural fairness.[5]

(24) The CMA's decision not to grant merger parties a right of full access to file in Phase 2, both at the proposed Interim Report stages and Invitation to Comment on Remedies stage should be reconsidered on the basis that:

a) The CMA already provides each party to an investigation under the Competition Act 1998 with an opportunity to inspect the file "*to ensure that they can properly defend themselves* […] *and have an opportunity to make representations in respect of any proposed penalty*."[6] The CMA is flexible regarding the process used and the time given for inspection will depend on a number of factors including the size of the file, the nature of the documents and the access to file process being used.[7] In our view, it would be appropriate for the CMA to adopt a similar approach during a Phase 2 investigation to ensure the merger parties' right to reply to the case against the merger.

b) Earlier disclosure via confidentiality rings may give parties access to quantitative evidence before the Main Party Hearing (and in the Interim Report on Remedies/ Invitation to Comment on Remedies). Nevertheless, it is not the same as giving access to the full underlying evidence and analysis and can often be inadequate: confidentiality rings are highly context-dependent and the CMA retains a wide discretion as to what can be disclosed to provide the "gist" of its case.[8] This risks procedural unfairness and undermines merger parties' ability to exercise their rights of defence in response to the Provisional Findings currently, and the Interim Report in future. This is particularly important in the context of an investigation underpinned by a third-party complaint. Lack of access to the evidence relied upon by the CMA is particularly problematic for the merger parties' rights of defence in such a context, and undermines the robustness of the CMA's Phase 2 process.

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4 Revised Guidance, footnote 236.
5 Call for Information: Phase 2 merger investigations, responses published on 20 November 2023 (link available here).
6 Guidance on the CMA's investigation procedures in Competition Act 1998 cases, paragraph 11.21.
7 Ibid, paragraph 11.23.
8 *Meta Platforms Inc v Competition and Markets Authority* [2022] CAT 26, paragraph 148(4).

c) The CMA's decision not to grant "full" access to file is a missed opportunity to level up its process with that of other global regulators with administrative processes, notably in the EU. In particular, merger parties may already have access to similar evidence submitted by the same third parties in parallel reviews – access to file by the CMA would help bring further transparency and confidence in the CMA's process and allow for more informed discussions between the CMA, the merger parties, and other regulators. This will be particularly valuable where there is potential divergence of opinion between regulators on the same case. In the same respect, it would facilitate more streamlined and earlier international cooperation and alignment, including on remedies.

d) Introducing access to file should not negatively impact the CMA's timetable given that these processes can be set up relatively swiftly and can be adjusted depending on the circumstances of the case in the same way as under CA98 processes. For example, the Commission must, on request of a recipient of a statement of objections in Phase II, grant access to its file to enable the company concerned to exercise its right of defence. This is carried out in a manner that does not unduly impact the timetable. Firstly, access file is often granted on CD-ROM, while the Commission reserves the right to grant access by providing hard copies of documents or by inviting parties to examine the accessible file on the Commission premises, in particular in relation to data rooms for access to underlying economic evidence. Second, rights of access do not extend to confidential information, including internal Commission documents and correspondence between the Commission and other competition agencies. Third, in granting access to file, although the Commission aims to ensure the protection of business secrets and other confidential information, nevertheless, the burden rests on parties that have provided information to make a substantiated claim that such information should be treated as a business secret. The CMA could equally introduce such qualifications around access to file to reduce any administrative burden that could arise.

D. Are the requirements of the Phase 2 Remedies Form sufficiently clear? Are there any comments you wish to make on the proposed Phase 2 Remedies Form?

(25) As mentioned above, we expect the proposed reforms to significantly improve the chances of achieving a positive outcome on remedies for all stakeholders involved. We note, however, that the CMA is not at this stage proposing to make any changes to its substantive remedies guidance, despite the introduction of the Remedies Form and the proposed process in the Revised Guidance. It would be beneficial, once the Revised Guidance in its final form is published, if the CMA's guidance on remedies (CMA87) were also updated to reflect these developments.

(26) Furthermore, paragraph 11.24 of the Revised Guidance provides for the possibility to engage on possible remedies on a *without prejudice* basis prior to the Interim Report. A written submission (such as a draft Phase 2 Remedies Form) is likely to be a constructive way to begin engagement with the CMA (paragraphs 11.47 and 11.48 of the Revised Guidance). It would introduce more clarity if the CMA could confirm that it would be possible to submit a draft Remedies Form more than once, statutory timeline permitting, before the formal Phase 2 Remedies Form must be submitted (*i.e.* no more than 14 calendar days from the publication of the Interim Report).

(27) Finally, the CMA's preference for structural remedies is clear in the Remedies Form and there has been no indication that its stance on behavioural or contractual remedies has softened. Viewed through this substantive lens, the reforms in this respect are relatively modest. According to the Remedies Form, if the merger parties wish to offer a behavioural remedy, they should provide answers to questions 1 to 3 of the Remedies Form, as well as any other questions that are relevant. The CMA's unwillingness to date to consider behavioural remedies makes this suggestion in the Remedies Form seem like a formality. In CMA87, the CMA states that it will generally only use behavioural remedies as the primary source of remedial action in a merger inquiry where structural remedies are not feasible, where the substantial lessening of competition is expected to have a short duration or where behavioural measures will preserve substantial relevant customer benefits that would be largely removed by structural measures.[9] This may indicate that behavioural remedies are a rarity, however provision for specific requirements that the CMA would expect to see in relation to behavioural remedies (*e.g.,* scope, term, dispute resolution mechanism) should also be included in the Remedies Form for such circumstances.

III. Proposed amendments contained in the Draft Revised Merger Notice

(28) The proposed amendments included in the Revised Merger Notice Template are clear and welcomed changes (*e.g.* updates following Brexit, including timing implications on parallel review timelines with other authorities[10]).

IV. Conclusion

(29) In summary, the CMA's acknowledgement of the need for greater engagement and transparency is highly welcomed. However, as discussed above, this can be further improved, in particular, with related updates to its assessment of remedies and access to third-party information. We hope our comments and suggestions are useful to the CMA.

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9 CMA87, paragraph 3.48.

10 Revised merger notice template, note 2.g.