THE CMA'S CONSULTATION ON DRAFT MARKETS GUIDANCE

RESPONSE BY FRESHFIELDS LLP

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FRESHFIELDS

Response to the CMA's Consultation on draft Markets Guidance

1. Introduction

1.1 Freshfields LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on its updated draft Markets Guidance (respectively, the ***Consultation*** and the ***Draft Guidance***) pursuant to which the CMA is proposing further amendments to its markets regime guidance.

1.2 This response is based on our significant experience and expertise in advising clients on CMA market reviews, market studies and market investigation references (***MIRs***) under the Enterprise Act 2002 (***EA02***). We rely on this breadth of experience to provide these comments on the Draft Guidance.

1.3 We have confined our comments to those areas of the Draft Guidance which we consider are most significant. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2. General observations

2.1 We welcome the CMA's goal of modernising its operations, as well as its new "4Ps" framework – Pace, Predictability, Proportionality, and Process – which seeks to create a more agile and business-friendly regulatory environment across all of the CMA's functions.

2.2 We also commend the CMA's commitment to enhancing its operational framework through the inclusion of the 4Ps in its Draft Guidance. We further agree that the distinct pieces of the 2024 draft guidance should be updated and consolidated into a single, comprehensive document covering the entirety of the CMA's markets regime; a move away from fragmented guidance on the same topic is considerably more user-friendly.

2.3 In particular, we consider that a number of the proposals related to the CMA's 4Ps framework should lead to a more transparent and consistent process for parties:

(a) *Project Roadmaps*

2.4 The CMA proposes to issue a Project Roadmap at the beginning of each market review, study and investigation, which will include, inter alia:

- bespoke KPI timeframes for each stage of the markets work;
- points at which each party can expect to engage with the decision makers(s);
- any proposed progress reports and the stage at which 'State of Play' meetings can be expected;
- public consultation points; and
- the CMA's intended approach with regard to appointing sector experts.

2.5 These will be helpful to the extent they set out clear timeframes for each stage of the CMA's markets work, including the points at which parties can expect to engage directly with the decision maker, receive progress reports, and participate in State of Play meetings. Main parties should, however, be given the opportunity to comment on the Project Roadmap early on and suggest relevant changes. Clear timeframes will also require the CMA to exercise discipline in keeping to the administrative timetable. Use of bespoke KPIs tailored for each project may prove helpful, provided that flexibility is built into the approach and process is not sacrificed for the sake of achieving pace.

2.6 In practice, however, it is unclear how the CMA will know the extent of any issues at such an early stage, before it has undertaken appropriate information gathering or properly engaged with the industry about the nature and extent of the concerns in any given market. We expect that this will make setting specific timing KPIs and timelines challenging in the initial Project Roadmap. The CMA will need to find an appropriate balance between retaining flexibility so as to be able to (reasonably) adjust anticipated timelines, while ensuring the predictability for parties that it seeks to achieve. See further our comments in section 4 of this response.

(b) *Early involvement of sector expertise*

2.7 Early involvement of sector expertise with the intention of minimising the administrative burden placed on parties throughout the project and to assist/accelerate the CMA's understanding of the market at the outset is a positive step. Ensuring the CMA is quickly up-to-speed on the key issues and fully understands market dynamics is crucial for a successful outcome, and should assist the CMA in proceeding at pace while ensuring that requests for information (***RFIs***) remain targeted and proportionate (see further comments on RFIs in paragraph 4.3 below).

2.8 However, the Draft Guidance would benefit from further clarity as to when or in which cases the CMA would expect to rely upon sector expertise. In terms of predictability, the CMA could consider including a presumption that sector expertise will be involved in *all* cases, unless it is agreed with the main parties that it is not necessary. Moreover, there is no guidance as to the rights and/or expectations the main parties will have regarding the appointment of such experts, including in relation to the parties' ability to have sight of the expert advice that is provided (in order to be able to provide meaningful representations on it). Main parties should also be provided with the right to make representations to the CMA about why a particular expert might not be suitable (e.g. due to potential conflicts of interest, or perceived bias against one or more market participants in the expert's previous publications). Such safeguards are important to ensure a robust process is maintained.

(c) *Enhanced, earlier engagement with parties, including launch webinars and teach-ins*

2.9 Improving the opportunities for main parties to engage with the Inquiry Group throughout the MIR process is helpful in enhancing the transparency and robustness of the MIR process. Such engagement further helps crystalise the CMA's understanding of market dynamics at an earlier stage and can support the CMA in focusing on key substantive issues so as to avoid expending time and resources on other points, simply because they were contained in the original Issues Statement.

2.10 As regards the format of such engagement, in our experience, site visits and teach-ins are always more productive in person, whereas virtual site visits and teach-ins tend to be less engaging. Further, in-person engagement provides the best opportunity to build a positive working relationship between the Inquiry Group and the businesses involved. In practice, it is helpful to have clarity regarding the agenda for teach-ins in advance of the session, and to have a list of topics and/or questions the CMA would like to cover, ideally at least a week before the planned session. This can increase efficiency, especially when the CMA is in parallel preparing an RFI and some or all of the draft RFI questions can be covered during the teach-in.

2.11 While earlier and enhanced engagement is intended to be beneficial, the CMA must be mindful not to increase disproportionately the burden of engagement on businesses. We would therefore encourage the CMA to include more detail in the Draft Guidance around the procedural guardrails to protect businesses from undue administrative burdens and public scrutiny.

2.12 Finally, for completeness, we encourage the CMA to give parties (particularly main parties) advance notice of material announcements relating to the CMA's proceedings (which has not always happened in some recent cases). Such advance notice is key for businesses to make adequate preparations for the internal and external engagement that may be necessary around these announcements.

(d) *Overall end-to-end timeline efficiencies*

2.13 The Consultation Document[1] proposes a more streamlined approach to 'putbacks' (including in relation to the number of documents published). Given the significant burden which putbacks currently place on market participants, we broadly welcome this more proportionate approach. However, the Draft Guidance provides little detail about what this means in practice. Putbacks are an important safeguard against publication of confidential information, and parties need to be confident that the CMA is rigorous in its approach. Again, a balance must be struck between pace (avoiding lengthy putbacks processes) and proportionality (involving a less onerous burden on parties) on the one hand, and process on the other (including by avoiding the imposition of unreasonably short deadlines). The CMA's revised approach to putbacks must also reflect the balance between ensuring confidential information is adequately protected, while disclosing an appropriate amount of information. In some previous cases, the CMA

[1] Market Reviews, Studies, Investigations and the monitoring and review of market remedies Updated guidance on the CMA's approach, Consultation document.

has sought to disclose specified information relating to specific businesses to the public at large on the (non-specific) basis that this information was somehow important to facilitate public understanding of the CMA's reasoning. In other cases, the CMA has made overly expansive redactions which unduly impair parties' ability to interrogate the substance of the CMA's reasoning and evidence base sufficiently.

2.14 Relatedly, as regards confidential information more generally, we note that in recent cases, there have been instances where the CMA has inadvertently disclosed confidential information to the parties. Not only do such accidental disclosures have a negative impact on those concerned, they also undermine the level of confidence businesses have in the CMA's ability to keep their commercial information confidential. In this respect, the CMA should consider including in the Draft Guidance explanation as to how the CMA's Procedural Officer will handle any confidentiality complaints in the markets context, similar to what it has set out in the CMA's updated draft mergers guidance. It is essential for the Procedural Officer to continue to uphold the principles of due process at all stages of the complaints process so as to ensure that business' procedural rights are fully respected. This includes, for example, providing businesses with sufficient opportunity to comment or make representations on any information or representations made by the CMA in such circumstances.

3. Issues for further consideration

3.1 While we support the need for modernisation and efficiency, some of the CMA's proposed amendments raise significant concerns around the potential erosion of fundamental procedural safeguards. The CMA must avoid a trade-off in which the CMA's drive for pace and predictability comes at the cost of due process and robust decision-making, thereby undermining the transparent, documented, and challenge-based process that has historically underpinned the UK's markets regime. In particular, as we describe further below, informal engagement is not a substitute for formal and documented procedural steps. In addition, informal engagement will only, in our experience, contribute to the effective consideration of key issues where the CMA (including senior staff and decision makers) are willing and able to engage bilaterally to discuss their emerging views (rather than just using informal engagement as another opportunity to raise questions).

(a) *Removal of working papers and annotated issues statements in market studies and MIRs and replacement with an update following internal State of Play*

3.2 The CMA's MIR process is a multi-stage, public, and highly structured procedure designed to ensure fairness and robustness. A key element of this process is currently the use of working papers. By summarising the CMA's emerging thinking on key issues, working papers provide parties with the opportunity to challenge that thinking before the CMA's views become too firm. This practice is a foundational element of administrative due process, serving as a critical check and balance.

3.3 Accordingly, we have a number of concerns with the CMA's proposal of issuing working papers on an exceptions-only basis and instead providing parties with an "update" after the CMA's internal State of Play meeting.

3.4 First, **removing working papers deprives parties in an MIR of a critical opportunity to interrogate the detail of the CMA's analysis and evidence at a pre-decisional stage**.

(i) The CMA gathers a significant volume of evidence from a large number of stakeholders in MIRs and typically produces detailed quantitative and qualitative analyses based on this evidence (e.g. regarding market definition, profitability, switching etc.).

(ii) It is therefore crucial for parties to have an opportunity to consider the CMA's analysis in detail at a pre-decisional stage. To do this, the CMA must produce a *documented* account of its emerging thinking, including full disclosure of its economic analysis (via confidentiality rings where necessary). Without this, parties cannot test the CMA's analysis rigorously and understand its implications for the CMA's thinking on potential adverse effects on competition (***AECs***) *before* the AEC decision is made.

(iii) A more rigorous analysis of key issues is also, in practice, likely to aid the CMA's desire to prioritise key issues at the earliest possible stage (e.g. by facilitating a back-and-forth on the evidential basis for mooted concerns).

3.5 Second, **the format of the "update" that will replace working papers is unclear and is unlikely to provide sufficient transparency regarding the CMA's emerging thinking**.

(i) The CMA's Consultation Document notes that "*The CMA commits to providing an update after an internal state of play meeting. The update could be in the form of a written email update, progress report and/or an external state of play meeting.*"[2] The breadth of the CMA's discretion as to the format and granularity of this update means that parties and their advisers will have no way of knowing what level of detail to expect, and in what form. This broad discretion undermines predictability and may in practice result in inadequate disclosure in complex or contentious cases (as discussed further below).

(ii) It is clear, however, that this "update" – whether by email, progress report or external State of Play meeting – will not be an effective substitute for the detail provided in working papers. As discussed above, working papers provide parties with the opportunity to test the CMA's emerging thinking rigorously, including by examining economic analysis in detail. The proposed "update" is unlikely to enable this essential detailed engagement. Nor is it likely, in practice, to allow – as the CMA's proposals

[2] Consultation Document, para. 2.9.

suggest – any meaningful early discussion on remedies,[3] except in the most straightforward cases where there are no areas of disagreement regarding potential AECs.

3.6 Third, **while we recognise the potential efficiency gains from replacing working papers with an "update", these benefits are unlikely to materialise in a markets context.**

(i) In our experience in the mergers context, clear updates from the Inquiry Group in external State of Play meetings can be beneficial, allowing merger parties to understand the core elements of the CMA's concerns while avoiding the burden of a full working papers process. Removing working papers – which typically focus on all of the issues raised in a Phase 1 decision – can also enable the Inquiry Group to focus more efficiently on the core issues (including, where appropriate, narrowing the scope of the CMA's enquiry by dispensing with lower priority issues at an earlier stage). We appreciate the need for pace and proportionality, and welcome these efficiency gains.

(ii) However, we have significant concerns that these efficiency gains are unlikely to be achieved in MIRs through an analogous approach. The greater breadth and depth of the CMA's analysis in MIRs – which make oral updates far less suitable than in a mergers context – is evident in several respects:

(A) First, MIRs are extended 18-24 month reviews of the operation of an entire industry sector, with input from a broad range of market participants. The scope of issues under consideration in MIRs is therefore typically much broader than the question in mergers of whether the combination of two enterprises results in a substantial lessening of competition. Given this much broader focus, oral updates from the Panel are unlikely to provide the requisite level of detail to enable parties to engage fully with the CMA's emerging thinking.

(B) Second, it is common in MIRs for the CMA to undertake detailed quantitative analysis which draws on industry-wide pools of data and is often deployed to reach conclusions about market dynamics such as profitability, price movements, local concentration, etc. In addition, the CMA often reports the findings of detailed consumer surveys. Oral updates are very unlikely to permit the main parties from undertaking any form of meaningful interrogation of the CMA's work of this nature.

[3] "[T]*he CMA considers that this greater engagement* [State of Play] *would enable improved focus on the key areas, provide more transparency over emerging thinking, and facilitate more targeted submissions and, where relevant, earlier discussions on remedies*" (Consultation Document, para. 2.11(d)).

(C) Third, when compared with mergers, MIRs involve a far greater range of stakeholders, whose views often differ considerably (in large part because of their diverse incentives). The inclusion of a working paper stage in addition to the Provisional Decision Report (***PDR***) currently provides a valuable opportunity for parties in MIRs to consider and challenge the published submissions of other parties, which can assist the CMA in its assessment of various stakeholders' views. By removing working papers altogether (as opposed to simply streamlining them, as discussed below), this would be lost.

(iii) We note that the Inquiry Group "*may also disclose elements of analysis before the publication of its interim report through, for example, the use of confidentiality rings where appropriate or disclosure rooms, and/or it may disclose some early thinking in progress reports*".[4] We welcome this opportunity for further disclosure, which may help address some of the concerns outlined at para. 3.4 above. However, the Draft Guidance currently provides the CMA with a broad discretion as to when it will make such disclosures, which undermines predictability for market participants. We therefore recommend that the CMA clarifies the circumstances in which it will make such disclosures (at a minimum, we would expect this to occur in relation to detailed quantitative evidence and analysis), and that there will be parity of disclosure to all main parties in a given MIR.

3.7 We therefore do not support the proposed removal of working papers from the MIR process. However, we recognise that the CMA's current practice results in extremely voluminous working papers, which are often repetitive and overlap with one another. This approach places a disproportionate burden on the parties involved in an MIR. Rather than removing working papers altogether (which would be sub-optimal for the reasons explained above), we would urge the CMA to retain working papers but commit to a more streamlined and focused approach to working papers.

(b) *Possible hearings with main parties before the IR – but not mandatory*

3.8 Similarly, we consider that the CMA's proposal to dispense with mandatory early-stage hearings with the main parties may also undermine the due process rights of those parties.

3.9 While the Draft Guidance notes that the Inquiry Group *may* hold hearings with parties, it also affords the CMA broad discretion to determine that no additional hearings are necessary (such as where there has been substantial early engagement with the parties through informal meetings).[5] This proposed change implies that there would no longer be a guaranteed

[4] Draft Guidance, paragraph 8.36.

[5] Draft Guidance, paragraph 8.38.

opportunity for the main parties to engage with the CMA's Inquiry Group ahead of the publication of the Interim Report (***IR***).

3.10 We appreciate that the CMA is envisaging enhancing the process with a number of earlier opportunities for engagement, including webinars, 'teach-ins', internal State of Play meetings, and informal updates. These proposals are positive, but they do not obviate the need for a more formal and documented opportunity for market participants to present their case to the CMA at a critical juncture in the investigation. Indeed, the current hearings play a vital role in reducing the risk of confirmation bias in provisional decisions, ensuring the Final Report is based on a more thoroughly debated and well-evidenced foundation.

3.11 We consider this change may seriously curtail parties' rights to be heard on the key substantive issues at a point in time when it is still possible to impact the outcome of the IR. This is also borne out by the CMA's current guidance, which states that early-stage hearings *"provide an opportunity for the parties to explain their views in person directly to the decision-makers as their thinking is developing"*.[6]

3.12 The risk described in this section is further compounded by the proposed removal of working papers. The net effect of these two proposals, when taken together, is the loss of two important opportunities to respond formally to the CMA's evolving thinking.

3.13 In view of the above, we consider that the default position should be for main parties to be given the opportunity to have early-stage hearings, with the possibility for parties to opt out. Early-stage hearings should be held sufficiently early to enable the CMA to take such parties' views into account in the IR.

(c) *Interim Report*

3.14 Under the CMA's proposed reforms, the first guaranteed formal, documented opportunity to assess and challenge the CMA's views will occur following the IR, when the CMA has already reached provisional views regarding any AECs and potential remedies. Although this will occur at an "earlier stage" than the current PDR, the IR may nonetheless be published a year or more into the investigation. We have significant concerns that this is simply too long for parties to proceed without: (i) the CMA being under an obligation to articulate clearly the theories of harm it considers may be well-founded, or is at least continuing to investigate, and the evidence on which these views and continuing investigations are based; and (ii) the main parties having an opportunity to challenge the CMA's views formally in an in-person setting with the Inquiry Group. It seems inevitable that the CMA's views will be considerably more settled at the IR stage than the emerging thinking currently expressed in working papers. As a result, we have concerns that the IR would instead become the PDR by default, meaning it would be significantly harder for parties to influence the CMA to depart from

[6] Market Studies and Market Investigations: Supplemental guidance on the CMA's approach, para 3.47.

its provisional views. This is particularly worrisome given the CMA's thinking will not have been exposed to any detailed challenge prior to the IR.

3.15 On this basis, is it imperative that the CMA ensures the IR is published early enough in the timetable, for example following the CMA's review of the document and information collection exercise, to afford parties an opportunity to comment on emerging thinking. While the informal discussions and updates are helpful in driving pace, parties must be given the opportunity to comment upon and challenge the CMA's findings and proposed remedies at a stage in the process which allows the CMA time to consider the responses and make appropriate amendments to its thinking as necessary. This will enhance engagement with the parties and facilitate a robust process.

3.16 Moreover, if the CMA is minded to remove working papers entirely, then the *nature* of the IR must be materially different to that of a PDR, and be presented both to the parties of an MIR and to the public as emerging thinking, rather than initial decisions.

3.17 Further, removal of the annotated issues statement (alongside working papers) offers little to no visibility to parties as to whether the CMA's thinking has developed following responses and hearings. While the Consultation Document refers to the *possibility* of supplementary reports, acknowledging that this could mean that supplementary interim reports are required more frequently than is currently the case, the Draft Guidance does not make any reference to the use of supplementary IRs. It is, therefore, unclear as to when the CMA will consider this a proportionate measure, resulting in additional unpredictability. The Draft Guidance should therefore be updated in this respect, noting that in cases where there are such "*changes in the direction of travel*",[7] the CMA would be expected to consult on revised provisional findings. Moreover, in the event that the CMA's provisional findings do not change, the Draft Guidance should make clear that parties will be given the opportunity to make representations on material new evidence that the CMA intends to rely upon in its Final Report.

(d) *Response Hearings*

3.18 Based on our experience with the improved format of the Phase 2 merger main party hearings, we encourage the CMA to adopt a similar approach to the Response Hearings in the context of market investigations. At present, it is unclear whether parties will be given the opportunity to first respond in writing before attending the hearing. Our view is that this sequencing (written response followed by the hearing) is most effective/efficient, and allows sufficient time for the Panel to review and digest any written response prior to an oral hearing. To allow parties to better understand the process and appropriately prepare for the relevant stages of the investigation, the guidance would benefit from clarifying:

(i) the proposed steps between the IR and Response Hearings;

[7] Consultation Document, paragraph 2.14.

(ii) whether hearings will similarly follow in the same format as the Phase 2 merger process, i.e. consisting of two parts – the first responding orally to the IR and other relevant topics of the parties' choosing, and the second being led by the CMA to explore issues that were not addressed / that they wish to address in more detail; and

(iii) whether this is an opportunity to engage on remedies.

3.19 The Draft Guidance notes that decisions on which main and third parties to invite to hearings, and the format and sequencing of any hearings, rest with the CMA. We suggest that the CMA clarifies that the main parties would always have the right to a hearing to address the Inquiry Group, however the format of such hearings are at the discretion of the CMA.

3.20 With respect to timing, the CMA must ensure that the parties are given adequate time to properly prepare for Response Hearings following publication of, and Parties' response to, the IR. In particular, any hearings must be held only after the Parties have responded in writing to the IR and the Inquiry Group should be afforded sufficient time to properly review such responses. While we understand the CMA's need to proceed at pace, it is important that the window to respond to the IR and prepare for the hearings is not rushed, especially if the IR is the first documented indication of the CMA's thinking. Providing main parties with sufficient time to consider the IR and prepare adequately for their Response Hearings will not only protect their due process rights, but will also increase the likelihood of the Response Hearing being productive and useful for the CMA.

3.21 Finally, it is unlikely that there will be much time to engage comprehensively on remedies during the main party hearings given in many cases the IR will set out the CMA's initial AEC findings. The current system provides parties with an opportunity to focus on AECs at the main hearings and address potential remedies slightly later in the process – as such, the CMA should ensure that Parties do not miss an opportunity to engage with the Inquiry Group on remedies.

(e) *Remedies*

3.22 As regards markets remedies, the core conceptual underpinnings of remedy design and purpose have not fundamentally changed as between the Draft Guidance and the remedies guidance that formed the basis of the CMA's December 2024 consultation. Nevertheless, we welcome a number of the more procedural additions to the Draft Guidance, including the more explicit and proactive approach to the principle of proportionality:

(i) A significant and welcome improvement is the explicit inclusion of a "sunset clause" for new remedies orders *by default*. This default approach will reduce the long-term and potentially unnecessary burden of remedies on businesses (and the CMA), and a clear endpoint enhances legal certainty for the duration of a remedy, allowing businesses to plan and invest with greater confidence.

(ii) Furthermore, the CMA's commitment to being more proactive in its review and removal of old remedies that are no longer needed, pledging to retain only those remedies that remain appropriate on the basis that they continue to address the competition problem and consumer detriment identified in the MIR is a positive development.

(iii) We also welcome the CMA's commitment that where remedies are no longer appropriate, it will typically seek to *remove* the remedy and will only consider amending it if there is clear evidence that the relevant competition problem has endured and is material.

(iv) Finally, the promise of a more comprehensive assessment of the costs of proposed remedies to businesses, and adopting a more balanced and evidence-based approach to remedy design, including active engagement with businesses - further enhances the remedies process.

3.23 However, there remains one key area in which the Draft Guidance could be further improved by including additional substantive clarity: *remedy implementation trials*. While the Draft Guidance commits to a targeted, proportionate, and efficient approach, including clarification that the CMA will seek to run concurrent rather than successive trials and will end a trial early if the results are clear, it fails to address a number of other important aspects.

3.24 There is still relatively little information as to the safeguards that will be put in place to ensure that businesses are not harmed or disproportionately burdened as a result of conducting a remedy implementation trial. We acknowledge that the CMA has attempted (in paragraphs 19 and 20 of Appendix 6) to provide a more precise indication as to the typical or expected timeframes when determining what would be an appropriate deadline for such trials. However, we would encourage the CMA to include as much detail as possible in order to fully achieve its Predictability ambition in relation to this new power (for example, what it means by 'non-complex' cases). Indeed, the Draft Guidance still omits information as to the process for subsequent implementation trials if at the end of a trial the initial remedy is found not to be effective. Various questions remain here, including whether subsequent implementation trials be run for the same amount of time as the first, and how many implementation trials the CMA will consider appropriate.

3.25 Separately, while updates to the Draft Guidance on the review process are a necessary step, we believe that the CMA should aim for *legislative* amendment to the EA02 itself to recalibrate properly the balance between the permanence of a remedy and the dynamism of markets. The current statutory "change of circumstances" threshold requires a substantive, evidence-heavy assessment even where a remedy is clearly obsolete or *de minimis*. This "one-size-fits-all" review approach directly conflicts with the principles of pace and proportionality. Parties often encounter significant procedural friction when seeking a review of existing remedies on this basis

due to the time and resource intensive nature of the process the CMA must follow – and the CMA is disincentivised from making such an assessment due to the resource demands of such a review.

3.26 To allow the CMA to act with greater efficiency, the legislation could be amended to introduce a lower-burden test for the quick revocation of obviously defunct or historical remedies. Furthermore, an explicit proportionality filter could be embedded into the statutory review criteria, ensuring that the full in-depth review process is only triggered when the CMA concludes that such a review is *necessary* in order to decide whether a change of circumstances has taken place. This would complement the changes already introduced by the Digital Markets, Competition and Consumers Act 2024 in respect of the CMA's ability to review and/or revoke remedies on grounds that they are ineffective.

3.27 The CMA may also wish to consider in this context whether it is appropriate that the current statutory structure mandates a backward-looking assessment ("by reason of any change of circumstances"), thereby hindering a proactive, forward-looking lens to the remedy in question. An amendment to Part 4 of the EA02 could introduce a statutory power for the CMA to vary or revoke a remedy if it is found to be a material impediment to investment, growth, or innovation, irrespective of whether a single defined 'change' is found to be present. This would better align the market remedies regime with the CMA's broader mandate for economic growth and the policy of the 4Ps.

3.28 Since the government has signalled its intention to open a consultation on possible legislative changes to the EA02, specifically concerning the jurisdictional tests of the UK mergers regime, we believe that this legislative window presents an opportune and efficient mechanism to review and update the market remedies framework. Addressing this issue now would ensure a coherent and modernised competition statute, ultimately enhancing the efficacy and credibility of the UK's competition framework as a whole.

4. Additional comments on the Updated Draft Market Guidance

4.1 It is encouraging to see that the CMA has taken on board a number of the suggestions contained in our response to the 2024 markets consultation. However, we believe the Draft Guidance can be further improved by taking account of the following additional comments.

(a) *Pace should not compromise due process*

4.2 While a commitment to achieving pace in its market inquiries is of course a welcome objective, pace should not come at the expense of due process. There are a number of areas in which the Draft Guidance can be improved in this respect, to make clear that the rights of market participants are fully respected when carrying out the CMA's markets function. Indeed, while the 2024 draft guidance contained a specific reference acknowledging that, despite its expanded duty of expediency introduced by the Digital Markets Competition and Consumers Act 2024, the CMA must ensure that the rights

of market participants are fully respected (footnote 4 of the draft Procedural Guidance), that reference does not seem to appear in the Draft Guidance. We see no reason for its deletion and would encourage the CMA to reinstate it explicitly into the preface.

4.3 More broadly, a focus on pace should not, in practice, equate to an increased (and disproportionate) burden on market participants, ensuring that "*bespoke timing KPIs*"[8] are reasonable. In particular:

(i) Deadlines must be reasonable: Deadlines set during the information gathering stages of market studies and MIRs are often unreasonable, and frequently have to be negotiated upwards. Despite its pace ambition, the CMA must set deadlines that are reasonable and consider valid, reasoned requests for extensions of time. Full, comprehensive and well-articulated responses to RFIs, for example, are in the interests of all parties, including the CMA, and – within reason – must take precedence over the CMA's need for speed. This is particularly pertinent in relation to those aspects of the markets regime for which there are no statutory timeframes (for example, market reviews and the conduct of implementation trials or the review of remedies); and

(ii) Targeted RFIs: Pace will be facilitated if the CMA ensures that its RFIs in the information gathering stage are targeted to those areas of key importance. Moreover, careful consideration should be given to ensure that the volume of questions is proportionate, that separate RFIs avoid asking the same question and that questions relating to the same topics are not set out in multiple RFIs. To the extent possible, RFIs should follow a coherent and methodical approach, reflective of the CMA's developing assessment. The CMA should also make good use of early teach-in sessions and sector expertise to abandon points that are not key and focus in on the core area(s) of concern – much like it has done under the new Phase 2 merger process – and continues to do so continually throughout the investigation. Relatedly, we reiterate our view that the sharing of questions in draft form often leads to an overall more efficient information-gathering process for the CMA, given the parties' ability to help guide the CMA as to the type, format and accessibility of information held, and therefore encourage the CMA to share drafts in advance (and where drafts are not shared in advance for the CMA to explain to parties why that approach has not been taken).

(b) *Disclosure of evidence*

4.4 In addition to the broader points about access to evidence through the CMA's working papers, the CMA should give active consideration to the proactive disclosure of key evidence throughout the course of its proceedings. For example, where the CMA has commissioned survey

[8] As referred to in, "*The CMA's approach to markets work*", 24 July 2025 (***Approach to Markets***).

evidence or other expert report, there is no need to hold back the publication of this document to accompany the IR or other key case milestone (as has happened in some previous cases). Instead, such key evidence should be made available to interested parties as soon as possible.

(c) *CMA Board Steer and case selection/prioritisation*

4.5 The Draft Guidance continues to make a vague reference to any Board Steer being taken "taken into account" by the Inquiry Group. As noted, previously, Board Steers are not provided in all MIRs. We continue to believe it helpful for the CMA to clarify what factors determine whether a Board Steer will be given, as well as the status and strength of the Board Steer in the MIR process.

4.6 More broadly, the markets regime would benefit from greater transparency in the decision-making processes as regards *when* and *how* the CMA is choosing which markets to review. In this respect, we encourage the CMA to include factors currently set out in its Approach to Markets document directly in the Draft Guidance for the same reasons the CMA has sought to consolidate the 2024 draft guidance into a single piece of guidance.

4.7 Notably, the following factors from the CMA's Approach to Markets document as regards case selection and prioritisation should be included (and expanded upon) in the Draft Guidance, as they directly contribute to the predictability of the CMA's markets work:

(i) When assessing the potential net benefits before launching a project, the CMA will adopt a broader consideration of costs to businesses, encompassing categories such as regulatory compliance costs and forgone investment; and

(ii) That the CMA will prioritise issues demonstrating the greatest potential for consumer harm and/or the highest prospect of a successful remedy that can deliver significant benefits to consumers, businesses and the wider economy.

Freshfields LLP

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