UK's Competition and Markets Authority
phase2callforinfo@cma.gov.uk

August 25, 2023

Call for information: Phase 2 investigations

Dear Sir/Madam,

We have great pleasure in enclosing a submission on behalf of the Mergers Working Group of the Antitrust Section of the International Bar Association (IBA) in response to the Competition and Markets Authority's (CMA) call for information on the UK's Phase 2 merger investigations.

The Co-chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the CMA if that would be useful.

Yours sincerely,

Samantha Mobley
Co-Chair Antitrust Section

Janet Hui
Co-Chair Antitrust Section

IBA ANTITRUST SECTION COMMENTS ON THE COMPETITION AND MARKETS AUTHORITY'S CALL FOR INFORMATION ON PHASE 2 MERGER INVESTIGATIONS

I. INTRODUCTION

The International Bar Association ("IBA") is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at http://ibanet.org.

The IBA's Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. The comments set out in this document have been prepared by the Mergers Working Group ("Working Group") of the IBA's Antitrust Section and draw on that combined experience.

The Section welcomes the opportunity to comment on the CMA's call for information on the UK's Phase 2 merger investigations. We offer the following comments and suggestions in the hope that they will assist the CMA in identifying areas for further improvement in its Phase 2 merger process.

II. OVERVIEW

The Working Group commends the CMA for seeking feedback and comments on its current Phase 2 merger investigation process. While the Working Group considers that there are a number of aspects of the current process that are working well, there are also some key aspects that would benefit from further improvement.

Before commenting on the questions raised by the CMA in its call for information, we consider it helpful to set out some initial, key considerations that should be borne in mind when designing a Phase 2 process by reference to **ICN Recommended Practices**.[1] Specifically:

- Merger investigations should be conducted in a manner that promotes an **effective, efficient, transparent and predictable merger review process**. (Recommended Practice VI, A)
    - These objectives can best be achieved if there is a **frank and open dialogue** between the competition agency and the merging parties. (Working Group, Comment 2)

- Merger investigation procedures should include **opportunities for meetings or discussions between the competition agency and the merging parties at key points in the investigation**. (Recommended Practice VI, B)
    - ...in appropriate cases merging parties should be afforded an **opportunity to meet with the competition agency at key points** of the investigation. (Working Group, Comment 1)

- Prior to a final adverse enforcement decision on the merits, **merging parties should be provided with sufficient and timely information on the facts and the competitive concerns** that form the basis for the proposed adverse decision and should have a **meaningful opportunity to respond to such concerns**. (Recommended Practice VII, B)

[1] Recommended Practices for Merger Notification & Review Procedures - ICN (internationalcompetitionnetwork.org)

The CMA's call for information asks for views on six particular issues, as set out here:

1. Are there ways in which merging parties (and others) would be able to engage more effectively with inquiry groups in relation to the competitive assessment of a merger?
2. Are there ways in which merging parties (and others) would be able to engage more effectively with inquiry groups in relation to remedies?
3. Do the existing key opportunities to make written submissions (ie in response to the issues statement, annotated issues statement/working papers, provisional findings, and remedies working paper) work well? How could they be improved?
4. Do the existing key opportunities for direct in-person engagement with the inquiry group (ie the site visit, main party hearing, and response hearing) work well? How could they be improved?
5. What are the perceived barriers to engagement on possible remedies prior to the CMA's provisional findings (and what factors might explain why the existing mechanism for 'without prejudice' remedies discussions in Phase 2 investigations has rarely been used in practice since its introduction in 2020)?
6. Are there aspects of regimes in other jurisdictions that you consider might work well within the UK regime?

The Working Group has addressed each of these points below. In summary, the Working Group respectfully submits that:

- while there are a number of aspects of the current Phase 2 process that work well, there is a clear need to improve engagement between the CMA and merging parties in relation to both:
    - (i) the competition assessment (issues 1, 3 and 4);
    - (ii) remedies (issues 2, 3, 4 and 5); and

- There are aspects from other jurisdictions that could work well in the UK (issue 6), which we address briefly in our comments below.

III. WAYS TO IMPROVE ENGAGEMENT BETWEEN THE CMA AND MERGING PARTIES IN RELATION TO THE COMPETITION ASSESSMENT

Current opportunities for direct engagement with the Inquiry Group

Current opportunities for direct engagement with the Inquiry Group are limited. At present, there are only two opportunities for merging parties to engage in person with the Inquiry Group prior to the publication of provisional findings (PFs), namely via: (i) the site visit (weeks 1-6) and (ii) the main party hearings (weeks 7-15).

The site visit is designed to introduce the CMA to the merging parties' businesses. It '*is an opportunity for the CMA to gain a greater understanding of the merger parties' businesses and to engage with key commercial and operational staff.*' (CMA2, 11.32)

The main party hearings are largely inquisitorial in nature where in practice the CMA leads the hearing and puts questions to the merging parties. '*The primary purpose of the main party hearing is to enable the CMA to test certain evidence and explore key issues with the merger parties.*' The hearings also provide an opportunity for the merging parties to make opening or closing statements but the CMA's guidance notes prescribe that these must be brief, and typically no more than 15 minutes).

Other than the site visit and main party hearings, there are no other opportunities for direct engagement with the Inquiry Group unless a special request is made. All communications in this respect are conducted via the Phase 2 case team and it is not common for the CMA to agree to further direct engagement or additional meetings to discuss substantive issues unless that direct engagement is instigated by the CMA.

Need for the CMA to increase / enhance the opportunities for direct engagement with the Inquiry Group

In respect of these two engagement opportunities, the Working Group makes the following comments:

First, the Working Group considers that the site visit is a useful opportunity for merging parties as a first form of engagement with the Inquiry Group where they can explain their business and begin to engage with the CMA on particular issues of relevance in a relatively informal setting. The Working Group suggests that the site visit is retained and kept unchanged in format.

Second, the Working Grop respectfully suggests that the main party hearing would benefit from becoming a more effective and constructive form of bilateral engagement between the merging parties and the CMA. In this respect, it would benefit if it were more similar in style to the issues meeting at Phase 1 where there is a more open and frank dialogue between the merging parties and the CMA's case team and decision makers. At present, the main party hearing creates limited opportunity for frank an open dialogue, since it is heavily stylised (with scripted questions posed by the CMA and limited follow-up / meaningful discussion) and with insufficient opportunity for the merging parties to make their own representations orally to the Inquiry Group and subsequently engage constructively with the Group on the key issues of concern.

The current format of the hearing can be contrasted with the approach to oral hearings and, more generally, Phase 2 engagement between decision makers in other jurisdictions. The Working Group has cited a few examples below.

> As a first example, the **European Commission's** (EC) oral hearing in Phase 2 – and, more generally, opportunities for engagement with the merging parties provides comparatively greater opportunity for open and frank engagement between the EC and the merging **parties**.
>
> For context, as part of the EC's Phase 2 process, if the EC concludes that a proposed transaction is likely to impede competition, it may send a Statement of Objections (SO) to

the merging parties, informing them of the EC's preliminary conclusions. The merging parties may request an oral hearing to take place following the submission of their written response to the SO.

The EC oral hearing, which is confidential, is conducted by the competition Hearing Officer, and gives the merging parties the opportunity to present their views to an audience including (among others) the EC case team and senior management, Legal Service, representatives of the competition authorities of the Member States as well as certain third parties. At the oral hearing, both substance and the scope and timing of possible remedies may also be addressed. Taken together, the Working Group respectfully submits that this creates greater opportunity for actual, frank and constructive engagement between the merging parties and the EC.

This is, of course, not the only opportunity for engagement between the merging parties and the EC during Phase 2 proceedings (as also discussed in greater detail below). Indeed, as the EC's Best Practices make clear, "[the EC} *endeavors to give all parties involved in the proceeding ample opportunity for open and frank discussions and to make their points of view known throughout the procedure*."2 Such opportunities encompass, for example, the oral hearing, but also state of play meetings, triangular meetings and informal engagement. The Working Group considers such opportunities for discussion to be an important part of Phase 2 proceedings, and respectfully submits that such an approach would work well within the UK regime.

Similar approaches, which create opportunities for engagement with decision-maker in Phase 2 proceedings, can be found in other jurisdictions. For example in **France**, there is always a formal hearing before the decision making body (called "Collège") of the *Autorité de la concurrence* (i.e. French Competition Authority, FCA). This hearing takes place after the notifying party has an opportunity to respond to the FCA's Rapport (rough equivalent of an SO), which is mandatory in Phase 2 proceedings. At the oral hearing, both the

2 See European Commission, DG Competition, *Best Practices in the Conduct of EC Merger Control Proceedings*, para. 29.

substance and potential remedies are discussed and, indeed, remedies may be submitted officially or in draft before or after the hearing. (Remedies can still be discussed after the hearing but, in practice, such discussions may be limited by the assessment made by the Collège following the hearing. The parties can also submit a new set of remedies late in the review.)

In **Singapore**, the Competition and Consumer Commission of Singapore (CCCS) will also issue a Statement of Provisional Decision (SDP) if it considers a potenital prohibition of a transaction. While the right to an oral hearing is not enshrined in regulation, the merging parties have the opportunity to respond and meetings will generally be accomodated by the CCCS case team if requested, including with regard to remedies discussions.

In addition to improvements to the oral hearing process, the Working Group also respectfully suggests that the UK Phase 2 process would also benefit from additional engagement opportunities between the merging parties and the Inquiry Group prior to the issuance of the PFs. Indeed, such engagement forms part of the Phase 2 process in other jurisdictions.

For example, and as also noted above, in the **EC** Phase 2 process, merging parties are normally offered the opportunity of attending a state of play meeting twice before the EC's provisional findings: once following adoption of the Phase 1 decision and a further time before the issuance of the Statement of Objections (SO). This latter state of play meeting gives the merging parties an opportunity to understand the EC's preliminary view on the outcome of the Phase 2 investigation and to be informed of the type of objections the EC may set out in the SO. Indeed, the attendance and involvement at such meetings by relevant EU decision-makers has enabled direct dialogue regarding the authority's emerging thinking on each case.

Even in the abscense of a formal Phase 2 state of play meeting, competition authorities in other jurisdictions create other equivalent opportunities for engagement.

For example, in **France**, the FCA's Phase 2 process also creates additional opportunities for engagement with decision-makers. While a state of play meeting will not necessarily take

place in Phase 2, informal discussions and meetings are customary in France between the merging parties and the FCA.

Similarly, in **Singapore**, the CCCS will typically accommodate engagement when requested by the merging parties, and usually in the form requested. While this does not flow from a specific "right" to a state of play meeting it is simply the prevailing practice of the CCCS.

Notwithstanding the compressed nature of the CMA's statutory timetable, the Working Group respectfully considers that the CMA should consider introducing the opportunity for a state of play meeting towards the end of its evidence gathering and investigation phases. This should be preceded by the CMA sharing its emerging thinking in written form which would help provide the merging parties with a better understanding of the CMA's potential concerns and an opportunity to comment on them. In turn, this would facilitate a more constructive dialogue between the Inquiry Group and the merging parties at the main party hearings. The state of play meeting should be attended by senior members of the case team and the Inquiry Group. [SJM: The general consensus in discussions as part of this consultation is that it would be challenging for the Inquiry Group to delegate their collective responsibility to one of them and so it needs to be the whole group. Given to organisational challenges, I suggest we recommend one state of play meeting].

Of course, as illustrated above, formal state of play meetings are not the only way to increase effective direct engagement between the CMA and the merging parties. Indeed, in addition to state of play meetings, the Working Group encourages the CMA to consider more opportunities for informal engagement with the merging parties throughout the process. The Working Group would welcome alternative suggestions by the CMA to address this issue and would be pleased to further engage with the CMA on this topic.

Current opportunities to understand the CMA's case

At present, the main opportunities for the merging parties to understand the CMA's written case are in the form of the issues statement, the annotated issues statement and the PFs. The CMA

also issues put-back papers but these provide little insight into the CMA's thinking as certain key parts of the papers are redacted.

As explained below, the Working Group respectfully considers that the issues statement, annotated issues statement and PFs framework could be made more effective, as they do not provide the merging parties with sufficient understanding of the CMA's case at the appropriate juncture(s) in the process.

The Issues Statement is published at the end of the "information-gathering" phase of the Phase 2 process. The document is typically short (~15 pages) and will often mirror the Phase 1 decision. Critically, it does not contain third-party feedback. The Annotated Issues Statement (which is not published) suffers from the same limitations, given that it is based on the Issues Statement. Although the Annotated Issues Statement is usually supplemented by materials submitted to the CMA in working papers (which may include further details relating to third party evidence ahead of the main party hearing), the Issues Statement and Annotated Issues Statement provide only limited detail, which hampers the merging parties' ability to meaningfully respond.

By contrast, the PFs provide a more detailed view of the Inquiry Group's assessment but they are only published around week 15 (alongside any Remedies Notice) by which time it is typically too late in the process for the merging parties to meaningfully respond to the CMA's competitive assessment. This is reflected in the format and content of the response hearing (which follows the PFs) where little time is set aside to discuss the PFs and the merging parties' response to them (with the focus of that hearing instead being on remedies).

Need for the CMA to give merging parties a better sense of its case

The Working Group respectfully submits that there is a clear need for the CMA to give merging parties a better sense of its case by certain key points in the process. This could be achieved in a number of different ways by changing the timing / sequencing of current papers. While the Working Group is not wedded to how this is achieved, it has set out below some practical examples about how the process could be enhanced:

- Remove or delay the issues statement – given the timing of the Issues Statement, it provides limited insight into the CMA's thinking over and above that provided in the

Phase 1 decision. Accordingly, taking into account the compressed nature of the statutory process, there could be a case for removing the Issues Statement from the CMA's timeline or alternatively re-purposing it at a later stage in the process, i.e. at a time where the Inquiry Group has had an opportunity to engage with the materials, including from third parties, and in advance of the main hearing.

- The main party hearings are currently held before the PFs are published. As a result, the merging parties do not have a good enough understanding of the CMA's case at the time of the main hearings, and by the time of the response hearing it is too late (given the focus at that hearing is on remedies). These deficiencies could be addressed, for example, either by the CMA providing the merging parties with a re-purposed issues statement ideally shortly before the state of play meeting we recommend above or at the latest before the main hearing (i.e. similar to the Phase 1 process with the issues letter and issues meeting) or holding the main hearing once the PFs (or equivalent) have been published, in much the same way as the Oral Hearing in the EC takes place after the Statement of Objections has been issued, and the merging parties have responded to it, and, in France, after the *Rapport* has been issued and the notifying party has had an opportunity to respond.

- Access to file - while the Working Group appreciates there is a body of precedent on the requisite standard of CMA disclosure in PFs, it respectfully considers that an access to file process should be introduced as part of its Phase 2 review. By way of contrast, access to file is envisaged as part of the EC Phase 2 process.

  Access to file is important in the context of the UK regime, given that :

  - as a matter of principle, it is fundamental that merging parties have the right to examine the evidential basis of the case against them. This principle is consistent with ICN Recommend Practices which state: "*the merging parties' ability to obtain access to third-party submissions may implicate procedural fairness considerations [and] confidentiality rules applicable to third-party submissions should strike an appropriate balance between these procedural*

fairness considerations and the need to protect confidential information contained in such submissions." [3]

- The CMA attributes significant weight to third-party documentary evidence and the views of customers and competitors.

In sum, allowing the merging parties access to file would enable them to better understand the rationale for and context of the CMA's concerns, and therefore mean they are better placed to respond appropriately. Access to file should occur at the same time as the CMA provides the parties with the re-purposed issues statement we suggest above.

IV. WAYS TO IMPROVE ENGAGEMENT BETWEEN THE CMA AND MERGING PARTIES IN RELATION TO THE COMPETITION ASSESSMENT

Under the current framework:

- The first formal milestone relating to remedies is the Remedies Notice which is published at the same time as the PFs. It is only when these two documents have been published that the merging parties have information regarding the CMA's competition concerns and its initial thoughts as to what remedies may be required to address those concerns.
- Prior to this, the merging parties have the option to engage at an earlier stage of the process in "without prejudice" remedies discussions with the CMA. [4] However, such discussions are with CMA staff and not Inquiry Group members.
- The response hearing then takes place before the remedies working paper and is similar to that of the main party hearing (*i.e.* a CMA-led process).[5] As already

[3] https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf. Recommendation IX.D: Confidentiality rules should strike an appropriate balance between protecting the confidentiality of third-party submissions and procedural fairness considerations, Comment 1.

[4] CMA2, para. 12.4.

[5] CMA2, para. 13.17.

noted, the focus of the response hearing is on remedies. The remedies working paper feeds into the Final Report.

The Working Group respectfully considers that the current framework could be improved to encourage effective discussions between the merging parties and the CMA at an early stage.

As discussed above, the process prior to the PFs does not provide sufficient information or opportunities for "without prejudice" remedies discussions for two reasons: first, the merging parties do not have proper insight into the CMA's emerging thinking on the competitive assessment and, second, they do not have access to members of the Inquiry Group. Any such remedies discussions are with CMA staff only and for this reason, there are limits on what those staff can discuss with merging parties in the absence of Inquiry Group members.

The Working Group notes that the Digital Markets, Competition and Consumers (DMCC) Bill will address some of these issues, such as through the introduction of a "stop the clock" mechanism in Phase 2 to allow remedies negotiations at an earlier stage (*i.e.* before PFs). The ability to apply a lengthier extension (of 11 weeks instead of the existing 8 weeks) could also help ensure that merging parties and the CMA have sufficient time to consider and engage on remedies without any such engagement affecting the merging parties' right to respond and contest the PFs. The Working Group cautions, however, that it is preferable to engage with remedies earlier in the process rather than further extending Phase 2 review periods.

Indeed, and as advocated by the Working Group, earlier and more regular engagement on substance during the competition assessment phase would also facilitate earlier dialogue on remedies. Nevertheless, it would be critical for any such engagement to involve the Inquiry Group or, if not feasible, senior CMA staff would need to be fully empowered to represent the views of the Members. Without the involvement of the Inquiry Group or such delegated authority, merging parties are unlikely to engage early.

The current process can be compared with the process in the EU where remedies discussions do occur in parallel to the competition assessment workstream and where senior decision makers participate and engage constructively on the topic. A similar process applies in France, as discussed above. Furthermore, discussions around remedies are inherently iterative and can often require several meetings between merging parties and the decision makers. This currently

happens in the EC process and it is clear that the CMA process would benefit significantly if this could be replicated in the UK. We would be pleased to discuss this topic with the CMA in more detail.

V. CONCLUSION

The IBA Working Group appreciates the opportunity provided by the CMA's call for infomratoin on the UK's Phase 2 merger investigations. The Working Groups would be pleased to respond to any questions that the CMA may have regarding these comments; or provide additional comments or information that may assist the CMA.