UK CMA consults on its mergers process

The CMA yesterday launched a Consultation into proposed changes to its Phase 2 mergers procedure. The consultation was launched during a CMA event, with keynote speeches from Sarah Cardell and Martin Coleman and also follows an earlier call for evidence which the CMA launched over the summer and to which Euclid Law responded.

We are pleased to see that many of the changes recommended by Euclid Law and others have been adopted. These include:

- greater opportunities for engagement throughout the procedure, and especially early on, giving the parties greater scope to influence the Inquiry Group's approach to the case.

- a new "interim findings" report and main parties hearing, giving the merging parties a more meaningful opportunity to respond to the case made against them.

- modest improvements to the remedies process to facilitate earlier and more meaningful engagement on remedies.

It remains to be seen how the proposed changes, and the greater commitments that will be necessary from the Inquiry Group to apply these changes in practice, will work without any changes to the CMA panel itself, given the time constraints which, in our experience, can make it difficult to diarise key hearings and meetings.

Unfortunately, the CMA has not, however, decided to adopt Euclid Law's recommendation to grant the parties so-called "access to file", i.e. access to the underlying third party evidence on which the "interim findings" would be based. This will inevitably limit the ability of the parties, during the process itself rather than in a subsequent appeal, to challenge the way that the CMA has interpreted the evidence before it. My colleague, Michael Reiss, has commented on this point more fully here.

In addition, the consultation proposes a number of changes to its:

- 'de minimis' exception

- jurisdiction and procedure guidance (CMA2) to reflect latest CAT judgments and CMA practice;

- merger notice and confidentiality waiver template to bring it in line with the most recent CMA practices and guidance.

The consultation runs until 8 January 2024.

Increasing engagement throughout the Phase 2 process

The CMA received feedback requesting more opportunities to engage directly with the Inquiry Group, in particular at the beginning of the process. The CMA is therefore suggesting:

- abolishing the issues statement and instead using the phase 1 decision as its starting point.

- supplementing the already popular site visit with a 'teach-in' component, to focus on explaining how the merging parties' businesses work and the relevant products/services.

- adding an 'initial substantive meeting' which provides the merging parties with an opportunity to present their case.

- increasing the use of informal update calls with the case team, providing greater insight into the direction of the inquiry.

- allowing for greater direct engagement between the merger parties' economic advisers and the CMA's economics team.

These overall appear sensible and will address the calls received during the feedback for greater and earlier engagement. In particular, the opportunity for an initial substantive meeting should be welcomed. In our experience, a number of these suggestions are already being used in some Phase 2 cases and it is positive that these best practices will be applied more consistently.

The new "interim findings" and revamped main party hearing

The CMA received feedback that the main party hearing process could be improved as it is currently too focused on fact-finding and that the provisional findings come too late in the process to enable the response to them to influence the CMA's decision in all but a handful of exceptional cases. The consultation suggests removing both the annotated issues statement / working papers and provisional findings, replacing

them with a new "interim findings" report that will be published around weeks 12-14, slightly earlier than the current week 15 for provisional findings.

The main party hearing would now follow the new interim findings, going from being largely evidence-gathering by the CMA to providing what we hope will be a meaningful opportunity for the parties to rebut the theories of harm and evidence against the merger.

Given the earlier publication, the draft guidance allows for publication of a supplementary interim report (although not necessarily subject to the 21-day period for consultation) in case the CMA changes its provisional decisions as published in the interim findings.

Phase 2 remedies process

Finally, the CMA is also addressing the feedback that the discussions on remedies start too late in the process. To address this, the CMA are proposing to:

- encourage earlier discussion with the parties through (i) the use of informal update calls with the case team (see above) and (ii) engagement with the Inquiry Group early on in Phase 2 and, in particular, where the merger parties submit a sufficient advanced remedy proposal at an early stage of the investigation (e.g. no later than four weeks after the initial substantive meeting).

- introduce a remedies form to be used in response to the interim findings, although parties are encouraged to submit earlier.

- publish an invitation to comment on remedies (based on the parties' remedies form), including a non-confidential version of the parties' remedies proposal.

- replace the 'response hearings' with 'at least one meeting or call' to engage with the Inquiry Group on possible remedies.

At first sight, the remedies process has perhaps not changed as much as other parts of the process, although the CMA's consistent push to engage in earlier discussion may encourage parties to overcome their previous reluctance to do so.

Access to third party evidence

Whilst the CMA largely appears to have taken on board the feedback for earlier and greater engagement with the Inquiry Group, they have rejected the calls for parties to be granted full access to the third-party evidence relied on by the Inquiry Group (so-called "access to file"). A number of reasons have been provided for this, including (i) impact on the desire of third parties to provide evidence; (ii) the CAT's confirmation that the existing process is sufficient to ensure procedural fairness; and (iii) the impact

on the CMA's case management and the additional burden created by access to file. This is disappointing and evidence of its use in other regimes does suggest that it would be possible without extending the Phase 2 deadline.

Instead of access to file, the CMA proposes formalising its approach post-*Meta Platforms Inc v CMA*, which is to make available certain documents in unredacted form to external advisers via a confidentiality ring. This does not appear to go far enough to address the concerns expressed in response to the call for evidence.

The CMA's approach to access to file is therefore disappointing, although perhaps not surprising given the additional burden access to file may entail.

Other changes

The CMA also announced that it plans to make changes to its "de minimis" exception, under which the CMA may decide not to refer a merger for a Phase 2 review if it believes that the market is not of sufficient importance to justify a reference. One of the proposed changes is to increase the threshold beneath which the CMA may deprioritise a merger from £15 million to £30 million. The CMA also plans to withdraw its policy not to apply the de minimis exception where clear cut undertakings in lieu could be offered by the parties to resolve the competition concerns identified.

Whilst the CMA has not yet published a revised 'de minimis' guidance document, the suggested amendments will be a welcome change for smaller mergers for which a resource-intensive Phase 2 process would be disproportionate.

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Our core expertise covers all aspects of competition law, including cartels and anti-competitive agreements, merger control, abuse of dominance, state aid, competition litigation, market investigations as well as audit and compliance. We are recognised experts at navigating the UK and EU Foreign Direct Investment and UK National Security. With offices in both London and Brussels, in-depth experience and a network of contacts in key jurisdictions around the world built up over many years of practice, we have the ability to advise clients across Europe and worldwide. We represent clients before EU, UK, German and Belgian authorities and courts.

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