**COMPETITION SECTION OF THE CITY OF LONDON LAW SOCIETY**

**AGENDA FOR DISCUSSION WITH CMA SENIOR LEADERSHIP: INITIAL THOUGHTS ON IMPROVING MERGER REVIEWS – MAY 2025**

INTRODUCTION

The CLLS Competition Committee welcomes the CMA’s recent reviews of the UK merger regime. Many aspects of the regime work well : we are seeing improvement in client reaction to the reformed Phase II process; and the MIC process works well in many cases to deliver very rapid outcomes for business.

The purpose of this short paper is to set out the more operational areas of the regime which, as practitioners and users of the system, we consider could be modified or improved, without requiring legislative reform and which would enhance delivery of the “4Ps”.

# BRIEFING PAPERS

Clients and practitioners greatly value the briefing paper process, but there are ways in which the CMA can improve certainty and maximise efficient allocation of CMA resources:

* **Market Testing and Third Party Engagement**. In appropriate cases, the CMA should be open to short calls directly with merging parties during the MIC process and, where a third-party “sense-check” could assist the CMA in coming to a view, targeted engagement with third parties in more cases than currently occurs (particularly for borderline cases). This would ensure that full Phase 1 investigations are only opened where necessary, saving significant time and resources at the CMA (we think that a CMA MIC process with limited and high level “sense check” outreach could be done in substantially less time than pre-notification + 25 WDs on the clock). A full Phase 1 investigation is considerably more burdensome than the MIC process, so taking such additional steps in appropriate cases would be proportionate with the aim of avoiding unnecessary Phase 1 investigations.
* **Transactions with UK Impact**. The CMA should use the MIC process to prioritise the investigation of cases (i) with a distinct and direct impact on UK consumers and (ii) those that are not already being thoroughly reviewed by peer agencies in jurisdictions with similar market conditions.
* **Predictability and Consistency**. The CMA should continue to ensure NFQ decisions are only reversed in very exceptional circumstances given the significant ramifications for businesses once closing has taken place. The CMA should also consider issuing guidance on MIC’s approach to key issues or common questions based on past practice (e.g. application of “*de minimis*” exemption, acceptance of BPs prior to a signed term sheet and interpretation of “material facts”).
* **Non-Binding Agreements**. The CMA should consider softening the current requirement that a binding agreement is in place between parties before a briefing paper will be considered by MIC. This would provide merging parties with increased certainty earlier on in the transaction process, which can often become a key commercial driver in deal negotiations.

# PHASE 1 PROCEDURE AND INITIAL ENFORCEMENT ORDERS

There should be a focus on reducing the burden and unpredictable nature of Phase 1 investigations, particularly the pre-notification phase:

* **Burden of Pre-notification Period**.The CMA should deploy proactive project management strategies and ensure all RFIs and S109 document requests are entirely proportionate to the concerns being considered in line with international peers (like the EU). In achieving the CMA’s new KPIs to complete pre-notification in 40 WDs and issue clearance decisions in 25 WDs in straightforward cases, the CMA should also ensure that (i) too many resources aren’t allocated to reduce pre-notification in “long-pole” cases at the expense of straightforward cases and (ii) where parties express a desire to stay in pre-notification, this is considered by the CMA given the complexity of the markets in question or other features of the case.
* **Day-one Teach-ins and Direct Engagement**. The CMA should enable earlier engagement with parties/external advisers and allow day-one “teach-ins” prior to submission of a DMN to allow the CMA to better understand complex markets early on and reduce the need for written RFIs later down the line. Most other authorities do not have this policy, so CMA teach-ins often occur later in time and subsequently result in more detailed and time-consuming initial RFIs and document requests than needed. Teach-ins would be useful in almost all cases and should be attended by the full case team (including senior decision-makers). Multiple teach-ins can also be beneficial in appropriate cases.
* **Issues Letters and Issues Meetings**. The CMA should send issues letters to parties at least five (not two) WDs before the issues meeting to give parties sufficient time for preparation. Issues letters should be shorter and relate only to issues which the CMA believes could satisfy the Phase 2 referral test. Too much time in both written and oral responses is spent covering the field rather than those concerns the CMA considers could lead to referral. The length of issues meetings should also be extended (> 90-120 mins) in more complex cases to facilitate more meaningful discussion of the issues between the parties and the CMA (e.g. up to three hours may be appropriate in complex cases with multiple theories of harm).
* **IEOs**. IEOs should only bind the parts of the merging parties’ businesses relevant to any potential competition concerns in the UK and should only exceptionally apply to the entire purchaser group’s operations (e.g. where the purchaser group only has activities in the market in which the competition concern with the target arises). Derogations should be applied more consistently between case teams and there should be more transparency around “standard” derogations which will be rapidly granted (and the CMA should commit to a time frame e.g. two WDs post-imposition of IEO for these). The parties should be able to raise concerns about IEO scope and refusal of derogations (or delay in obtaining these) to the procedural officer to provide for accountability.

# REMEDIES

The CMA’s remedies consultation is very welcome as there are some key areas for improvement beyond the welcome increased willingness to accept behavioral remedies:

* **Achievable Phase 1 Remedy Standard**. The CMA should temper the CMA’s high “clear cut and comprehensive” Phase 1 remedy standard (requiring merging parties to show that a remedy proposal has no possible risk of failure) to allow more flexibility in the type of remedies the CMA is willing to accept during Phase 1, including e.g. behavioural remedies, mix-and-match remedies and structural carve-out remedies. Relatedly, the CMA should focus on proportionality more than perfection, a concept which case teams have typically dismissed in recent years. Instead of the current approach of considering effectiveness and proportionality sequentially (i.e. what is effective and then what is the most proportionate, effective remedy), a better approach would be to consider these issues together, and to set aside all disproportionate remedies in favour of greater use of behavioural/quasi-structural remedies. Cases should not proceed to Phase 2 simply because of a reluctance to accept certain types of remedies at Phase 1 that are often perfectly viable (e.g. carve-out remedies). Achieving more complex Phase 1 remedies would also be facilitated by our separate recommendation of earlier and more senior engagement between the CMA and parties in pre-notification.
* **Clearer Guidance on Remedy Assessment**. The CMA should provide greater clarity on how it will weigh the benefits and potential risks of proposed remedies. In doing so, it should also ensure remedies are assessed in the round and not dismissed on the basis of there being a minor potential distortion of competition, particularly where greater pro-competitive benefits are anticipated.
* **International Alignment**.The CMA should align remedy decisions with international competition authorities, diverging only where unique facts apply to the UK. The CMA should also only impose extraterritorial remedies in the most exceptional cases, particularly in circumstances where competition authorities in other jurisdictions have cleared a transaction which is subject to a remedy in the UK.
* **Divestment Terms**. The CMA should accommodate a wider spectrum of divestment sale terms agreed by parties, particularly those that include standard consents that are expected to be obtained as a matter of course. The CMA remedies team were previously much more willing to show greater deference to divestment terms as agreed between parties on the basis that they were best place to know what protection were required (e.g. non-competes), thereby ensuring investments are made on commercial terms and reducing uncertainty in remedy negotiations.

# EFFICIENCY, EXPERTISE, AND ENGAGEMENT

There remains significant scope to improve the efficiency, expertise and engagement of the CMA more generally to ensure companies receive a “best-in-class” experience amongst peer agencies:

* **Specialist Expertise**. Consider introducing sector-focused case teams with deeper industry knowledge, akin to the EC’s sectoral structure or the CMA’s DMU, to improve institutional knowledge in-house and therefore the efficiency of reviews. This is a particularly acute issue in cases involving digital markets and software but also in cases involving life sciences and pharmaceuticals. Both of these sectors are amongst the Government’s eight strategic sectors.
* **Transparency and Open Engagement**. Take a more proactive approach to engaging with merging parties in pre-notification and Phase 1, thereby improving the efficient, transparent and collaborative nature of the review process.
* **More Senior Involvement**. Appreciating the challenge faced by resourcing demands, increase the involvement of more senior CMA staff in case teams from the outset to ensure the CMA takes a pragmatic approach to initial information gathering and manages interactions with parties in an appropriate and reasonable way. For example, merger parties have found it very helpful to have the senior director on a case attending the initial teach in by parties and have had the sense that this has resulted in more understanding of markets and more targeted RFI’s as a result from the case team.