LET'S KEEP TALKING: MAJOR UK MERGER PROCEDURAL REFORMS PROMISE BETTER ENGAGEMENT AND TRANSPARENCY FOR COMPLEX DEALS

There is no question that the UK's Competition and Markets Authority is playing an increasingly pivotal role in global transactions. In a post-Brexit world, the CMA has successfully inserted itself into the top-table of merger enforcers, with UK approval being key to focus the minds of dealmakers around the world.

Whilst it has made itself heard on its path to becoming a leading international regulator, much of the CMA's Phase 2 procedures pre-date its establishment in 2014. Its limited reforms over the years have led many to question whether the current process is capable of handling the increased volume and complexity of the CMA's caseload.

Although it is one of the most intensive merger processes in the world, the UK Phase 2 review currently provides only limited access to decision-makers and few opportunities to influence and respond to substantive concerns.

The fact that 57% of transactions have either been effectively blocked or abandoned in the last five years suggests that it can be incredibly challenging for merging parties to obtain approval. Whether this stems from a flaw in the system or is simply a natural consequence of the CMA's expanded remit, merging parties are clear that something needed to change.

To its credit, the CMA has listened. This past summer it issued a call for information to gather feedback and has now proposed significant procedural reforms within the limits of the existing statutory framework. These proposals are an important signal by the CMA of its willingness to increase engagement throughout the Phase 2 process, and a welcome step towards more predictability and transparency for merging parties, especially regarding remedies. The package also represents the first major attempt to reform the UK merger control process since 2014.

Many of these proposals codify the latest practice, including the learnings from Microsoft/Activision Blizzard. Based on our experience of that case and others, we give our insights below. Whilst undoubtedly a step in the right direction, there is more that the CMA can do to provide merging parties with the requisite transparency to defend their mergers. We will also be responding to the CMA's current consultation on the proposals – please do reach out if you would like to discuss our response.

1. INCREASED ENGAGEMENT AND ACCESS TO DECISION-MAKERS FROM THE OUTSET OF PHASE 2

The CMA has suggested a number of reforms to the Phase 2 process that are designed to increase substantive engagement and provide increased opportunities for the parties to interact directly with the CMA's Inquiry Group (the panel of decision makers deciding the case). If implemented effectively, this a key set of proposals that should allow parties to understand the case against their deal and, in theory, the types of evidence that may shift the dial towards clearance.

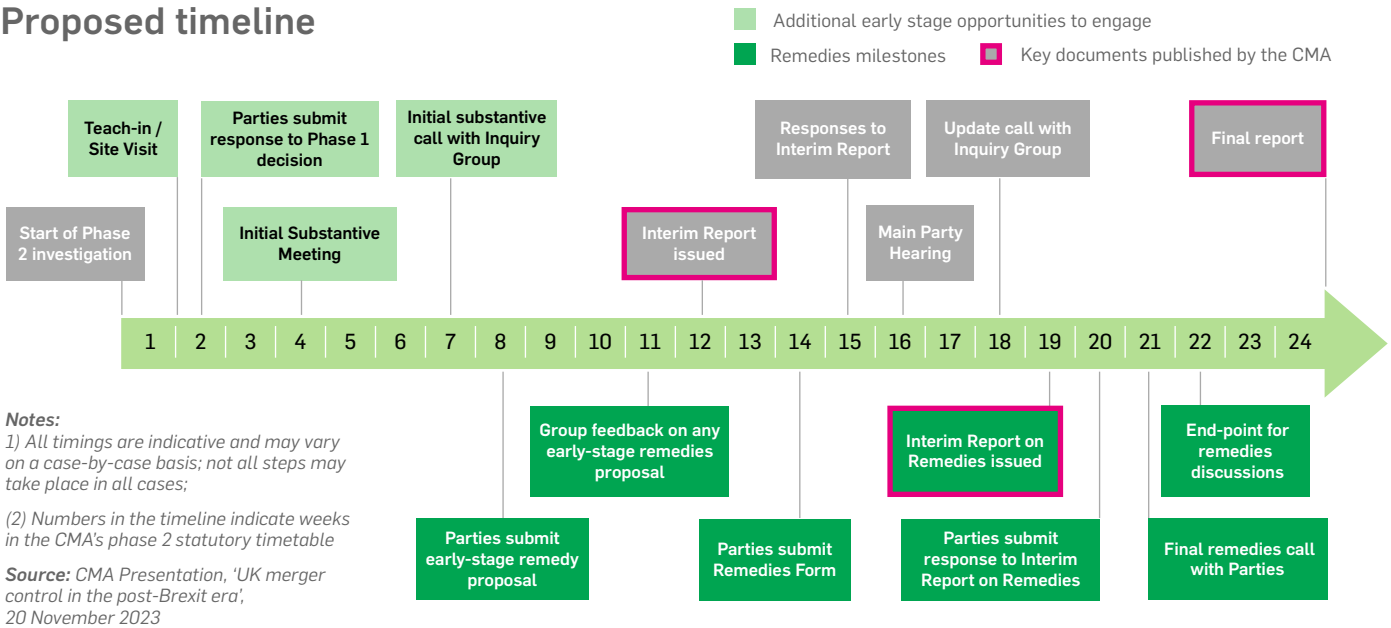
By providing clarity earlier on in the process, this should help to address the criticisms around a lack of transparency and inability to influence the direction of travel ahead of the "big reveal" via the Provisional Findings. For parties engaged in parallel reviews with multiple global regulators, this set of proposals should also (in principle) increase the ability to coordinate strategy and understand where the CMA is headed much earlier than was previously possible.

The suggested reforms are as follows:

- **Abolishing the Issues Statement and making the Phase 1 decision the starting point for the Phase 2 assessment.** This move enshrines what appears to be the trend in most cases and brings greater continuity between Phase 1 and Phase 2. With key case team members already staffed on merger investigations for their entire duration, this reform perhaps codifies the position that Phase 2 is no longer a completely fresh review of the merger as originally envisaged under the Enterprise Act. It was questionable how much value the Issues Statement continued to bring to the process. By giving increased importance to the Phase 1 decision, parties should have a clearer target to aim at as Phase 2 begins.
- **Introducing an initial substantive meeting with the Inquiry Group following the parties' response to the Phase 1 decision.** This is a welcome development and gives the parties the opportunity to make their case to decision-makers earlier on in the process – similar to the European Commission's *State of Play* calls. Under the current system, parties' interactions with the Inquiry Group are limited to a number of set-piece interactions. Whilst these can be used as part of an advocacy strategy, they do not lend themselves naturally to a substantive discussion or even to gain clear insight into the Inquiry Group's thinking on substance. More two-way discussions around the merits earlier on in Phase 2 can only be a good thing.
- **Formalizing a teach-in and site visit early in the Phase 2 process.** Alongside the initial substantive meeting, the CMA has proposed to formalize the practice of teach-ins and site visits early on in Phase 2. Again, this codifies recent practice and gives the CMA more opportunities to hear from businesses directly about how their industries work and rationale for pursuing a deal.
- **Increased engagement with case teams on emerging thinking.** The proposed reforms envisage more frequent discussions with the CMA's case teams to provide transparency around the case and where targeted submissions could be helpful. Given that case teams meet with the Inquiry Group at least once a week, this should in theory give parties a clearer indication of the direction of travel on a case and the ability to influence it. Following its recent trend to increase engagement with economic advisors (across both Phase 1 and Phase 2), the CMA also envisages greater economist-to-economist meetings. This will be crucial for cases where data analysis is central and novel theories of harm are driving the CMA's concerns. As these practices are already well-established in other global regimes, there is cause for optimism when thinking about international cooperation.

These changes offer real improvements to a system that some might say has been stuck in its ways. The CMA's messaging suggests that they do not see these reforms as merely perfunctory, and that they should lead to a system that is more transparent and responsive. That said, there is a still a lot of work to fit into the CMA's 24-week timetable. So we can expect to see cases subject to clock-stoppages or timing extensions as the CMA tries to accommodate these changes and their impact. But if this leads to greater control over the process and increased prospects for approval, timing slippages may well be a price worth paying.

Proposed timeline

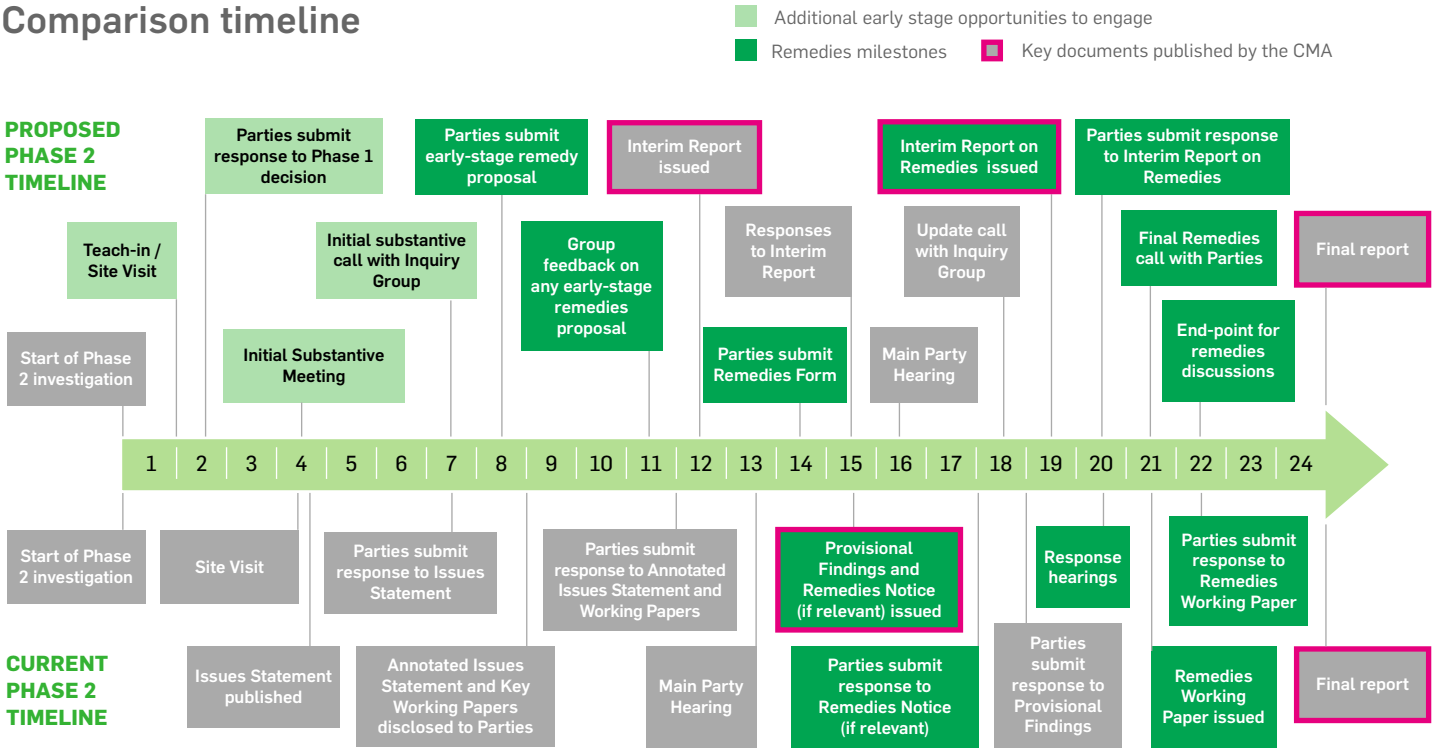


Notes:
1) All timings are indicative and may vary on a case-by-case basis; not all steps may take place in all cases;

(2) Numbers in the timeline indicate weeks in the CMA's phase 2 statutory timetable

Source: *CMA Presentation, 'UK merger control in the post-Brexit era', 20 November 2023*

Comparison timeline



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(1) All timings are indicative and may vary on a case-by-case basis; not all steps may take place in all cases;
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Source for proposed phase 2 timeline (top row): *CMA Presentation, 'UK merger control in the post-Brexit era', 20 November 2023*

2. INTRODUCING THE INTERIM REPORT – SAYING GOODBYE TO THE ANNOTATED ISSUES STATEMENT, WORKING PAPERS AND PROVISIONAL FINDINGS

A key proposal is the introduction of a new Interim Report to replace the current Annotated Issues Statement, Working Papers and Provisional Findings.

Under the current system, the Annotated Issues Statement and Working Papers are the first meaningful opportunity to understand the Inquiry Group's emerging thinking on key issues. Whilst they do provide some limited insight, they can be frustratingly inconclusive and it has always been unclear how much merging parties are able to respond to them ahead of the Provisional Findings in a way that influences the Inquiry Group's thinking.

Similarly, the Provisional Findings have served historically 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, the ability to change the CMA's thinking after their publication is limited. As is commonly spoken amongst the advisor community – there is often nothing provisional about the Provisional Findings.

The changes could impact the Phase 2 system in the following ways:

- **Earlier disclosures of evidence (including to advisors via a confidentiality ring) will make for a less formulaic process and provide greater opportunities to influence the outcome.** In theory, this removes the inflexibility of the Annotated Issues Statement and Working Papers and give the parties a more detailed level of reasoning of the case against them by addressing specific concerns earlier in the process.
- **The issuance of the Interim Report at an earlier stage the process will give parties earlier insight into the Inquiry Group's emerging thinking.** If implemented effectively, this reform should help remove the foreboding sense that parties only hear the case against the merger once it is too late and when minds are already made up. As this will now be published ahead of the revamped Main Party Hearings (see below), parties should have a clearer sense of the issues that they need to address directly with the Inquiry Group.
- **The trade-off of earlier publication of the Interim Report means that the Phase 2 process may be even more front-loaded for parties than it already is.** Similarly, the shorter window for case teams and

Inquiry Groups to commit their emerging thinking to paper may result in Interim Reports that are less detailed or conclusive than the Provisional Findings. But this is no bad thing if it preserves the ability to change minds and introduce new evidence. As we have seen in several cases (most recently Copart/Hills Motors, Hitachi/Thales, Microsoft/Activision Blizzard, and Amazon/Deliveroo), the submission of new evidence after the Provisional Findings has influenced the CMA and ultimately led it to take the right step of dropping specific concerns after the Provisional Findings. If this ability to influence the outcome is baked into the system – and not an anomaly – it should be welcomed.

- **Third parties will also be able to respond to the Interim Report (as opposed to later following the Provisional Findings).** This potentially gives them increased influence at an earlier stage in the process. Third-party evidence can be helpful in obtaining approvals, especially if factored into a properly devised outreach strategy. However, this will still require thoughtfulness and careful planning. The CMA very recently (and publicly) in Copart/Hills Motors raised concerns about how third parties were deployed to assist in the parties' in a merger investigation. In that case, the CMA decided to place *"considerably less weight"* on customer views than they *"otherwise would have done"* after Copart provided customers with detailed key points that they encouraged them to submit to the CMA.

3. REFORMED MAIN PARTY HEARINGS

Historically, the Main Party Hearings have served as a key part of the CMA's evidence gathering ahead of the Provisional Findings. Whilst an opportunity to speak to the Inquiry Group, it ultimately has its limitations, with businesses often feeling like they are subject to a number of set-piece and formulaic questions. And this setting can often creep closer to an interrogation rather than an interactive experience between businesses and the CMA.

Acknowledging room for improvement, the CMA has proposed to turn the Main Party Hearing into an interactive discussion, giving parties the opportunity to make presentations to the Inquiry Group and engage in substantive, two-way discussions based on the Interim Report, still led by the parties (and not their advisors).

4. REMEDIES REVAMPED – BUT HAVE THE CHANGES GONE FAR ENOUGH?

The CMA's process for handling remedies at Phase 2 has always been an area that merging parties have wanted to see improved. Compared with other regulators, most obviously the EC, the CMA process has historically been somewhat inflexible, with limited opportunities to have meaningful discussions with decision-makers. Following the introduction of the fast-track system in 2021, in most cases merging parties would either have to concede on the merits, or be afforded substantive remedies discussions only late in the process – and only after the CMA has identified a problem. This often leaves merging parties feeling around in the dark about whether their remedy proposal will ultimately be accepted.

Perhaps to address these concerns, the CMA is proposing to revise its remedies process as follows:

- **Remedies discussions *without prejudice* at an early stage.** The revised guidance codifies the CMAs position that it encourages early discussions on remedies. The CMA now envisages opportunities for the parties to propose draft submissions and hold early discussions with the Inquiry Group – and crucially, obtain feedback - ahead of the Interim Report. This will be particularly helpful in complex multi-jurisdictional cases where parties are required to design remedies capable of satisfying multiple regulators. In theory, parties should now have earlier indications as to whether a remedy is likely to be acceptable to the CMA. But it remains to be seen if this helps avoid the divergence seen in recent cases such as Cargotec/Konecranes and Microsoft/Activision Blizzard.
- **Increased opportunities to stay engaged on remedies discussions.** The CMA envisages replacing the Remedies Working Paper with an interim report on remedies following the Main Party Hearing. Whereas previously parties were required to wait until the Final Report before understanding the Inquiry Group's view, in theory this should provide an additional milestone through which parties will know if 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", meaning that the process should be more transparent and with more touch points than currently.

The CMA is not at this stage proposing to make any changes to its substantive remedies guidance. This means that the CMA's preference for structural remedies

remains and there has been no indication that its stance on behavioural or contractual remedies has softened. Viewed through this substantive lens, one could say that the reforms are relatively modest. But having more time to find a solution that works for the CMA and other regulators – plus clearer feedback on the CMA's position – is critical. So we should still expect the proposed reforms to significantly improve the chances of achieving a positive outcome on remedies for all.

5. STILL NO ACCESS TO FILE – A MISSED OPPORTUNITY TO LEVEL-UP PROCEEDINGS

The CMA has decided not to grant merging parties a right of access to file in Phase 2 – which the CMA has justified through the CAT's "clean bill of health" endorsements in Meta, BMI and Eurotunnel. This is despite feedback that this disclosure would facilitate a more informed discussion and enhance procedural fairness.

While earlier disclosure via confidentiality rings (see above) may give parties access to quantitative evidence before the Main Party Hearing, this is not the same as giving access to the full underlying evidence. Confidentiality rings are also highly context-dependent and the CMA retains a wide discretion as to what can be disclosed to provide the "gist" of its case. This is also – somewhat lamentably – in contrast with the practice of other global regulators, notably in the EU and the US (once litigation has commenced).

More encouraging is the CMA's suggestion that there may be scope to formalise the disclosure of limited key pieces of evidence pre-Interim Report. For example, in a vertical case particularly influenced by a third-party complaint, the CMA could share that complaint at an early stage with the merging parties. However, there remains more room for the CMA to move towards a more transparent an open system when it comes to the disclosure of third-party evidence. Especially as parties may have access to similar evidence submitted by the exact same third-parties in parallel reviews.

6. UPDATED DE MINIMIS GUIDANCE FOR SMALLER DEALS

In addition to its Phase 2 reforms, the CMA has proposed increasing the threshold relevant to its de minimis guidance. The market size threshold of the de minimis exception will increase from £15 m to £30 m, allowing the CMA to deprioritise mergers below this threshold where it believes the costs of pursuing a Phase 2 investigation would be disproportionate.

Whether or not to apply this exemption ultimately remains at the CMA's discretion. In particular, the CMA has stated that it plans to continue to look closely at (even small) transactions that form part of a potentially large number of similar mergers – as seen in the recent series of veterinary and dental merger investigations. So perceived "roll up" transactions in consumer-facing industries may still be subject to the CMA's continued scrutiny.

7. FINAL THOUGHTS AND NEXT STEPS

The CMA's proposals are independent from – but complementary to – the Digital Markets, Competition and Consumer Bill, which is set to significantly reform the CMA's wider competition law toolkit when enacted in 2024.

The CMA's acknowledgement of the need for greater engagement and transparency are welcomed. However, as discussed above, this can be further improved with related updates to its assessment of remedies and access to third-party information.

The CMA is consulting on the proposals until 8 January. We will be preparing a full response to the consultation. Please do reach out to discuss this with us. Following the consultation, the CMA will publish its final guidance in Q1 2024.

FOR MORE INFORMATION

Our Antitrust team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:

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