

**Response from third party D to the CMA's invitation to comment on remedies**

1. [X] welcomes the opportunity to respond to the CMA's invitation to comment on remedies dated 7 March 2025 (the ITCR) in relation to the completed acquisition by GXO Logistics, Inc. (GXO) of Wincanton plc (Wincanton and, together with GXO, the Parties) (the Merger). Capitalised terms that are not defined in this submission have the same meaning as defined in the CMA's interim report of 19 February 2025 in relation to the Merger (the Interim Report) and the ITCR.
2. [X] notes that the Parties have proposed the following alternative remedies to address the substantial lessening of competition in the supply of dedicated warehousing services to Grocery customers in the United Kingdom that the CMA has identified in its Interim Report (*the Grocery SLC*):
  - a. the **3PL Sponsorship Remedy Proposal**, which is a suite of behavioural commitments by GXO that is comprised of (i) a financial fund which will be made available to each Grocery customer currently serviced by either of the Parties to sponsor the entry and expansion of a new 3PL to supply dedicated warehousing services to Grocery customers (the **New Entry Sponsorship Fund**), and (ii) in the interim period, certain contractual guarantees to each of the Parties' existing Grocery customers for new contracts or for contracts coming up for renewal in the near term (the **Contract Term Guarantees**); or
  - b. the **Divestiture Remedy Proposal**, which is a divestiture to a CMA-approved 3PL purchaser of Wincanton's contracts with certain Grocery customers (the **Divestment Customers**) as well as all tangible or intangible assets, employees and supplier contracts necessary to service the Divestment Customers;(together, the **Remedy Proposal**).
3. As a starting point, the measure of effectiveness of any remedy in this case (behavioural or structural) must be whether the chosen remedy ultimately recreates the pre-Merger conditions of competition in the dedicated Grocery warehousing segment. In practice, this means that the Remedy Proposal must result in a situation where Grocery customers continue to be able to choose from at least three credible options (ie players with the relevant capability and track record in the UK) when their contracts come up for renewal and new contracts are tendered in the future.

4. With this principle in mind, and for the reasons set out in this submission, behavioural commitments such as those included in the 3PL Sponsorship Remedy Proposal are not effective in resolving the Grocery SLC. Divestiture remedies, on the other hand, would in principle be a more effective solution. However, in order for the Divestiture Remedy Proposal to be an effective remedy in this case, the parameters of the divestment package will have to be carefully defined – with regards to both the viability of the divested assets as a standalone business and the attractiveness of the package to potential purchasers. [X].

### ***Behavioural remedies are not effective in resolving the Grocery SLC***

5. The CMA’s current guidance on merger remedies states that it will “*generally only use behavioural remedies as the primary source of remedial action where: (a) structural remedies are not feasible; (b) the SLC is expected to have a short duration; or (c) at Phase 2, behavioural measures will preserve substantial [relevant customer benefits] that would be largely removed by structural measures.*”<sup>1</sup>
6. [X] considers that the 3PL Sponsorship Remedy Proposal might not meet these criteria:
  - a. **Structural remedies are feasible in this case:** as is evident from the fact that the Parties have offered the Divestiture Remedy Proposal, structural remedies are in principle feasible in this case (although, as set out in further detail below, [X] believes that certain changes and specifications are required to make the proposed divestment package both viable and attractive).
  - b. **The Grocery SLC is not expected to have a short duration:** CLS contracts are characterised by their long duration and, as the Interim Report recognises, it takes 3PLs “*several years to build relationships and reputation [with customers] in order to be invited to tender*”.<sup>2</sup> The Grocery SLC therefore does not have a short duration that could be effectively addressed by behavioural remedies.
  - c. **The Merger will not result in any relevant customer benefits:** the Interim Report has not identified any relevant customer benefits or significant efficiencies in relation to the Merger.<sup>3</sup> Indeed, the Merger does not bring about any discernible benefits to customers – on the contrary, it has caused harm to customers as a result of the Grocery SLC. Therefore,

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<sup>1</sup> CMA87, *Merger Remedies*, paragraph 7.2.

<sup>2</sup> Interim Report, paragraph 6.12.

<sup>3</sup> Interim Report, paragraph 6.49.

there is no risk that structural remedies could remove any relevant customer benefits.

7. In addition, there are inherent risks related to the design, monitoring and enforcement of the 3PL Sponsorship Remedy Proposal, which means that there is a significant risk that it will be ineffective:
  - a. **Specification risks:** it is unlikely that the 3PL Sponsorship Remedy Proposal could be specified with sufficient clarity to provide an effective basis for monitoring and compliance.<sup>4</sup> For example, while it is possible to monitor the Parties' commitment to make the New Entry Sponsorship Fund available to Grocery customers, it will be challenging to monitor how these Grocery customers make use of the money and whether it is actually being spent in a way that will facilitate the entry or expansion of a new 3PL to supply dedicated warehousing to Grocery customers. In addition, without the transfer of key inputs such as warehouses, technology, key employees and know-how from the Parties to the new 3PL it is highly unlikely that the new 3PL would be able to build up the requisite asset base and expertise to effectively compete for new business when the next Grocery CLS contracts come up for renewal. Most importantly, a simple transfer of money does not help to build up the all-important experience and track record which Grocery customers view as a key parameter of competition.<sup>5</sup>
  - b. **Circumvention risks:** as explained above, by offering just monetary support, which may not be used effectively by Grocery customers or the 3PL, the 3PL Sponsorship Remedy Proposal does not "*deal with all the likely substantial forms in which enhanced market power may be applied*",<sup>6</sup> such as the Parties' experience and track record. It is also counter-intuitive to provide financial support to a new 3PL when there is no guarantee that the 3PL would be able to win multiple contracts from Grocery customers and build up a track record. Even if financial support was made available to them, 3PLs will still need the certainty that there will be a return on their investments: they would not embark on a strategy of blindly leasing or acquiring assets all over the country in the hope of winning additional Grocery contracts in the future.
  - c. **Monitoring and enforcement risks:** if the 3PL Sponsorship Remedy Proposal were to be accepted it would be very difficult for the CMA to monitor the use of the New Entry Sponsorship Fund by Grocery customers, let alone the chosen 3PL. This is because the incentives of the

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<sup>4</sup> CMA87, *Merger Remedies*, paragraph 7.4.

<sup>5</sup> Interim Report, paragraph 5.77.

<sup>6</sup> CMA87, *Merger Remedies*, paragraph 7.4(b).

Grocery customers and the chosen 3PL are not aligned with the CMA's function to ensure effective competition in the relevant market. The Grocery customers and the chosen 3PL would not be "*in a strong position to report to the CMA on instances of non-compliance*",<sup>7</sup> and there would be scope for the New Entry Sponsorship Fund to be misused.

8. As the CMA acknowledged in the Interim Report, financial resources are not the only barrier to entry and expansion in this industry. A strong track record (which is particularly required by Grocers) is a "*material barrier to entry for potential competitors who do not yet have a strong UK track record*".<sup>8</sup> Track record and experience are built by working with Grocery customers and demonstrating an ability to handle their complex requirements; it is impossible to build a track record and experience through additional funding alone. Therefore, the 3PL Sponsorship Remedy Proposal is inherently incapable of eliminating this barrier to entry.
9. Similarly, [X] does not consider that the Contract Term Guarantees would be effective in resolving the Grocery SLC. As mentioned above, any effective remedy must recreate the pre-Merger conditions of competition in the dedicated Grocery warehousing segment, ie Grocery customers must continue to be able to choose from at least three credible CLS players. First, the Contract Term Guarantees only apply to the Parties' existing Grocery customers; the Merged Entity would be free to offer worse contractual terms to all other Grocery customers. Second, the Contract Term Guarantees would not perfectly recreate the pre-Merger conditions of competition even for the Parties' existing Grocery customers, as these customers may well be able to negotiate *more* favourable contractual terms going forward if the Merged Entity was effectively constrained by two credible CLS players. And third, given the complexity of the Parties' contracts with their existing Grocery customers, their renewal will require a high volume of complex information from the Merged Entity and the Grocery customers to counter the information asymmetry between the monitoring trustee and the businesses concerned, and help the CMA to determine if all the contractual terms are being retained.<sup>9</sup> This poses a significant risk for the effective monitoring and enforcement of the 3PL Sponsorship Remedy Proposal.

***A structural remedy such as the Divestiture Remedy Proposal could work in principle, but there are inherent challenges with its design and implementation***

10. The Divestiture Remedy Proposal, if carefully designed, could in principle be effective in resolving the Grocery SLC. But [X] believes that there are inherent

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<sup>7</sup> CMA87, *Merger Remedies*, paragraph 7.6.

<sup>8</sup> Interim Report, paragraph 21.

<sup>9</sup> CMA87, *Merger Remedies*, paragraph 7.4(d)

challenges in designing and implementing the Divestiture Remedy Proposal for the following reasons:

- a. **Composition risks:** the effectiveness of a structural remedy depends on how well the scope of the divestment package is defined – if it is too constrained or not appropriately configured then it is unlikely to attract a suitable purchaser, or may not allow a purchaser to operate as an effective competitor in the market.<sup>10</sup> Such composition risks are high with regards to the Divestiture Remedy Proposal, as it is a collection of contracts and assets as opposed to an existing, standalone business.<sup>11</sup> Defining an appropriate divestment package is crucial in this case, given that Grocery customers have very specific CLS requirements (eg the need to cater for the diversity and short shelf-life of SKUs).<sup>12</sup> The number and value of the contracts that will be transferred (along with any associated assets) also affect the sustainability of the divestment package, both in terms of the financial investments required by the purchaser and the ease of operational integration. [X].

For example, in *CHC/Babcock* the CMA found that one partial divestment package could “*face additional challenges in terms of establishing its credibility with potential customers*”<sup>13</sup>; another partial divestiture option was rejected because it “*may be less resilient and have a reduced ability to benefit from scale*”. In *Cargotec/Konecranes* the CMA expressed concerns about the information asymmetry between the merging parties and the CMA when it comes to identifying the assets needed to form part of a viable divestment package.<sup>14</sup> The CMA also found that the “*carve-out risks relating to the identification, allocation, and transfer of assets to be carved-out of the Parties’ existing businesses are substantial and have the potential to significantly impair the competitive capabilities of the divested businesses.*”<sup>15</sup> [X].

- b. **Purchaser risks:** as recognised in the Interim Report, the margins of the Parties’ contracts in the Retail sector (both Grocery and non-Grocery) are

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<sup>10</sup> CMA87, *Merger Remedies*, paragraph 5.3(a).

<sup>11</sup> CMA87, *Merger Remedies*, paragraph 5.12 notes that the CMA “will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater *speed*.”

<sup>12</sup> Interim Report, paragraph 5.77.

<sup>13</sup> CMA Final Report on the completed acquisition by CHC Group LLP of Offshore Helicopter Services UK Limited, Offshore Services Australasia PTY Ltd and Offshore Helicopter Services Denmark A/S (1 June 2022) (the *CHC/Babcock Final Report*), paragraph 9.53.

<sup>14</sup> CMA Final Report on the anticipated merger between Cargotec Corporation and Konecranes Plc (31 March 2022) (the *Cargotec/Konecranes Final Report*), paragraph 13.452.

<sup>15</sup> Cargotec/Konecranes Final Report, paragraph 13.491.

low, and the “*relatively low margins in the Grocery segment [...] may limit [3PLs]’ incentives to enter this segment*”.<sup>16</sup> [✂].<sup>17</sup>

- c. **Assets risks:** as the CMA identified in *CHC/Babcock*, the divestiture of a business operating contracts at the time of divestiture “*creates risks in terms of the financial resilience of the divestiture business in the event that [✂] the contract[s] is terminated for any reason*” and that “*this concern is particularly acute in a scenario in which only a small number of contracts are operated by the business*”.<sup>18</sup> [✂].<sup>19</sup>
  - d. **Incentives on GXO:** as one of the largest providers of CLS in the UK, GXO does not have the incentive to create new competitors to compete with its business. There is therefore no guarantee that GXO would specify in its final divestment package all the necessary assets to allow the divestiture to succeed.<sup>20</sup>
  - e. **Appropriate transitional period:** an appropriate transitional period should be specified to ensure the contracts can be transferred successfully with limited disruption for customers. [✂].
11. Furthermore, potential purchasers would need to understand in much more detail what would be included in the Divestiture Remedy Proposal to decide whether to participate in the remedy process or not. In [✂] view, the information that a potential purchaser would need to receive includes, but is not limited to, the following:
- a. [✂]
  - b. [✂]
  - c. [✂]
  - d. [✂]
  - e. [✂]
12. As mentioned in paragraphs 10.a and 10.b above, while the Divestiture Remedy Proposal could in theory address the Grocery SLC, there are inherent risk in the proposal which impact its viability and attractiveness to potential remedy takers. [✂].

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<sup>16</sup> Interim Report, paragraphs 5.55, 6.24 and 6.25.

<sup>17</sup> CMA87, *Merger Remedies*, paragraph 5.3(b).

<sup>18</sup> CHC/Babcock Final Report, paragraph 9.52(b).

<sup>19</sup> CMA87, *Merger Remedies*, paragraph 5.3(c).

<sup>20</sup> CMA87, *Merger Remedies*, paragraph 5.4 acknowledges the risk of the merging parties’ incentives to limit the future competitive impact of the divestiture remedy.

13. In terms of purchaser suitability, [X] submits that the CMA's criteria for choosing a suitable remedy taker are clear and should be applied in this case. In other words, the purchaser should be an independent 3PL without any significant connection to the Parties; must have appropriate financial resources and expertise to operate and develop the divestiture assets; must have a clear business plan and objectives for the acquired business; and the acquisition of the divestment package by the purchaser must not create new competitive or regulatory concerns of its own.<sup>21</sup>
14. In addition, [X]. The ideal remedy taker should also have some experience in the Retail space in the UK, which would help with integration. Other characteristics that a suitable purchaser should have include the following:
  - a. a good covenant strength in the UK to allow for the novation of property leases;
  - b. an established legal trading entity and a stable, long-term presence and trading record in the UK; and
  - c. a sophisticated HR function with a track record of on-boarding large-scale employee transfers.
15. [X] looks forward to continuing to constructively engage with the CMA during the Phase 2 investigation.

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<sup>21</sup> CMA87, Merger Remedies, paragraph 5.21.