Linklaters

Merger Remedies Review: Linklaters' Response to CMA Call for Evidence

1 Introduction and Executive Summary

(1) Linklaters welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") call for evidence on its approach to merger remedies (the "**Call for Evidence**"). We fully support the CMA's commitment "to work constructively with businesses to identify as quickly as possible whether there is an effective and proportionate remedy" that will resolve concerns identified during a merger review.

(2) As set out in further detail below, we consider that the CMA's current merger remedies guidance ("**Remedies Guidance**") could be adapted and improved in a number of respects, encompassing both the CMA's substantive approach to assessing remedies as well as the procedure that it follows (in particular in Phase 1 cases). We also consider that there is greater scope for the CMA to take into account pro-competitive merger efficiencies and benefits.

(3) We look forward to continued engagement with the CMA on this topic.

2 Remedy theme 1: CMA's approach to remedies

2.1 Questions on the CMA's approach to Phase 1 remedies, and effectiveness and proportionality

Q A.1: *Should the CMA's current guidance approach of requiring Phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' be revisited, within the confines of the applicable legislative framework and timing constraints inherent in the Phase 1 UILs process? If so, what standard should the CMA apply?*

Q A.2: *Is there more the CMA can do within its current legal framework to create opportunities for more complex remedies in Phase 1?*

(4) We fully endorse a strategic approach (in line with the Government's draft strategic steer) whereby the CMA seeks to resolve a merger review in Phase 1 wherever possible, bearing in mind the burden involved in a Phase 2 process. As the Call for Evidence notes, there will be clear benefits to pace and proportionality from achieving a Phase 1 remedy outcome, because the merger parties will avoid the time and cost of a Phase 2 reference.

(5) We believe that a Phase 1 remedy outcome is possible in a greater number of cases within the current legislative framework and timing constraints within which the CMA must operate. In order to achieve this, the CMA's current guidance approach of requiring Phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' should be revisited.

(6) As a starting point, we note that section 73(2) of the Enterprise Act 2002 (**"EA02"**) states that the CMA may "accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate'. Section 73(3) further provides that the CMA 'shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition ("**SLC**") and any adverse effects resulting from it'.

(7) There is no mention in the EA02 of any Phase 1 remedy needing to be "clear cut" or "capable of ready implementation". Rather, these are concepts that have evolved via the CMA's (and its predecessors') guidance and practice, which has hardened over time, resulting in the development of a relatively rigid approach (albeit with some exceptions). For example, in

cases involving the design and implementation of a decision rule to identify problematic local markets, a policy has emerged whereby divesting the entirety of the overlap in a given area is effectively required, even if the decision rule would be "passed" as a result of a divestment that is narrower in scope.

(8) In our view, therefore, the CMA Phase 1 UILs standard as set out in the Remedies Guidance is currently higher than is required by the legislation, and there have been a number of cases that either (i) could have been resolved with a more proportionate and narrower remedy, or (ii) could have avoided a reference to Phase 2. The 'clear-cut' and 'capable of ready implementation' standard should be replaced with an approach that more closely reflects the legislation's intention that a remedy should "achieve as a comprehensive a solution as is reasonable and practicable."

(9) However, simply amending the Remedies Guidance risks being ineffective if it is not coupled with a revised approach to how cases are run. Clearly and rightly, more complex remedies require more time both for the merger parties to devise, and the CMA to consider. We recognise the inherent timing constraints in Phase 1 (particularly immediately preceding and following the Phase 1 decision), but believe there is scope for more complex remedies to be considered via more active case management (in particular earlier and more candid engagement on theories of harm and potential solutions, including via increased engagement with senior business representatives). We appreciate that this requires open engagement not only on the part of the CMA, but also the merger parties.

(10) To be effective, given the constraints of the Phase 1 timetable, it should be possible to begin such engagement during pre-notification, as is common for many of the CMA's peer regimes (e.g. the European Commission). Linklaters has had mixed experience on the level of upfront engagement case teams are willing to provide, including a number of recent positive experiences. One common barrier in Linklaters' experience appears to be that cases can remain in pre-notification for some time with relatively limited senior involvement, which we perceive can result in case teams being reticent to express their emerging views in case those views are not shared by the decision maker (in some cases, this appears to be because the decision maker is assigned at a later stage of the process). It would be helpful if guidance and practice were to make clear that case teams are able (and encouraged) to engage with the decision maker in the early stages of a case whenever appropriate.

Q B.1: *Should the CMA's current approach to assessing the effectiveness and proportionality of remedies be revisited within the confines of the legislative framework? If so, what factors should the CMA consider?*

Q B.2: *Has the CMA's approach to effectiveness precluded potentially effective remedies being considered as part of its proportionality assessment?*

(11) As outlined above in para (8), we propose replacing the 'clear-cut' and 'capable of ready implementation' standard currently set out in the Remedies Guidance with a requirement that any remedy is effective and proportionate in addressing the competition concerns identified by the CMA at the end of Phase 1.

(12) As the Call for Evidence notes, the CMA's current process involves a two-stage assessment of remedies whereby it first assesses a remedy's effectiveness, before assessing proportionality in a second step.

(13) When assessing effectiveness, the CMA's starting point pursuant to the current Remedies Guidance is to seek an outcome that restores competition to the level that would have

prevailed absent the merger, thereby comprehensively remedying the SLC. The CMA is unlikely to accept a remedy proposal at Phase 1 where it does not comprehensively address the competition concerns unless it is abundantly clear that at Phase 2, the CMA would be materially no better placed than it had been at Phase 1 to achieve a remedy that would restore the levels of competition that existed pre-merger.[1] The CMA does not currently take proportionality criteria into account when assessing the comprehensiveness of the remedy.[2]

(14) In our view, the current approach places excessive weight on identifying a "comprehensive" solution, and insufficient weight (in relative terms) on assessing whether such solution is "reasonable and practicable" (and in turn, proportionate). This imbalanced approach is not reflective of the legislation and, as noted above, has likely precluded the acceptance of potentially effective remedies from being considered and accepted (for example in a local markets case where a partial divestment would align with the applicable decision rule, or in cases involving carve-out remedies). The impact of this can be exacerbated by the low legal test for identifying potential SLCs at Phase 1, making the burden to be discharged by the merger parties particularly high.[3] While the current guidance suggests that the need for a comprehensive solution may be moderated by reference to the strength of the competition concerns[4], our experience is this type of analysis is little used in practice. It is an important part of the current guidance, and we would suggest the CMA retains it and actively considers such factors in Phase 1 cases going forward.

(15) For the reasons set out above, we consider that effectiveness and proportionality should instead be considered together, as part of a holistic remedy assessment.

(16) In addition, there are a number of factors that emerge from the CMA's practice which we consider could be more explicitly recognised in refreshed guidance.

(17) For example, the CMA noted in the Remedies Evaluation Report (2023) that partial divestitures are a common form of merger remedial action, and that this has been the most prevalent type of divestiture at Phase 2 since April 2014. More generally, against this background, we would welcome explicit confirmation in the Remedies Guidance that the CMA is open to carve-out remedies (which may include mix and match remedies) at Phase 1, and to transitional service arrangements ("**TSAs**") of any duration provided that is justified by the circumstances of a case.

(18) It would also be helpful if the CMA could provide for greater flexibility in relation to the approach to conditionality within a remedy sale agreement. Currently, the Remedies Guidance indicates that the CMA will not accept agreements that contain conditions beyond those relating to the acceptance of the remedies by the CMA (and the completion of the main transaction if it remains anticipated).[5] This introduces unnecessary rigidity for global deals and may deter suitable buyers. The CMA has shown welcome willingness to flex its approach (e.g. *S&P Global / IHS Markit*[6]) but it would be helpful for this to be made clear in the Remedies Guidance.

---

1 Remedies Guidance, para 3.31.

2 Remedies Guidance, para 3.6.

3 See Remedies Guidance, para 3.29.

4 Remedies Guidance, para 3.28(a).

5 Remedies Guidance, para 4.30.

6 *S&P Global Inc. / IHS Markit Ltd* (ME/6918/20).

(19) As a final point, the Remedies Guidance rightly recognises that an upfront buyer may mitigate composition and purchaser risk in the case of a carve-out.[7] This has not always played out in practice, and we would encourage the CMA to rely on the commercial incentives of purchasers, where a purchaser and its business plans are credible.

2.2 Questions on the CMA's approach to behavioural remedies

Q C.1: *Is the current distinction that the CMA draws in its Merger Remedies Guidance between behavioural and structural remedies helpful and meaningful? If not, how should the CMA classify different types of remedies?*

(20) In our view, it is not necessary for the CMA or merger parties to take a rigid approach to classification. As the Call for Evidence observes, the distinction is not "black and white" and, in some cases, there may be difficulties in classification or overlaps (for example an investment remedy that is behavioural in nature but which has a structural impact on the relevant market), or circumstances where a combination of measures could work effectively together.

(21) In our view, a more helpful approach may be to consider the universe of available remedies and scope for a range of measures to address concerns, rather than distinct categories. In any event, the focus in every case should be on assessing the effectiveness and proportionality of any remedy proposal, in the circumstances of the case on its own merits.

Q C.2: *In what circumstances are behavioural remedies likely to be most appropriate?*

(22) By way of general comment, it is common ground that that the CMA's stance on behavioural remedies has hardened over time (albeit some very recent cases suggest a reconsideration of this stance), in particular since the Remedy Evaluation Report (2019). While that report carried out a thorough analysis of a number of previous remedies, caution must be exercised in reading across conclusions from the "failure" of certain historical behavioural remedies to new mergers, especially those in different markets. The existence of parallel EU / UK processes since the end of the Brexit transition period has made the CMA's approach to behavioural remedies particularly problematic in global deals given that the CMA's approach is narrower in practice than that of the European Commission, which has accepted behavioural remedies (e.g., access remedies, supply obligations, licensing or firewall provisions) in a number of (particularly vertical / conglomerate) cases.[8]

(23) As the Call for Evidence notes, the CMA's current approach (as set out in the Remedies Guidance) considers behavioural remedies in only three instances, i.e. where structural remedies are not feasible, the competition concerns have a short duration or where they will preserve substantial relevant customer benefits that would be largely removed by structural measures.[9] The CMA also notes potential suitability of behavioural remedies in a regulated sector where it is possible to involve the sectoral regulator in the monitoring regime.[10]

(24) We consider this approach to be too narrow - in particular, the CMA's position that behavioural remedies will *only* be considered where no structural remedies are available risks rejection of effective and proportionate solutions. There are clear circumstances in which behavioural measures, which enable existing competitors to access an input or

[7] See also CMA Remedies Evaluation Report (2023), para 5.28 (a). Remedies Guidance, para 5.14.

[8] See e.g. *Qualcomm / NXP* (M.8306), *Microsoft / LinkedIn* (M.8124) and *Broadcom / Brocade, Daimler / BMW car sharing JV* (M.8744).

[9] Remedies Guidance, para 7.2.

[10] Remedies Guidance, para 7.6.

technology, are even more likely to be effective than structural remedies, which bring issues of integration (both logistical / technical and cultural) and transition management. This is particularly likely to be true in technology markets where unlocking and protecting third-party access to certain platforms or IP of the merging parties can provide opportunities for competitors to enhance competition in a dynamic way. A fixation on pre-merger competition is often inappropriate in these cases and can lead to perverse outcomes, especially because many transactions are driven by the very fact that technology is changing the way competition works.

(25) We believe the touchstone for assessment of remedies, whether structural or behavioural, should be the circumstances of the case. The choice of remedy should be driven by: (i) a case-by-case analysis; coupled with (ii) the principles of proportionality and effectiveness. An approach whereby behavioural remedies are viewed as *a priori* not, or less, appropriate to address competition law concerns is unnecessary. Instead, the CMA should consider in each case whether behavioural remedies may be effective to address concerns and proportionate to the risks identified (while having the potential advantage, relative to a structural remedy, of preserving efficiencies and other positive outcomes). Specifically in terms of the guidance:

- The current threshold for the suitability of behavioural remedies[11] (see above, para (22)) is too high.
- Practical implementation: the acceptability of behavioural remedies should not be strictly tied to their "relatively short duration" and therefore we propose the CMA revisits para 7.2 of the Remedies Guidance. What should be decisive is whether monitoring and circumvention risks can be mitigated.
- Monitoring: many behavioural remedies may be effectively self-enforcing, because those third-parties taking advantage of the remedy will have every commercial incentive to rigorously monitor and ensure compliance with it (and as necessary, highlight any non-compliance to the CMA, who in turn has its recently enhanced fining powers). In other cases, sector regulators (including the CMA's DMU) may be in a good position to monitor behavioural commitments on an ongoing basis. Where neither of these factors apply, expert Monitoring Trustees can also reduce both the risks and the burden of monitoring remedies, as discussed further below.
- The guidance should explicitly recognise that behavioural remedies may be particularly suitable to address concerns in vertical / conglomerate cases (as per the European Commission's approach), where the competition law concern does not necessitate a binary go/no-go outcome. In this respect, the guidance should also clarify that evidence of a certain practice within a market (e.g. cross-licensing, exposure of APIs) can be useful evidence in understanding the likely effectiveness of a remedy.

(26) The need to monitor behavioural remedies has in the past been a major barrier to their acceptance by the CMA. We believe this can be addressed by professional Monitoring Trustees that provide a comparable degree of sophistication and independence in the exercise of their duties. In addition, for firms designated with Strategic Market Status by the CMA's Digital Markets Unit ("**DMU**"), we consider that it would be appropriate for the DMU to monitor certain remedies, and the fact that the DMU has broad powers to impose new

[11] Remedies Guidance, para 7.2.

rules and requirements on SMS firms should also be considered as a mitigating factor when weighing the risks of any proposed remedies.

Q C.3 *How should the CMA assess the likely effectiveness of behavioural remedies? What types of evidence should the CMA obtain to assess this (and from whom)?*

(27) In assessing whether a behavioural remedy is likely to be effective, the CMA should, in the first instance, engage with the merger parties to reach an informed view on the characteristics of the relevant industries (including the extent to which the proposed remedy would be consistent with common industry practice); what the remedies proposed entail in practice; and how monitoring and safeguards may be implemented.

(28) We also consider there is merit in the CMA seeking broader evidence from:

- Sectoral regulators including the DMU (if relevant) on e.g. the regulatory framework within which the merger parties operate and standard practices in the industry.
- Customers and competitors of the merger parties to understand the characteristics of the industry, their views on what is common practice in the sector, and the likely effectiveness of the proposed remedy.
- Other competition authorities working on the case on the concerns they have provisionally identified and the remedy solutions they are considering or might deem acceptable.

Q C.4: *To what extent could the CMA's new enforcement powers under the DMCC Act 2024 to fine merger parties for breaches of their remedy obligations under remedy undertakings and orders influence the types of remedies the CMA accepts at Phase 1 or imposes at Phase 2?*

(29) In our view, the CMA's new enforcement powers under the DMCC Act 2024 (whereby failure to comply with a remedy can lead to a fine up to 5% of global turnover and/or daily fines up to 5% of daily global turnover) create strong incentives for merger parties offering remedies (of any kind) to (i) propose clear commitments, that are capable of being implemented and complied with; and (ii) take appropriate steps to ensure compliance on an ongoing basis.

(30) These new enforcement powers therefore provide increased safeguards that a remedy will be implemented and complied with, and should provide the CMA with confidence to accept or impose a broader range of remedies in the future (whether at Phase 1 or Phase 2).

Q C.5: *Should the CMA take a different approach to behavioural remedies at Phase 1 and Phase 2?*

(31) The CMA must operate in line with its statutory framework and we recognise that the EA02 sets out different standards and timeframes for Phase 1 and Phase 2 processes which the CMA must reflect in its practice.

(32) However, in our view, the starting point for the CMA should be to assess whether a potential remedy is effective and proportionate to mitigate the competition concerns, regardless of the stage of the process. Whilst the procedural framework may be more favourable to behavioural remedies being offered at Phase 2 given the Phase 1 timing constraints, early engagement on remedies with the merger parties and stakeholders is equally possible in Phase 1 (as per Q C.3 above / Q C.6 below).

Q C.6: *What lessons can be drawn from evidence in other jurisdictions, and behavioural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?*

(33) Whilst we think that each case should be assessed on a case-by-case basis, bearing in mind the differences in the conditions of competition across jurisdictions and the potentially different standards applied by competition authorities in other jurisdictions non-merger cases, and / or sector regulators, the CMA could draw lessons from the practices and evidence of such authorities. This could include in particular:

- Evidence from sector regulators and market studies / investigations (or any other type of investigations that can be relevant e.g. antitrust investigations) on the conditions and characteristics of a market / industry (which is the same as the one that the CMA is investigating or similar), what types of remedies have worked or not in practice in the past; whether a proposed remedy is frequent or standard practice in the relevant industry and / or what behaviour/practice might constitute such a standard;
- Evidence on whether similar remedies have been accepted and successfully implemented in other jurisdictions in a merger context to alleviate competition law concerns; as well as lessons learnt from the process (e.g. difficulties of implementation and practical workarounds). Remedies offered in the same or similar markets may be a stronger indicator for the CMA that such a solution is acceptable in practice.

2.3 Questions on the CMA's approach to carve-out divestment remedies

Q D.1: *In what circumstances are carve-out divestiture remedies likely to be most appropriate?*

Q D.2: *Are there specific circumstances (eg certain industries) where the risks associated with carve-out divestitures are generally more or less likely to manifest themselves?*

Q D.3: *Are there any additional ways in which the risks relating to carve-out divestitures can be mitigated?*

Q D.4: *Purchasers may face challenges in conducting robust due diligence on divestment packages in carve-out divestiture remedies. This may limit the usefulness of such due diligence to the CMA as a safeguard against composition risks. Are there any steps that could be taken to mitigate these risks?*

Q D.5: *What lessons can be drawn from evidence in other jurisdictions, and from complex structural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?*

(34) Carve-out remedies may be appropriate in a range of circumstances. For example:

- In some cases, the merger parties are not able to divest a standalone entity – it is not uncommon for businesses to be unable to do so. For example, this may be the case in asset acquisitions, when the target company itself does not necessarily operate as a standalone entity, or in transactions involving parties with broad activities (e.g. across multiple products and geographies) and / or complex structures.
- In cases involving concerns that are relatively narrow in scope, a carve-out (accompanied by e.g. TSAs) is often the most proportionate solution.
- Carve-out transactions are common means of disposal and are particularly prevalent in certain industries (such as pharmaceuticals). The CMA should take comfort from the

prevalence of such carve-outs in the market, as well as remedies practices elsewhere, when assessing the risks associated with the carve-out.

(35) In our experience, risks associated with carve-outs can often be readily mitigated via effective remedy design, consultation and critically robust purchaser approval processes. If a purchaser is willing to take the commercial risk associated with a transaction, backed up by a robust business plan, this should provide the CMA with significant comfort regarding the success of the remedy. Purchasers (particularly those with relevant industry expertise) are generally well placed to identify any issues with the divestment package through a due diligence process and they are also strongly incentivised to conduct thorough diligence. Further, divestment packages are often accompanied by TSAs, which provide a further safeguard against composition risks, especially where the divestment must be completed within a short period of time.

(36) Depending on the circumstances of the case, additional considerations and evidence sources could include:

- Assessing whether the divestment package may be profitable on a standalone basis or once integrated with the purchaser's existing operations.
- Where the CMA may have prior experience in considering remedies in a certain sector (e.g. through a past merger investigation), the CMA may leverage that experience to assist the purchaser with considering any potential issues that may arise upfront.
- The history of similar or analogous carve-outs / M&A more generally in the relevant sector, including if relevant any examples where the parties and the proposed purchaser(s) have successfully integrated businesses.
- Engagement with other competition agencies working on the same investigation or (if relevant) the sectoral regulator
- Appointment of a monitoring trustee at an early stage, and where relevant, consideration of other independent consultants (e.g. industry experts), employed at the expense of merger parties, to assist with remedy design and implementation.

(37) The challenges associated with assessing complex structural remedies in terms of composition, assets and purchaser risks are similar, regardless of the jurisdiction.

2.4 Questions on assessing, monitoring and enforcing remedies

***Q E.1**: Are there circumstances in which the CMA could make greater use of Monitoring Trustees when monitoring and enforcing remedies? What would be the costs and benefits of this?*

***Q E.2**: Are there any circumstances in which the CMA could take on a greater role in the monitoring and enforcement of remedies? What would be the costs and benefits of this?*

(38) The appropriate level of monitoring will depend on the circumstances of each case. As noted above, certain remedies, for example access remedies, may be effectively self-enforcing as those third-parties relying upon them (e.g. for access to a physical or virtual input) will be commercially incentivised to hold the merged entity to its commitments. For others, a sector

regulator may be well placed to take on a monitoring role, as the CMA's Remedies Guidance already (in our view rightly) acknowledges.[12]

(39) In other cases, Monitoring Trustees can play a useful role in monitoring remedies. While enforcement will remain the responsibility of the CMA, there may also be an opportunity for Monitoring Trustees to assist the CMA in assessing potential enforcement action. As noted above, the enhanced enforcement powers in the DMCC Act will also provide parties with strong incentives to comply with remedies.

(40) Effective use of Monitoring Trustees could, in appropriate cases, reduce the CMA's monitoring workload, freeing up valuable resources to assist with other work. We believe that this would be beneficial for both the CMA and merger parties. The current approach, whereby significant remedy monitoring burden remains with the CMA (due to the somewhat limited use of Monitoring Trustees) risks a slower process and (sometimes) an overly cautious approach.

(41) Monitoring Trustees and sectoral regulators can also play a useful role in identifying when a remedy may no longer be required, and can be revoked, and we would encourage the CMA to evaluate its process for keeping remedies under regular review as part of this broader project.

(42) There are a number of experienced and effective Monitoring Trustees in the UK, including those with experience of remedies that go beyond the UK. While the appointment of a Monitoring Trustee carries additional costs for the merger parties, in our experience merger parties generally recognise that this may be a necessary (and worthwhile) cost to secure an effective and proportionate outcome (particularly in cases where a behavioural or quasi-structural remedy is contemplated). That being said, we do not consider that a Monitoring Trustee is required in every case, and where a Monitoring Trustee is a helpful addition, the scope of that trustee's mandate should be considered carefully to avoid unnecessary costs or burdens.

***Q E.3**: How can the CMA ensure it has access to the right expertise to assess complex remedies given the breadth of industries we cover?*

(43) We consider that expertise can be accessed in a number of ways, including:

- Continuous and constructive dialogue with the merger parties, including via e.g. teach-in sessions at an early stage of the CMA's review alongside information gathering (including via statutory notices where necessary).
- Full use of the capabilities of the CMA's Data Unit.
- Communication and coordination with other competition regulators and sectoral regulators, including the DMU and its advisory panel.
- Cooperation with other competition authorities.
- In certain cases, there may be independent experts who could assist the CMA.
- Drawing on industry expertise within the CMA staff and panel members wherever possible (as we understand is currently the case)

[12] The Remedies Guidance acknowledges the importance of sectoral regulators when it comes to the monitoring of behavioural remedies (para 7.6). We agree with the CMA that whenever appropriate, delegating the monitoring function to the sectoral regulator rather than to a monitoring trustee is preferable (and typically less costly for the merger parties).

Q E.4: *Are there ways in which the CMA can practically monitor complex and behavioural remedies* without *materially increasing its own resourcing costs or giving rise to conflict-of-interest issues?*

(44) First, it should be noted that for many remedies taken by the CMA, the businesses that benefit from the remedies will be commercially incentivised to effectively monitor and ensure compliance with the terms of the remedy package without any intervention by the CMA. This applies both to purchasers of a divestment package, which will in our experience take full advantage of any regulatory process to give themselves the greatest competitive advantage possible, and to behavioural remedies where as noted above the third-parties relying upon them will naturally be monitoring them. In both cases, any aggrieved third-party would be expected to raise its concerns with the CMA, which can in turn use its (recently enhanced) enforcement powers.

(45) As noted above, Monitoring Trustees can be an effective means of monitoring remedies (at the cost of the merger parties, rather than the CMA).

(46) Imposing appropriate reporting requirements on merger parties (with or without the support of a Monitoring Trustee) could also assist in certain cases. We encourage the CMA to think carefully about the types of information it would require to be able to monitor a particular complex or behavioural remedy, and ensure that such requirements are drafted clearly in remedy undertakings / orders.

(47) Effective external communications may also assist third parties in monitoring and identifying potential non-compliance based on the merger parties' market behaviour.

3 Remedy theme 2: preserving pro-competitive merger efficiencies and merger benefits

Q F.1: *What evidence should the CMA look for to support the materiality and likelihood of claimed rivalry enhancing efficiencies?*

Q F.2: *Does the CMA's current approach to remedies effectively capture potential rivalry-enhancing efficiencies? If not, how can the current approach be improved?*

Q F.3: *What are the circumstances in which it would be possible to design effective remedies that can lock-in genuine Rivalry Enhancing Efficiencies?*

Q F.4: *What more can the CMA do to ensure that its approach to merger remedies encourages pro-competitive investment?*

(48) The CMA already considers the merger parties' submissions, internal documents, and third-party feedback when considering the materiality and likelihood of claimed rivalry enhancing efficiencies.

(49) Whilst we agree that these are the right sources of evidence for the CMA to review in its assessment, we consider that the CMA could (and should) place significantly more weight on the merger parties' own synergies analysis (alongside other sources of evidence) than has historically been the case.

(50) Merger parties frequently invest significant resources (often supported by external advisers) into the assessment of available synergies or efficiencies as part of their general diligence and valuation assessments at the outset of a transaction. These analyses (which may include e.g. joint business plans) are commonly an important input into preliminary analysis

by investors / other stakeholders, as well as future business / integration plans. Indeed, such analysis often forms a core part of the transaction rationale.

(51) The Merger Assessment Guidelines ("**MAGs**") identify certain risks that relate to the merger parties' own synergies analysis (e.g. efficiencies may not be fully realised, and benefits are not always passed on to customers).[13] Whilst we agree that these are relevant considerations, and any submission should be carefully assessed in the usual way, we consider that there are opportunities for such analysis (alongside other evidence in e.g. internal documents or surveys conducted by merger parties) to be given greater weight by the CMA, which has often given merger parties' own analysis very limited (if any) weight.

(52) In certain cases, sectoral regulators and national sectoral bodies may also be well placed to provide the CMA with helpful evidence in considering rivalry enhancing efficiencies, as has the CMA has recognised previously in the context of hospital mergers.[14]

(53) As the Call for Evidence acknowledges, the CMA's starting point is to consider rivalry enhancing efficiencies as part of its competitive assessment, and to assess whether any such efficiencies might be sufficient to outweigh any SLC. To the extent that efficiencies are identified that do not outweigh the SLC (including because there may be some uncertainty as to whether such efficiencies will be fully realised), then we agree that remedies that are specifically focused on achieving such remedies may be appropriate. The CMA's approach in *Vodafone / Three* is a useful example of such an approach.

4 Remedy theme 3: running an efficient process

4.1 Phase 1 remedies process

Q H.1: *What process barriers are there currently to reaching a Phase 1 remedies outcome?*

Q H.2: *How can the CMA amend its Phase 1 process to allow more complex remedies to be assessed within a Phase 1 timeframe?*

Q H.3: *If the nature and/or scope of potential competition concerns are unclear, what steps can the CMA case team and merger parties take to ensure that they are best placed to engage effectively on remedies at the earliest possible stage in Phase 1?*

(54) In our experience, the main process barrier to achieving a Phase 1 remedies outcome (leaving aside the "clear cut" standard, discussed earlier in this response) is access to early information on the CMA's emerging views on a transaction. While in certain cases it is clear from the outset that a remedy will be required (and even here, insight into the CMA's emerging thinking would be extremely helpful), in other cases merger parties do not have clarity as to whether (and if so to what extent) concerns have arisen until a relatively late stage in the Phase 1 process, at the external state of play meeting. Even at the external state of play meeting, if informed that the merger review will be progressing to a Case Review Meeting and Issues Meeting, our experience is that very few details are shared with the merger parties about the extent of the CMA's concerns (including, for example, the nature of third-party concerns).

(55) Where insight into the nature of the CMA's concerns is not shared until the external state of play meeting, the merger parties and the CMA face a very compressed timetable during which to prepare for and respond to the Issues Letter, and a further very short window after

[13] MAGs, para 8.6.

[14] *Central Manchester University Hospitals / University Hospital of South Manchester* (ME/6653/16).

the decision is issued within which to offer UILs. In these cases, it would be helpful to have earlier insight from the case team (for example via a preliminary state of play meeting) on the progress of its substantive analysis, including third-party responses. Earlier notification (even if highly caveated given the constraints under which the CMA is operating) would enable merger parties to better prepare and make the most of their right to engage on a without prejudice basis on remedies with the CMA.

(56) Such an approach would more closely align with the approach adopted by the European Commission, where in recognition of the risk of timetable compression in Phase 1, it is common to have detailed discussions on emerging thinking and potential remedies during pre-notification. This facilitates a smoother process, which merger parties find more predictable. While such extensive discussions can have an impact on the length of pre-notification, in cases where it facilitates a Phase 1 remedy outcome (and therefore prevents a Phase 2 referral), it still has a positive overall impact on the duration of the review.

(57) We have had positive recent experience of engagement of the CMA remedies team in Phase 1 processes during pre-notification, but there is a persistent and critical "gap" in effectiveness of this engagement without the ability to have insight from the case team on areas of concern. In some recent cases, the CMA case team has been willing to have a call around the time of commencement to outline the theories of harm being investigated. While this is welcome, our experience is that case teams have been reluctant to share more than a very high level and cautious assessment of all conceivable theories of harm. As noted above, our impression is this is in many cases related to limited involvement of decision makers during pre-notification making case teams understandably cautious to take issues "off the table" without knowing the decision maker's view. We believe that in appropriate cases, earlier appointment of decision makers and Senior Director level involvement during pre-notification could be a helpful way to cut through some of these issues.[15]

4.2 Phase 2 remedies process

Q I.1: *What barriers are there currently to reaching a Phase 2 remedies outcome?*

Q I.2: *Does the current Phase 2 process adequately facilitate early remedy engagement? If not, how can it be improved?*

(58) The recent changes made to the Phase 2 process were introduced following an extensive consultation process during which many suggestions related to how the CMA could facilitate earlier remedy engagement. We welcome the amendments made to the Phase 2 process and recognise that these changes make clear that the CMA is open to commencing discussions on remedies early in process. The timetable flexibility introduced by the reforms to allow more time for consideration of complex remedies is also welcome and we note the CMA is making use of this in the ongoing *GXO / Wincanton* case.[16]

(59) Historically, merger parties only received meaningful engagement from the CMA on remedies at later stages of the Phase 2 process. We recognise that in the last few years the CMA has taken material steps to further encourage early remedy engagement, e.g. the latest amendments to the Phase 2 process, which based on the relatively few mergers assessed under the 'new regime', appear to facilitate earlier engagement on remedies.

[15] We note that the Remedies Guidance allows this on an exceptional basis (see para 4.6).

[16] *GXO / Wincanton* (ME/7099/24).

4.3 Questions on working with other regulators

Q J.1: *How can the CMA ensure its remedies process at Phase 1 and Phase 2 sufficiently takes account of parallel actions by other competition agencies?*

(60) The starting point should be an open discussion with merger parties about other investigations and their objectives for the overall transaction timetable. We appreciate this requires frank and reasonable engagement on both sides.

(61) Where the appropriate confidentiality waivers are in place, we welcome the CMA's proactive dialogue with other competition agencies about ongoing parallel reviews. We also encourage communication regarding the nature of any remedies that might be accepted to address competition concerns to ensure that remedies in different jurisdictions are consistent or mutually compatible.

(62) An ongoing dialogue with the merger parties is also important as in many cases it is in the interest of the merger parties to make the CMA aware of developments in parallel actions. For example, merger parties usually seek to align the CMA's remedies process with proceedings in other jurisdictions and make similar submissions to multiple competition agencies.

Q J.2: *How can the CMA ensure it utilises the expertise of other UK government departments or sector regulators to increase the chance of a successful remedy outcome?*

(63) We welcome the CMA's efforts to engage and consult with UK government departments and sector regulators on remedies and are of the view that the expertise of these bodies can be hugely helpful in remedies discussions. In our view, sector regulators are especially well-placed to share insights about the markets in which the merger parties operate which can help the CMA in its assessment of potential remedies. In addition, there are cases where transactions are driven by broader market dynamics on which the UK government may have views and/or expertise. For instance, in *Cellmark / Eurofins*[17] that related to the supply of forensic science services, the CMA took into account the difficulties that the market was facing and referred in its decision to a report issued by the House of Lords which stated that suppliers were under extreme pressure, and included recommendations on how the market could be improved.[18]

(64) We appreciate that conflicting demands can make it challenging for the CMA to get detailed engagement from other parts of the UK government in a timely manner, but consider meaningful early engagement should be the goal.

Q J.3: *On the question of whether the CMA or others should take remedial action to address an SLC, should the CMA make more use of making recommendations to others to take action to remedy competition concerns arising from a merger and if so, what are the circumstances where it may be appropriate to do so?*

(65) Under the Remedies Guidance, when deciding whether to make a recommendation to Government or other controlling body for remedial action, the CMA considers the likelihood of whether its recommendation will be adopted. Recognising that there is uncertainty over adoption, the CMA generally only makes recommendations for actions by others where it lacks the ability to carry out relevant measures itself, and only after consultation with the organisations possessing the relevant powers. While this will be appropriate in the majority

[17] *Cellmark / Eurofins* (ME/7098/24).

[18] *Cellmark / Eurofins* (ME/7098/24), para 20.

of cases, there will be cases that merit exceptions to this general rule. This could include, for example, where many of the identified "issues" in a market are not merger specific but nonetheless contribute to the SLC assessment (e.g. where improvement of government procurement practices could mitigate harm). Again, engagement as early as possible with sector regulators / other organs of the UK government will assist in this respect.