CMA REMEDIES REVIEW – CALL FOR EVIDENCE

Response on behalf of Macfarlanes LLP

We welcome both the CMA's decision to revisit its established practice in this area, and the opportunity to input into the process.

We believe that a more proportionate, targeted and tailored approach to remedies in merger investigations would support the CMA's critical objective of fostering growth in the UK economy. In particular, not only would it serve to encourage and unlock investment across multiple sectors, but through greater openness and flexibility in remedy design and implementation, the CMA will be more able to preserve merger-specific efficiencies and consumer benefits, whilst ensuring its remedies adequately address the substantial lessenings of competition (SLCs) it has identified.

Please find below our comments on the various themes / questions set out in the Call for Evidence.

Remedy Theme 1: CMA's approach to remedies

Approach to phase 1 remedies

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?

Effectiveness and Proportionality

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?

Macfarlanes response

Our experience suggests that the CMA may in the past have been unduly constrained by the requirement for Phase 1 remedies to be both clear-cut and capable of ready implementation. In particular, this requirement has tended to result in the CMA only being open to straightforward divestment remedies at Phase 1, to the exclusion of all others – even where more sophisticated or nuanced solutions could have adequately addressed the CMA's substantive concerns.

We therefore consider that the guidance should be amended, to remove these criteria. They are not specified under the Enterprise Act 2002, and sections 73(2) and (3) of the Act set out sufficiently clearly when undertakings in lieu of reference to Phase 2 will be acceptable – leaving sufficient discretion to the CMA to make that assessment, in view of the harms expected to result from the merger. Alternatively, through a concerted effort to give greater credence to more novel or complex remedies at Phase 1, the CMA may be able to expand its view of what is both clear-cut and capable of ready implementation[1].

Despite the presence of statutory and procedural constraints, which cannot be disregarded, we believe the CMA could make better use of the flexibility presently at its disposal to assess and negotiate more

[1] Indeed, the recent outcome in *Schlumberger Limited / ChampionX Corporation* may be an example of such a more open-minded approach to Phase 1 remedies.

complex remedies at Phase 1, involving tailored divestment packages and/or – potentially – quasi-structural or behavioural commitments.

The use of such remedies may be particularly appropriate where an SLC is based on speculative or dynamic theories of harm, such as where competition concerns arise only in certain future scenarios. Here we would encourage the CMA to consider conditional or time-limited solutions, such as granting third-party access to a critical asset only if certain market developments occur.

Key to unlocking the opportunities available to the CMA in this regard is earlier, without prejudice engagement with merger parties, during and even before the Phase 1 process, to enable parties to understand better the CMA's concerns with a view to addressing them via an appropriately considered, properly evidenced and tailored remedies package. Some merger parties prefer for the CMA to show its hand before they discuss remedies. In these circumstances, earlier engagement can help ensure that there is adequate time, within the constraints of the Phase 1 process, for the design and assessment of remedy proposals. This would also align with the approach of overseas authorities, such as the European Commission, that encourage parallel remedy discussions and foster more structured dialogue from the very outset.

On effectiveness and proportionality, we support the proposition that remedies should be no more burdensome than necessary to adequately address the SLC or mitigate its effects. In our experience, the pursuit of a near-perfect solution has sometimes meant that even marginal doubts over composition risk or future market uncertainties have caused the CMA to reject potentially workable remedies. We believe the CMA should be more willing to tolerate modest uncertainty where the remedy, though short of a full divestment, is closely targeted to the harm and – where necessary – underpinned by strong safeguards such as a robust monitoring scheme.

We believe a more balanced approach in this regard would reduce the need for lengthy Phase 2 investigations and avoid prohibitions or reversals of transactions in cases where a narrower remedy could be sufficient.

In short, the CMA need not insist on a perfect, one-size-fits-all solution where a "good enough," well-targeted remedy would alleviate the identified competition concerns whilst preserving a merger's pro-competitive potential.

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?

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

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)?

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?

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

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)?

Macfarlanes response

We support the sentiment expressed by the CMA in the Call for Evidence, that a very broad range of remedies – with diverse characteristics – can be included in the "behavioural" category, leading to

difficulties in classification and the potential for overlap between behavioural remedies and structural remedies.

This is particularly the case in modern digital and services-based industries. For instance, a remedy obliging a party to license critical IP on an open basis, on specified terms, will in many instances be functionally very similar to a carve-out of IP rights. Indeed, such a licensing commitment can be as "structural" as a divestment if it is properly crafted to be irrevocable, overseen effectively, and guaranteed under a transparent dispute resolution mechanism (the current CMA remedies guidance goes some way in recognising this, but appears to view such remedies as "quasi-structural" in nature, and appropriate only in some circumstances).

There is, therefore, a strong case for placing less importance on the distinction between behavioural and structural remedies (assuming by the latter one means remedies which involve a sale of assets, or the prohibition of an acquisition) – particularly insofar as that distinction can lead to an inherent scepticism on the part of the CMA as to a remedy's suitability. The focus should instead be on whether the remedies package is demonstrably workable, regardless of how one might categorise its components.

As to the new enforcement powers granted by the Digital Markets, Competition and Consumers Act 2024 (DMCCA), we consider that the CMA's ability to impose fines for failing to implement remedies is an important new tool for securing compliance. This should reassure the CMA that, with appropriate monitoring (perhaps involving the appointment of suitable Monitoring Trustees), the implementation of suitably designed behavioural solutions is feasible.

Should behavioural remedies be more frequently imposed, careful consideration will need to be given to their duration. Ongoing restrictions/obligations on businesses' commercial conduct can be expensive to implement where such implementation requires the adoption of internal compliance frameworks and associated infrastructure/governance. Experience to date in respect of behavioural commitments/requirements arising out of markets and antitrust investigations suggests that they may, if open-ended, be allowed to persist for longer than strictly necessary, given the CMA's finite capacity to review them and a lack of concrete obligations to do so. Built-in sunset or review clauses should, therefore, be considered as part of the remedy design process, with the opportunity for separate applications to be made to end or vary commitments in the event of material changes in market circumstances.

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)?

Macfarlanes response

Our experience is that the CMA has at times demonstrated a lack of willingness to consider carve-out divestment remedies – insisting on nothing less than a full divestment of the acquired business/assets in order to remedy the identified SLC(s). This has resulted in disproportionate outcomes: either a referral

at Phase 1 or, at Phase 2, a prohibition or full unwinding of a transaction, when more targeted remedies were available.

A more flexible approach to carve-out remedies is therefore warranted, to ensure that better-targeted but still sufficiently effective remedies are not unduly discounted due to a perception that carve-outs carry inherent risks, such that a full divestment should always be preferred.

For example, where a transaction consists of an asset purchase, a sale of a package of customer contracts (and the assets needed to fulfil them) that excludes those that are loss-making may be significantly more attractive to purchasers than a full business divestment, whilst still addressing adequately the SLC. This can both reduce composition and purchaser risks and avoid unnecessary referrals and prohibitions, as well as being inherently more proportionate.

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?

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?

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?

Macfarlanes response

We would support the wider use of Monitoring Trustees in connection with the monitoring and enforcement of behavioural remedies, particularly as concerns around the administrative burden for the CMA in overseeing such remedies have been cited as a reason not to encourage or permit the broader use of such remedies.

The appointment of suitably qualified Monitoring Trustees could significantly ease the CMA's operational and resourcing challenges in this regard, whilst minimising the risk of the merged entity failing to comply with its ongoing obligations. In order to do so, however, the Trustees must be sufficiently conversant with the merged entity's business, such that they truly understand the obligations they are overseeing, and must have sufficient autonomy to avoid the need to check points with the CMA on an overly regular basis. This might require the appointment of Trustees with demonstrable sectoral experience or expertise (or, failing that, access to it).

The appointment of such Trustees – in combination with appropriately designed dispute resolution mechanisms – could also ensure that breaches are swiftly addressed, and that remedies have the desired market impact. As noted above, the CMA's new fining powers under the DMCCA should also serve to reduce the risks of the merged entity failing to comply with its ongoing obligations.

Remedy Theme 2: Preserving pro-competitive merger efficiencies and merger benefits

Questions on the CMA's current approach to rivalry enhancing efficiencies (REEs) and relevant customer benefits (RCBs)

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?

Q G.1: Does the CMA's current approach to remedies in phase 1 effectively capture RCBs? If not, how can the current approach be improved?

Q G.2: Does the CMA's current approach to remedies in phase 2 effectively capture RCBs? If not, how can the current approach be improved?

Q G.3: Should the CMA's current approach to the types of evidence for substantiating RCBs be revisited, within the confines of the legislative framework? If so, what types of evidence should the CMA accept in substantiating RCB claims?

Q G.4: How can the CMA best quantify and balance RCBs on the one hand with the SLC's adverse effects on the other?

Q G.5: Are there any barriers to merger parties engaging on RCBs with the CMA throughout the different stages of a case (either at phase 1 or phase 2)?

Macfarlanes response

In our experience, merging parties have tended to refrain from preparing and submitting evidence on REEs and/or RCBs because of the impression (whether warranted or not) that they are unlikely to receive serious consideration.

A greater willingness on the CMA's part to assess such benefits – perhaps also earlier in its process – and weigh them carefully against the harms that may result from the merger, could both encourage more proposals for remedies that preserve those benefits, and reduce the likelihood of potentially transformative transactions being deterred or abandoned. Such an approach would also align the UK merger regime with broader global trends towards more holistic, forward-looking solutions to competition concerns.

Indeed, if there are verifiable efficiencies or relevant customer benefits associated with a merger, a targeted structural or behavioural commitment may well be preferable to outright prohibition – ensuring that consumers and the market collectively reap the positive outcomes from the transaction. Broadening the CMA's evidentiary framework to allow merging parties to substantiate prospective efficiencies with real-world data, economic analysis, and industry expert testimony – supplemented by credible third-party views – could help achieve such outcomes.

Remedy Theme 3: Running an efficient process

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?

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?

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?

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?

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?

Question on any other processual changes

Q K.1: Are there any other ways, not covered by the specific questions above, in which the CMA could improve its remedy processes, at either phase 1 or phase 2?

External support

Q L.1: How should the CMA access external expertise, for example using Monitoring Trustees and/or industry experts in its remedy assessment and implementation, including oversight of divestment sales processes, divestment purchaser suitability assessments, or monitoring of remedy implementation and/or compliance?

Macfarlanes response

We welcome the changes the CMA made to its Phase 2 mergers process last year. By bringing forward discussions of potential remedies and allowing them to take place flexibly and on a without-prejudice basis, the possibility of reaching a proportionate Phase 2 remedies outcome is materially increased. Given we have only recently begun to see the impact of these changes, we would not suggest the CMA revisits the Phase 2 process as part of the present review. Instead, the focus should be on potential amendments to the Phase 1 process, to address the challenges raised by the current timetable, which leaves little time to design and agree novel remedies packages.

In order to be able to assess, negotiate and finalise more complex undertakings-in-lieu, and thereby avoid unnecessary and complex Phase 2 proceedings, more time needs to be made for discussion of remedies in Phase 1. Absent changes to the legislative framework, this can only be achieved by bringing forward such discussions, so that potential remedies can be discussed up front if necessary – including at the pre-notification stage – on a without prejudice basis.

This raises two further considerations. First, should pre-notification discussion of remedies be necessary, those discussions should not be cut short as a result of the CMA's new 40 working-day KPI for pre-notification. Parties should not be pressured to notify and commence the statutory timetable where the overall timeline (including a possible Phase 2 investigation) would be better served by exploring and addressing the CMA's concerns in extended pre-notification. And if, as we understand, parties are to be able to "opt out" of being subject to the CMA's pre-notification KPI, the implications of this should be clear to them. Second, there will need to be greater transparency, and much earlier in the process, regarding the theories of harm the CMA is seriously concerned about. Again, these could be explored at the pre-notification stage, with the formal Phase 1 process primarily being used to test the relevant theories (and potential remedies), rather than to identify new issues.

Aside from concrete changes in procedure, we would urge the CMA to maintain an open-minded position, with a willingness to depart from established practice when exploring novel or atypical remedy proposals with merger parties; recognising the risks that can attach to preventing or discouraging mergers, as well as to allowing them. A modernised, flexible, and proportionate approach to merger remedies should not only encourage investment, innovation, and growth in the UK economy, but also ensure that UK merger enforcement continues to adapt to the evolving nature of global markets.

MACFARLANES LLP

12 May 2025