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Competition & Markets Authority Call for Evidence: Review of merger remedies approach

Response from the In-house Competition Lawyers' Association

The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers with more than 500 members across the globe. ICLA does not represent companies but is made up of individuals who are in-house experts in competition law. This paper represents the position of ICLA's UK branch (with circa 130 members) and does not necessarily represent the views of all its individual members.

ICLA UK welcomes the opportunity to respond to the CMA's call for evidence in respect of its merger remedies review. We have responded to the questions below on a thematic basis (rather than question by question). We look forward to discussing this topic further at the ICLA UK-CMA roundtable on 19 May.

Theme 1: CMA's approach to remedies

Approach to phase 1 remedies; effectiveness and proportionality

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?

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

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?

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

1.1 As a general point, many of our members consider that, given the clear connection between remedies and the concerns that they seek to address, the CMA should not approach its remedies review in isolation, but should be open to feedback as part of this review on its wider approach to handling mergers which might require remedies. In particular, many of our members have found that a significant obstacle to engaging on remedies early with the CMA has been a lack of willingness on the part of case teams to provide a meaningful steer ahead of the State of Play as to which areas are – and are not – likely to be of concern.

1.2 For any review of the CMA's remedy procedures and policies to be effective, it will be critical that case teams are empowered and encouraged to shift to a more active case-management model, providing the parties with meaningful feedback on potential concerns as early as possible in the pre-notification and phase 1 process, both through formal engagement at key milestones and less formal, day-to-day engagement. We fully accept that any such steer would

not be binding, given the case team does not have decision-making powers, but with appropriate caveats early indications of the case team's thinking would still be hugely helpful to build confidence between the case team and the businesses, to enable substantive work on potential remedy design and fruitful remedies discussions. Some of our members have had positive experiences engaging with the European Commission ("EC") in this way, with more open communication enabling parties to identify potential remedies earlier in the process. A shift to more active case-management would be in line both with the 4Ps and with the CMA's commitment in the Mergers Charter to "open and constructive engagement".

1.3 Regular informal meetings with the case team would be hugely helpful in this regard. These could vary on a case-by-case basis but could, for example, be in the form of a weekly or fortnightly call with the case team (with flexibility to ramp up or down as required), with the case team empowered to give steers as to their thinking and the direction of travel. Some of our members have already had recent positive experiences with the CMA being open to such informal contact in MIRs and under the new phase 2 process. Transferring this good practice over to the pre-notification and phase 1 process would build on the progress that has already been made in reforming phase 2, and in the experience of some of our members, would in fact be a return to the old way of working for the CMA.

1.4 Specific feedback from the decision-maker after the Issues Meeting would also be helpful in this regard. The informal meetings described above can serve this purpose. A clearer way to accommodate this would be an additional formal "touchpoint" in the timetable at a reasonable point after the Issues Meeting (e.g. five working days). This meeting might also be a more appropriate forum at which to discuss remedies (on a without prejudice basis), rather than tacking on this discussion to the Issues Meeting – which in the experience of some of our members necessitates a difficult shift for our business colleagues from advocating for the merger to discussing potential remedies, all in the space of a few minutes.

1.5 To allow the CMA to consider more complex remedies at phase 1, the Remedies Guidance should be amended to enable case teams to apply both the "clear cut" and "capable of ready implementation" standards more flexibly.[1] In both cases, the principle of proportionality should be paramount and greater deference should be given to the industry expertise of the parties as to what kind of remedy will work best to allay the CMA's concerns.

1.6 The CMA should also amend the Remedies Guidance to recognise that it is open to the CMA to recommend a remedy that would mitigate an SLC in circumstances where this is "reasonable and practicable". Such circumstances could include the following (amongst others):

(A) Cases where the low bar at which the CMA has a duty to refer to phase 2 has only just been crossed, so that mitigation would produce a more proportionate remedy.

(B) Cases where there are material out-of-market benefits which a mitigation remedy would preserve, but which would be negatively impacted by an alternative remedy applying a stricter standard.

[1] For example, the Remedies Guidance currently simply notes that "*at phase 1, the CMA is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns*" (para 3.48).

1.7 In addition, the CMA should alter its approach to assess the effectiveness and proportionality of potential remedies in parallel, rather than assessing these factors sequentially. This would allow for a more nuanced approach, where case teams could consider the benefits and risks of any potential remedy holistically.

Behavioural remedies

C1: 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?

C2: In what circumstances are behavioural remedies likely to be most appropriate?

C3: 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)?

C4: 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?

C5: Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

C6: 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)?

1.8 Many remedies have both behavioural and structural elements, which makes a binary categorisation unhelpful. In many cases (in particular but by no means limited to cases involving technologies) a remedy which is not fully structural will be most effective at resolving the identified concern.[2] Rather than seeking to categorise remedies as "behavioural" and "structural", and approaching remedies discussions with a preconceived preference for the latter, the CMA should instead consider that in any given case it will have access to a toolbox of potential remedies, from which it can pick and choose which tools alone or in combination will be most suitable to remedy the identified concern. Taking a more holistic approach to remedies in this way would in many cases enable the CMA to identify more directed and impactful remedies than outright divestment.

1.9 The CMA should not limit itself to accepting only certain types of evidence to assess the effectiveness of non-structural remedies, as what constitutes robust evidence will vary widely depending on the form of the proposed remedy. However, moving remedies discussions earlier in the process via the proposed shift in approach set out above would leave more time for the CMA to stress-test early remedies proposals with third parties.

[2] Some of our members urge the CMA to shift away from its perceived allergy to licences and instead take a more flexible and proportionate approach in cases where full divestment of the relevant technology is impractical, but where granting a licence would solve the CMA's concern.

CMA's approach to carve-out divestiture remedies

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

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

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

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?

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)?

1.10 Carve-out divestiture remedies are likely to be appropriate in a broad range of circumstances, and the CMA's scepticism towards them is misplaced. As a general rule, the CMA should have more faith in the M&A process and give due credit to a business' ability to assess whether a due diligence process is sufficiently robust. This is particularly (but not only) the case in an upfront-buyer scenario – i.e. if a named business (or businesses, where different remedy-takers take different aspects of a non-structural remedy) is so confident that a carve-out is viable that they will put their name(s) forward as remedy-taker, this should be sufficient to mitigate any perceived composition risk.

1.11 The CMA could further mitigate any perceived risks by involving Monitoring Trustees ("MTs") earlier on as required, such as during the remedy design process – see further below.

Assessing, monitoring and enforcing remedies

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?

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?

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?

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?

1.12 MTs can vastly reduce the burden of monitoring any ongoing remedies requirements at no direct cost to the CMA, since this cost is borne by the parties.[3] Independent technical experts and consultants (who usually form part of the MTs mandate) exist in every industry, so there should be no barrier to the CMA and the parties accessing the relevant expertise across all industries at an early stage in phase 1 and phase 2 (or even during pre-notification). We consider that it will often be appropriate to engage MTs when a remedy requires ongoing monitoring, given the clear benefits (low cost, expertise) to the CMA in doing so.

1.13 The CMA should also consider placing the monitoring burden on the parties themselves where appropriate, by requiring them to self-monitor and report on compliance. This is standard practice in FDI processes, where senior management are required to provide annual reports and certificates detailing their businesses' compliance, and which in the experience of some of our members can work very well.

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

CMA's approach to rivalry-enhancing efficiencies (REEs) and Relevant Customer Benefits (RCBs)

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

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?

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

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

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?

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?

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?

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

[3] The CMA presumably would need to retain some capacity to read the MT's periodic reports and deal with any issues arising, but we would not expect this to be a significant cost (particularly when compared with the costs of the CMA taking a greater role in monitoring and enforcing remedies itself).

2.1 Despite different legal frameworks, in practice there may be substantial overlap between REEs and RCBs, and so we address them together below.

2.2 In respect of both REEs and RCBs, the CMA has the opportunity to contribute meaningfully to the government's growth agenda, and we are encouraged by the flexibility recently shown by the CMA's approach to the claimed REEs in *Vodafone/Three* to secure significant investment for the UK's mobile network. RCBs however remain a well of untapped potential, where the CMA could have a genuine impact on growth and sustainability (amongst others) across all UK markets, given the significant scope under the existing legislation to take into account out-of-market benefits.

2.3 We note that there is no mention of efficiencies or RCBs in the CMA's current template Merger Notice until section 23 – the last substantive section. This contributes to the sense many of our members have that these points have a tendency to be treated as afterthoughts by the CMA, and that submissions on them are unlikely to move the dial – which in turn has often led to members deprioritising this section in submissions. One impactful, but quick and easy change the CMA could make to ensure that its approach effectively captures potential REEs would be to move this section further up the document, for example to be included in the first substantive section (The Merger Situation) which currently deals with points including "the strategic and economic rationale" for the transaction.[4] Efficiencies are often a key driver of any merger, and shifting this section up to substantiate properly the currently very brief section on merger rationale would enable our businesses to present these important points upfront together with the broader rationale of which they form part, rather than as a defence. We would hope that this would encourage fulsome engagement from the case team, which will be critical to moving away from the current 'afterthought' position (outlined above).

2.4 In terms of evidence, in addition to economic modelling the CMA should be open to receiving qualitative evidence in support of the claimed REE. This might include evidence from industry experts and customers, whom the CMA should consult early on in the process. Some of our members have felt that, at times, comments from customers and competitors have been "cherry picked" to support particular theories of harm, with insufficient weight given to comments made in support of efficiencies (or of the transaction itself).

2.5 Similarly, where the likelihood of claimed efficiencies arising is consistent with merging parties' statements of intent, in line with CMA's commitment in the Mergers Charter to "*engage proactively with an open mind, without prejudice or bias*" the CMA should consider internal documents which evidence the parties' commitment to realise efficiencies with an open mind and without undue scepticism. If the CMA considers internal documents to be of sufficient probative value on which to base an SLC, such documents should also be accepted (or at least considered with an open mind) as the basis for efficiencies.

2.6 If the CMA accepts an REE as "genuine" and the issue is one of proving likelihood, then it should be possible to design appropriate remedies that "lock in" the REE in almost all circumstances. Any such remedy should include measurable milestones which are within the parties' power to achieve (rather than being outcomes-focused). Whilst these could be

[4] The substantive efficiencies section might fit well as a new Section 5, before the section on jurisdiction.

investment milestones (as in *Vodafone/Three*), the CMA should be flexible in approach and not limit itself in this way.

Theme 3: Running an efficient process

Phase 1 and phase 2 remedies process

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

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

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?

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

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

3.1 We reiterate the points made in response to Theme 1, that the key barrier to reaching a phase 1 remedies outcome is the absence of a steer early in the process as to which areas are likely to require a remedy, and a general perception that case teams can be less open to exploratory dialogue with the parties than some members have experienced with, for example, the EC. As set out above, for any review of the CMA's remedy procedures and policies to be effective, it will be critical that case teams are empowered and encouraged to shift to a more active case-management model, akin to that deployed by the EC. This is somewhat less of an issue at phase 2, where in our experience the CMA's recent reforms have gone some way to facilitating early engagement and providing additional opportunities for an interactive dialogue on remedies, but it remains a flaw of the phase 1 remedies process.[5]

3.2 Earlier and more substantive access to the decision-maker, when requested by the parties, would likely also help with this. This is especially the case at the start of the merger process, possibly even in pre-notification, when "teach-ins" and introductions to the arrangements are important for decision-makers and CMA staff, as well as at crucial points when decisions in relation to relevant theories of harm and remedies are made.

3.3 Certain members have also found that introducing new individuals from the RBFA team to take forwards discussions on remedies can lead to inefficiencies within a compressed timetable, as that team is required very quickly to get up to speed with the substantive issues to be able to contribute meaningfully to designing the remedy. Whilst we can see the merit of a specialised remedies team for monitoring and enforcement, the remedy design process might better sit with the case team, who are already fully apprised of the concerns (that they have identified) and with whom the parties will have built a rapport. Delaying the introduction of the remedies team

[5] Some of our members have also noted that even under the new phase 2 process issues of inadequate engagement can still arise at the implementation stage, and it is critical that the decision-maker remains engaged at this point.

until after the remedies themselves have been agreed may well lead to a greater number of successful remedies outcomes at both phase 1 and phase 2.

Working with other regulators

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?

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?

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?

3.4 It is extremely important for businesses that agencies cooperate on cross-border remedies in global deals. Our businesses are in most cases happy to provide waivers to facilitate engagement, but such engagement must be both substantive (covering the agencies' developing thinking on all aspects of the case) and regular for it to be meaningful.

3.5 In terms of whether the CMA should make more use of making recommendations to others to take action to remedy an SLC, there may be circumstances where a sector regulator might be well placed to take the relevant action, or where a remedy that the parties have already offered to a sector regulator is sufficient to dispel any competition concerns. In both cases the CMA should avoid creating a situation of "dual regulation". To facilitate this, the CMA should consult any relevant government departments or sector regulators early in the process (ideally as early as pre-notification, or otherwise at the start of phase 1). The recent Vodafone/Three merger assessment process is a good example of this practice.