AlixPartners

1 Introduction

1.1 We welcome the opportunity to respond to the CMA's Call for Evidence document regarding the Merger Remedies Review ('Mergers Remedies Review Document').[1] We advise clients on a range of competition economics matters, including in the context of merger investigations in the UK and worldwide. Our recent experience of merger cases where more complex remedies were accepted includes acting as economic advisers to a third party (Virgin Media O2) during the CMA's assessment of the merger between Vodafone and Three.[2]

1.2 The focus of this response is mainly on the some of the substantive issues set out in themes 1 and 2 of the Mergers Remedies Review Document.[3] We think the current review presents an opportunity to ensure that all aspects of the CMA's remedies process achieve the objectives of increasing growth and productivity through preserving competition. The relationship between competition policy and growth and competitiveness has been the subject of recent in-depth analysis and review in the UK and Europe. In particular, the Draghi report on The future of European competitiveness of September 2024 has emphasised the importance of ensuring that competition policy protects investment and innovation, including that there should be innovation defence where a merger increases the ability and incentives to innovate.[4] In this submission we highlight some aspects of the CMA's approach that in our view can be improved to achieve this goal.

2 Theme 1: CMA's approach to remedies

2.1 The Merger Remedies Review Document invites comments on a range of topics under Theme 1. However, within this Theme, we feel we are best placed to provide views in response to consideration of structural and behavioural remedies, and in particular 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?"*[5] As a starting point, we recognise that there is some merit in retaining a level of distinction between structural and behavioural remedies. It is useful to distinguish between those remedies that have an effect on the structure of the market, and those that aim to alter the behaviour of market participants. However, we think that this distinction may not be helpful in distinguishing between more or less effective remedies.

2.2 To be more precise, a distinction between behavioural and structural remedies may be helpful in guiding the assessment of effectiveness of remedies in some industries. Namely structural remedies may tend to be more appropriate in markets with well-defined goods and services that are sold by firms, typically with important production assets and that mainly compete on price. In other words, in those industries where the structure of the market is a good indicator of competitive incentives. In these markets, structural remedies are likely to be clear cut and capable

[1] Merger Remedies Review - Call for Evidence document ('Mergers Remedies Review Document'), CMA, 2025.
[2] Vodafone / CK Hutchison JV merger inquiry - GOV.UK, CMA, 2025.
[3] Remedy Theme 1: CMA's Approach to Remedies and Remedy Theme 2: Preserving Pro-Competitive Merger Efficiencies and Merger Benefits, Mergers Remedies Review Document, CMA, 2025.
[4] See the Draghi report, page 299.
[5] Call for evidence, p. 14, CMA, 2025.

of ready implementation, , such that they are suitable phase 1 remedies, as they may act on the market features that more directly affect firms' incentives to compete, with more competitors increasing firms' incentives to set lower prices by increasing the risk of them losing business if they were to set higher prices.

2.3 However, many of the markets that competition authorities currently deal with, are different from these. Firms may compete by innovating, and price is only part of a set of competitive parameters. In such markets, the structure of the market at the time of a merger may not be a good guide to competitive incentives. Indeed, in some R&D intensive industries a high level of concentration is a result (and an enabler of) intense competition to innovate.[6] In such markets, there may be other options to ensure that a merger does not result in a lessening of competition, beyond those directly affecting structure. These may include those remedies that the CMA refers to as "quasi-structural", such as granting IP licences or divesting scarce airport landing slots.[7] Such quasi-structural remedies can be fully effective where they enable a new firm(s) to enter the market or materially expand, thereby offsetting any SLC.

2.4 In our view, a distinction that works across all markets and that is helpful in guiding the remedies process, at least when it comes to considering the remedies' effectiveness, is one that is based on whether the remedy acts on:

(a) **Firms' incentives to compete**: directly reducing or eliminating any lessening of competition created by the merger; or on

(b) **The outcomes of the competitive process**: controlling market outcomes, such as prices or the level of investment.

2.5 In the current guidance all structural remedies are seen as falling in the former category, [8] as the purpose of a structural remedy is to divest a business (including the core underlying assets) in order to bolster the competitive constraints placed on the merged entity and therefore the incentives the merged entity has to e.g., improve its products or reduce prices. Some behavioural remedies (so called "Controlling Measures") fall under the latter category. We think that, given the often complex nature of markets under scrutiny, it would be more helpful to use more explicitly this distinction and acknowledge that there are a range of structural and non-structural remedies that can address firms' incentives, all potentially effective and that deserve to be considered on a case-by-case basis. Conversely, emphasising the structural nature of some remedies, risks overlooking some potentially effective non-structural or quasi structural remedies.

2.6 One simple way of achieving this would be to explicitly adopt the current distinction used for behavioural remedies ("Enabling Measures" vs "Controlling Measures") for the whole spectrum of remedies by seeing structural remedies as a type of "Enabling Measure". The distinction between structural and behavioural remedies could still be retained and would be useful for considering the likely ease of implementation.

2.7 This approach seems consistent with CMA practice of considering a range of potentially complementary remedy options. As advisers to the VM/O2, we welcomed the CMA's approach in accepting a remedies package capable of disciplining the incentives of the merging parties, and where appropriate controlling market outcomes (whether temporarily if any substantial lessening

[6] In fact, R&D expenditure may be an endogenous sunk cost that increases as market size grows, as emphasised by for example in Sutton, John, *Technology and Market Structure: Theory and History*, MIT Press, 1998.
[7] Merger remedies, para 36, CMA, 2018.
[8] Merger remedies, para 3.5 (a), CMA, 2018.

of competition ("SLC") is expected to be temporary or on an on-going basis if divestment would either be ineffective or disproportionate), in order to preserve the procompetitive effects and efficiencies of the merger.

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

3.1 We very much welcome the CMA's review of its approach in relation to pro-competitive efficiencies and merger benefits. We think this presents an important opportunity to ensure the merger process is appropriate for reviewing mergers in a way that fosters competition and innovation in markets. In this context, the CMA rightly states that mergers can lead to more innovation and greater and more efficient R&D activity.[9]

3.2 Among the questions asked by the CMA are Q F.1 *"what evidence should the CMA look for to support the materiality and likelihood of claimed rivalry enhancing efficiencies"* and Q F.4 *"what more can the CMA do to ensure that its approach to merger remedies encourages pro-competitive investment"*.

3.3 As the CMA is aware there are now more mergers where innovation theories of harm are considered[10] and form the basis for an SLC finding. This is also the case in the EU and reflects the changing nature of competition in many markets as well as the importance rightly placed by regulators on preserving incentives to invest.

3.4 At present, however, there is in our view a potential imbalance in the way the evidence is considered. While evidence of a potential SLC via a reduction in innovation is considered in the competitive assessment, the evidence that should point to the merger leading to greater and more efficient R&D activity could be considered in the context of Relevant Customer Benefits (RCB). While this can work as a process in some cases where the link between the merger and future innovation is very clear, it is not likely to work in other cases where the innovation process and its links to the merger are much less clear.

3.5 In fact, even when innovation processes are relatively well defined and understood, the information relating to innovation processes is typically considered to be of the most strategically significant nature and hence in our experience kept largely confidential from the other merging party even through a merger process. It is difficult therefore for the parties to present very detailed plans for how the merger will change innovation processes. This is not to say that efficiency and effectiveness of innovation are not considered and indeed key to many deals. But the level of information available risks making the parties submissions' fall short of the bar expected for the consideration of RCB.

3.6 Instead, the CMA could explicitly recognise that innovations are rivalry enhancing in the same way as a cost reduction is and consider the whole question of whether the merger is likely to increase or reduce innovation wholistically in the competitive assessment.

3.7 This in our view would also improve the consideration of some key pieces of evidence for innovation theories of harm, such as R&D expenditure. At the moment, evidence of reduced R&D

[9] Call for evidence, para 49, CMA, 2025

[10] This has particularly applied in certain recent digital and pharma cases, but in 2013 the CAT upheld the Competition Commission's finding that the AkzoNobel and Metlac merger would have harmed competition in innovation.

expenditure is widely used as a sign of a potential reduction in incentives to invest caused by the merger. This is possible of course, but R&D expenditure also represents the **cost** of innovation, and a pro-competitive merger in an intensely competitive market would be expected to try to be more effective and reduce R&D expenditure while still being innovative. In fact, in some cases[11] even the mere "redirection" of R&D spend was taken by the CMA as a sign of possible adverse effects of the merger. It seems odd to not consider the obvious potentially pro-competitive effects of a cost reduction in R&D and its redirection in other (presumably less competitive) markets within the same competitive assessment, and indeed to require from the parties a higher evidentiary standard in submissions that highlight the pro-competitive effects on innovation. The CMA could prevent this by more explicitly stating that it will consider evidence on positive effects of a merger on innovation in the context of the competitive assessment.

4 Theme 3: Running an efficient process

4.1 There are two points we would like to make about process for setting out remedies. The first relates to the differences between the EC and CMA in its approach to market testing, at least at Phase 1 of the process (and as such is relevant to consultations questions Q H.1 – H.2). To better implement the broad principles we set out above, we would encourage the CMA to think about its approach to market testing. Currently, as part of the Undertakings in Lieu (UILs) process at Phase 1, the CMA may be more passive in receiving feedback from third parties relative to the approach taken by the EC. This varies on a case-by-case basis and is a matter of degree.

4.2 In particular, the CMA publishes proposed UILs by the Parties and then invites comment from third parties. This contrasts the EC's current approach which seeks to proactively take a summary of proposed remedies and provide a targeted questionnaire to third parties encouraging comment. The European Commission's Merger Manual of Procedure of November 2024 specifically states that normally a market test will be carried out unless the commitments are clearly insufficient to address the competition concerns, with questionnaires being sent to all customers and competitors and third parties that have been involved in the market investigation, and third parties may also be consulted. Indeed, this difference in process may be a current obstacle to the CMA in pursuing remedies which are more nuanced in preserving efficiencies (or indeed identifying gaps in remedies proposals), whilst at the same time targeting the incentives of the merging parties effectively.

4.3 Finally, as concerns Q K.1 and Q L.1, whilst the economic coherence and incentive compatibility constraints of a remedy package are important, we also acknowledge that such remedies have to be practically implemented as a course of business. In this respect, we encourage the CMA to do more in increasing its capabilities in attracting business and strategic insight through the Strategic Business Analysis function. In particular, sector-specific specialists may provide valuable advice on the implementation of remedies.

[11] For example *Illumina/PacBio*: Illumina Pacbio: Provisional findings report, para. 8.334, CMA, 2019.