CMA review of merger remedies approach

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Oxera response to the CMA's Call for Evidence

12 May 2025

1 Introduction

Oxera welcomes the CMA's call for evidence on merger remedies. There is clearly significant scope to improve the way in which potential remedies are assessed by the CMA. A more balanced and flexible approach is likely to reduce the number of merger prohibitions in cases where, with suitable remedies in place, the merger would be benign or even procompetitive.

In this response we have not attempted to answer all of the questions set out in the CMA's Call for Evidence document, but have selected specific questions on which we are well placed to comment from an economist perspective. The response has been informed by discussions with the CMA and other economist firms at the roundtable session held on 30 April 2025.

The submission follows the structure of the Call for Evidence.

Remedy theme 1: the CMA's approach to remedies

Questions on the CMA's approach to behavioural remedies

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

Behavioural remedies are likely to be most appropriate in a number of circumstances. These include the following.

- Situations in which structural remedies short of prohibition are not possible, or where they would risk undermining aspects of the merger that would benefit consumers.
- Situations in which a behavioural remedy would effectively target the source of the substantial lessening of competition (SLC) in a way that is less disruptive than a divestment remedy.[1]
- Situations where the CMA concludes that the merger would give the merged entity the ability and incentive to foreclose a third party, and that this would lead to an SLC. If the ability to foreclose can be removed by binding supply or access contracts between the merged entity and relevant third parties, this may provide a more efficient solution than requiring divestments. However, in order for the remedy to be effective, the CMA would need to be satisfied that the problem of incomplete contracts will not lead to the merged entity finding ways to partially or fully foreclose, as the incentive to foreclose would remain.

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

[1] A potential example of this is the acquisition of the dairy operations of Dairy Crest Group plc by Müller UK & Ireland Group LLP, which was assessed by the CMA in 2015. In that case, to avoid a Phase 2 reference Müller offered to supply a certain volume of fresh milk to a third-party dairy processor via a tolling contract. This allowed the independent fresh milk capacity that would have been supplied by Dairy Crest absent the merger to be preserved without the need for divestments.

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)?

When deciding whether to accept behavioural remedies, it would be sensible to engage with the merging parties and interested third parties, particularly those that are likely to be directly affected by the theory of harm underlying the SLC, and that would therefore benefit directly from the remedy. Depending on the circumstances, it may be possible in some cases to trial the remedy in advance of it being accepted—for example, in fast-moving digital markets where elements of the offer can be changed quickly and for only a subset of customers, allowing A/B testing of the impact. In other cases, the CMA could look at outcomes in previous UK cases, and those in other jurisdictions, where similar remedies have been implemented.

Related to this, it may also make sense for the CMA to put in place processes to capture evidence on the longer-term outcomes of the remedies that it has accepted (this applies to behavioural as well as structural remedies). The evidence can then be used to assess the effectiveness of particular types of remedy for future cases. Following the 2021 Funerals Market Investigation, the CMA imposed a monitoring remedy on funeral directors, forcing them to provide regular updates to the CMA with information on the prices and volumes of funerals. This has allowed the CMA to monitor the evolution of the market following the investigation, including the effect of the remedies that the CMA imposed.

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?

The CMA has limited resources, and these should be spent according to where they can have the greatest impact. In the past, the monitoring and enforcement of merger remedies has not typically been seen as high priority by the CMA. However, the evaluation of outcomes is one of the most important aspects of the CMA's work. Without good evidence on which remedies are effective and which are not, the CMA will

struggle to learn from mistakes and fail to build on successes. Therefore, there could be significant benefits from the CMA taking a greater role in the long-term monitoring and enforcement of remedies. To preserve its limited resources, the CMA may be able to shift a significant part of the monitoring burden to merging parties and/or monitoring trustees, but the CMA itself should take a keen interest in how well remedies are working, so that it can learn for future cases.

Remedy theme 2: preserving procompetitive merger efficiencies and merger benefits

Questions on the CMA's current approach to rivalry enhancing efficiencies

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

The CMA should consider all types of evidence when attempting to understand the materiality and likelihood of claimed efficiencies. These will differ from case to case. In some cases there may be relevant internal documents or analyses, particularly where the transaction is linked to a restructuring or reorganisation of the firms involved.[2] However, it is often the case that internal documents do not focus directly on the customer benefits of a transaction, as the main audience is the shareholders who need to approve the transaction. Therefore, an absence of internal documents and analyses focusing on customer benefits should not be taken as evidence that such benefits do not exist. The CMA should therefore take an open-minded approach to evidence on efficiencies that has been produced in contemplation of the transaction being notified to the relevant competition authorities.

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?

The CMA's current approach to accepting rivalry-enhancing efficiencies and relevant customer benefits (RCBs) typically puts the evidential burden on the merging parties. For example, in relation to RCBs, paragraph 3.20 of the current Remedies Guidance states: 'The merger

[2] See, for example, *Arçelik/Whirlpool*, which was assessed by the CMA in 2024.

parties will be expected to provide convincing evidence regarding the nature and scale of RCBs that they claim to result from the merger and to demonstrate that these fall within the Act's definition of such benefits.'

Although merging parties will often have better access to information than the CMA about the efficiencies and/or RCBs arising from a merger, they may not have the understanding or internal resources to provide evidence of the type and quality required by the CMA. This is particularly the case for mergers between smaller or less well-resourced firms. Putting the evidential burden on the parties can lead to situations in which overall benign or even procompetitive mergers are either prohibited, or abandoned in the face of remedy requirements from the CMA that undermine the value of the acquisition for shareholders.

In order to fulfil its mandate of promoting competitive markets, the CMA should take a proactive interest in exploring and understanding potential efficiencies and RCBs. Particular efforts will be required to overcome the current 'chicken and egg' situation, where merging parties and their advisers are typically reluctant to invest in producing evidence on efficiencies because the number of cases in which such evidence has been accepted is extremely small and the number of cases in which it has been determinative is even smaller.

Questions on the CMA's current approach to RCBs

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?

As noted above in relation to rivalry-enhancing efficiencies, in order to fulfil its mandate of promoting competition, the CMA should take more of a proactive role in exploring RCBs, as this will lead to better outcomes than the current situation where the burden is on the merging parties.

On the specific issue of out-of-market RCBs, where the benefit of the transaction falls to customers in a different market to the one facing an SLC, the CMA may need to re-think its approach to merger assessment more widely. The CMA's current practice involves focusing information-

gathering and assessment on markets where there is scope for competition to be lost. This can lead to situations in which merger benefits that apply to other parts of the merging parties' activities are not considered. For example, if the merging parties sell complementary products across the UK, which could lead to lower prices post merger due to Cournot complementarity, but also sell competing products in one part of the UK, the focus of the CMA's investigation would typically be on the one part of the UK where an SLC is possible. Information would not be gathered about the potential positive impact of the acquisition elsewhere in the UK.

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?

Wherever possible, the CMA should seek to quantify the adverse effects of the SLC and relevant RCBs in a way that allows them to be compared—for example, converting the SLC and RCBs into monetary amounts. This is not a straightforward exercise and is likely to involve significant measurement error. However, the alternative, which involves a vague qualitative comparison, is likely to be even less satisfactory. In cases where the RCB involves lower prices in a market other than the one facing the SLC, the CMA could seek to estimate the magnitude of the price increases and decreases and multiply these by the number of affected customers in each market. In cases where the RCB relates to higher quality or greater choice, robust research techniques (such as conjoint surveys) are available that allow a monetary value to be placed on non-price dimensions of a product or service. The CMA has used conjoint surveys in previous merger cases, including *Amazon/Deliveroo*. In cases where the RCB relates to increased innovation, this would typically be harder to quantify. However the CMA could attempt to assess the likelihood of innovation happening and the potential benefits arising from it.