ADDLESHAW GODDARD

AG RESPONSE TO CMA'S MERGER REMEDIES REVIEW CALL FOR EVIDENCE

12 MAY 2025

1 Introduction and general comments

1.1 Addleshaw Goddard LLP (**AG**) is grateful for the opportunity to share its views on the CMA's approach to merger remedies as part of the CMA's call for evidence dated 12 March 2025 (**Call for Evidence**). AG is an international law firm, with competition experts located in multiple jurisdictions including France, Germany, Ireland, Poland, Spain and the UK. AG's Competition and Regulatory team is made up of individuals with extensive expertise in UK, EU and global merger control, including both for the merging parties and third-party competitors and customers. We are therefore well placed to comment on how the CMA can make sure it runs an efficient merger review process, including by introducing changes to its approach which embody the "4Ps" principles of improving pace, predictability, proportionality and process.

1.2 Throughout our response, we have been mindful to limit our suggestions to options which would not involve making any changes to existing statutory provisions, as requested by the CMA in the Call for Evidence. To our minds, the key levers available under the existing merger remedies framework (many of which are already identified in the CMA's consultation questions) are:

(a) the interpretation of key concepts under the Enterprise Act 2002 including the "mitigation" (rather than outright removal) of substantial lessening of competition (**SLC**) and assessment of "relevant customer benefits" (**RCBs**);

(b) the CMA's own risk positioning when assessing the suitability of remedies and considering checks and balances for their successful implementation (including through external resourcing), and how this is reflected in the CMA's guidance;

(c) the extent to which the question of proportionality is embedded within the CMA's remedies assessment itself; and

(d) how the CMA communicates its approach to merging parties and the wider markets.

1.3 In the rest of this response, we offer comments and suggestions following the order of the CMA's Call for Evidence questions. We hope the CMA finds our response useful and look forward to engaging with the remaining consultation steps due to follow after this Call for Evidence.

1.4 Finally, we confirm that this submission is not confidential and may be published on the CMA's website should the CMA wish to do so.

2 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?

2.1 The CMA's current guidance on Phase 1 remedies allows for very little flexibility, particularly in relation the CMA's requirement that remedies are "***clear-cut***". As a consequence, the current guidance rules out remedies at Phase 1 that might ***mitigate*** (rather than remove) the SLC. Whilst it is understood that this standard stems from the risk position adopted by the CMA at Phase 1 – namely that in order to accept undertakings in lieu of a Phase 2 reference (**UILs**), the CMA must be confident that all of the potential competition concerns would be resolved without the need for further investigation – this risk position goes further than the underlying legislation which provides for the possibility of a Phase 1 remedy which ***mitigates*** rather than removes the SLC.

2.2 The CMA's current approach, coupled with the limited time allowed for discussing remedies with the case team at Phase 1 within the statutory timetable, has meant that, in practice, merging parties shy away from entertaining or proposing remedies that fall short of the CMA's "*clear-cut*" standard.

2.3 If the CMA wishes to move the dial and open the door to a wider range of possible remedies at Phase 1, it would need to adjust its risk position and provide clear guidance on the practicalities of such a new approach. This in turn would need to include guidance on how the CMA will interpret "mitigation" in the context of the legislation. For example, does "mitigation" encompass remedies that reduce the increment rather than remove it? Or does it allow for a higher potential failure risk inherent in the remedy? Depending on how that standard is expressed, might it open the door a little wider for behavioural remedies and carve-out remedies at Phase 1? Does the concept of proportionality also enable the CMA to accept a greater degree of risk at Phase 1 where the effects of the SLC are relatively less acute or wide ranging? A clearer articulation of the factors (with examples) of the factors that would go to assessing potential remedies should open an avenue to a wider range of credible proposals from merging parties.

2.4 Should the CMA wish to take on a greater degree of risk at Phase 1, the CMA may find it useful to build up a database recording more complex remedies proved to be effective over time at Phase 1 as well as detailed rationale for rejecting remedies at Phase 1. As a starting point, the CMA could interrogate remedies agreed and found to be effective at Phase 2 and these could provide a template for remedies in the same or similar markets at Phase 1. This in effect happens informally – for example, experience in local market divestments built in Phase 2 cases in certain industries has made it easier and reduced the risk profile of deploying such remedies in Phase 1. Drawing out such practical experience in guidance, setting out a full range of remedies experiences, will help merging parties shape and assess their options for realistic Phase 1 remedies.

2.5 Ultimately, the CMA will need to get comfortable that a remedy accepted at Phase 1 mitigates the SLC with sufficient certainty to relieve the CMA from its duty to refer the transaction for Phase 2 assessment.

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?

2.6 In most cases, complex remedies will likely require longer to analyse and consider fully, and early engagement therefore helps mitigate time pressures within Phase 1. The CMA's current guidance makes it clear that merging parties are encouraged to discuss remedies with the case team at an early stage, including in pre-notification. Whilst we understand that there are cases where merging parties have tabled remedies and the case has subsequently been cleared at Phase 1, we would encourage the CMA to consider what further reassurance the CMA could give merging parties that early engagement on remedies will not prejudice CMA thinking (consciously or subconsciously) on the likelihood of an SLC. For example, the publication of statistics might help if these showed the number of cases each year in which the merging parties tabled remedies during Phase 1 and which were subsequently cleared at Phase 1 without remedies.

2.7 Second, it may help to allow for a more iterative approach at Phase 1, notwithstanding the time constraints imposed by Phase 1 statutory deadlines, including early signalling of views as to whether remedies may be required so parties are appropriately prompted to give consideration to remedies. We believe that even during the Phase 1 process, there would be scope and time for wider discussions on changes that could be made to proposed remedies to make them acceptable at Phase 1. This is prohibited by the CMA's current guidance with respect to formally tabled UILs which states that "*given that the period for making a UILs offer is short, merger parties should not expect to engage in iterative discussions or negotiations with the CMA*", but presents potential inconsistency with the notion that potential remedies for emerging UILs could be discussed iteratively.

2.8 Lastly, we recognise that more complex remedies may be harder to market test, not least because it can be harder for third parties to understand how the proposed remedies will work in practice and whether they will be effective. With this in mind, we would suggest the CMA explores whether there is scope for earlier engagement with the market that may mitigate this risk to some degree, whilst merging parties remain motivated to secure clearance for their merger. Third party engagement once a UIL is accepted in principle may leave key risks of a novel remedy proposal insufficiently considered.

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?

2.9 The CMA's current guidance requires the CMA to first assess effectiveness (will the remedy address the SLC to a high degree of certainty?) and second, to consider proportionality (is the remedy disproportionate to the SLC?). At Phase 1, the "*clear-cut*" standard provides little flexibility for the CMA to consider less intrusive remedies which may well be proportionate to the SLC. Even at Phase 2, it seems to us that the CMA rarely "grades" the relative severity of the SLC and as such, rarely considers whether a less intrusive remedy might be "good enough".

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)?

2.10 Whether a remedy is "effective and proportionate" will depend in large part on the transaction and market context. In our view, the classification of remedies as either "structural" or "behavioural" is too blunt a distinction and has led to the perception that all types of behavioural remedies will simply not be accepted at Phase 1 and only accepted at Phase 2 in very limited circumstances. Instead, we suggest the CMA simply lists the factors it will consider when reviewing a proposed remedy, regardless of whether it is considered "behavioural" or "structural".

2.11 The CMA's current guidance states at paragraph 3.48 that behavioural remedies will only be acceptable if "*divestiture and/or prohibition is not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC*". This is not helpful; virtually all divestment remedies are feasible if the price is right, and the CMA's guidance makes it clear that loss of target value is not a relevant cost. This statement therefore sets the bar too high and provides the CMA with an automatic justification to reject proposed behavioural remedies without proper consideration. Our general observation is that once the CMA has identified a possible SLC, it is rare for the costs of a divestment remedy to be weighed against the scale of the adverse effects of the SLC – i.e., as noted above, proportionality is rarely part of the remedy assessment.

2.12 A large part of the CMA's reluctance to consider behavioural remedies stems from concerns about difficulties in design, implementation and monitoring, which are real, but not insurmountable. We would encourage the CMA to explore various options that might help. With regard to design and implementation, we would suggest that more detailed guidance is provided on what the CMA would expect to see as standard in, for example, IP licences, supply or access agreements. We have welcomed our experiences of third party engagement in recent Phase 2 cases as a positive development and we would encourage the CMA to build on this, with early and full engagement likely to result in a remedy that the CMA and market participants can take confidence from. The approach of relatively light touch, less formal, but regular engagement strikes the right balance in terms of resource demands on third parties whilst providing rich insight.

2.13 With regard to monitoring, we would encourage the CMA to explore options including appropriately drafted compliance statements, third-party monitoring trustees (at the merging parties' expense) for as long as deemed appropriate. This could extend, where considered necessary, to a mini annual audit to be carried out by the monitoring trustee.

2.14 We also note that in the recent *Vodafone/ Three* JV Phase 2 clearance, a key factor for the CMA to accept behavioural remedies was that the sector in question benefited from ex ante regulator oversight (Ofcom) which the CMA could lean on for the purpose of monitoring compliance. It would be helpful for the CMA to explore the potential for wider application of this solution to other regulated sectors, and to communicate its approach going forward in its guidance documents. In particular, would the CMA consider all other UK concurrent regulators as suitable candidates to support the monitoring of remedies? Might the extent of sector regulation entrusted to them affect their suitability to act as monitoring agents for the CMA, for example if their ex ante powers do not include price regulation (e.g. the Financial Conduct Authority)?

2.15 Separately, consideration would need to be given to the ability of the merging parties to circumvent remedies without detection, but this could be mitigated through the appointment of a monitoring trustee with detailed industry knowledge (or the cooperation of a sectoral regulator where one exists and can appropriately act within its powers). Competitors or customers who wish to flag circumvention/ non-compliance could do so via a monitoring trustee in order to preserve confidentiality. We would also encourage the CMA to look to other authorities e.g., the Investment Security Unit for how they propose to monitor ongoing remedies in an NSIA context.

2.16 We note that there will inevitably be a degree of upfront uncertainty with behavioural remedies as to whether they will be effective, and the potential to overlook a material factor in the initial design – whether in effectiveness or practicability. To mitigate these risks, the CMA could explore the following avenues:

(a) including "reopeners" in the Final Order that allow it to alter the remedies if found not to be working in certain respects at specific points in time;

(b) encouraging the inclusion of outcome and timing specifications in the drafting of undertakings, so as to facilitate the CMA's reliance on section 75 of the Enterprise Act 2002 where it appears that the undertakings are not being or will not be "*fulfilled*". This approach would enable the CMA to more easily intervene and amend original undertakings as appropriate in circumstances where the merging parties have carried out the measures set out in the Final Order but the expected result did not materialise. In particular, a plain reading of "*not* […] *fulfilled*" suggests that the scope is broader than non-compliance. This avenue would rely on the merging parties being amenable to initial undertakings being revisited in future (failing this, the CMA would need to enforce its order through the courts) – the CMA might explore securing this as part of the original undertakings to mitigate the risk; or

(c) to a lesser extent, interpreting the concept of "*change in circumstances*" under section 92(2)(b) of the Enterprise Act 2002 more liberally, so as to include the CMA gaining an understanding that a particular remedy is not promoting the desired outcome. In this regard, we note that the CMA has in the past considered similar powers in relation to market investigations to limit its range of action, and that this led to reforms under the Digital Markets, Competition and Consumers Act 2024 – specifically sections 138 (power to conduct remedy trials) and 139 (duty to monitor undertakings and orders). In light of this, the CMA may find it difficult to follow a different interpretation of section 92(2)(b) after having gone through the process of making legislative changes in a market investigations context.

2.17 We see no reason to take a materially different substantive approach to behavioural remedies at Phase 1 and Phase 2, particularly if the CMA is willing to: (i) accept a greater degree of risk at Phase 1 and to explore remedies that "mitigate" the risk; and (ii) adopt a more iterative approach at Phase 1.

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)?

2.18 In a similar vein to the comments made above in relation to behavioural remedies, we would urge the CMA to consider changes to practice and procedure that might allow carve-out remedies to be given proper consideration at Phase 1, and broader consideration at Phase 2, so as to allow for remedies that at least "mitigate" the SLC. In this regard, we commend the CMA for including questions relating to carve-out remedies as part of this Call for Evidence.

2.19 A number of the complexities of carve-out remedies are common across cases including, ensuring sufficient contracts and/ or assets are included to ensure a viable business; and the need for an ongoing relationship with the Seller (e.g., transition service agreements or IP licences). The CMA should not shy away from these complexities but rather build up a bank of expertise as to what works and what does not work, and draw on relevant industry expertise where it is available.

2.20 There is clearly a difference between a case where existing competitors are interested in acquiring assets/ production lines/ contracts/ employees and can use these to strengthen their existing business, and a case where only new entrants express any interest. With the latter, there is clearly a greater risk that the divestment package is not sufficient to enable a new entrant to impose a competitive constraint within a short period of time. This increased risk should not, however, automatically necessitate ruling out a new entrant purchaser, particularly, where the risk accepted by the CMA is proportionate to the size of effects of the SLC and where that entrant has complementary expertise and resources that might mitigate.

2.21 We also recognise the risk that robust due diligence can be more challenging in carve-out divestiture remedies. However, due diligence in assets deals is common practice. As noted above, the CMA will have built up expertise over time as to what information is required, what works and what falls short within the constraints of the CMA's timetable. This expertise could be used to prepare pro forma Seller due diligence questionnaires as templates for the merging parties and facilitate effective processes.

2.22 As in the case of behavioural remedies, clear early signalling to merging parties to encourage early exploration of more complex carve outs would facilitate due diligence and more robust remedies.

2.23 Looking at other jurisdictions, it is noteworthy that carve-out remedies are among those being routinely accepted at by the EC at Phase 1, across a variety of industry sectors. Recent examples include: Case M.11253 *Safran / Collins* (2025), Case M.10507 *Hitachi Rail / Ground Transportation Systems Business of Thales* (2023), Case M.10560 *Sika / MBCC Group* (2023), Case M.9686 *Mitsui / Belchim Crop Protection* (2021) and Case M.9554 *Elanco Animal Health / Bayer Animal Health Division* (2020).

2.24 Lastly, by way of more general comment in relation to divestment remedies (including carve-outs), the standard set for buyer approvals ought to be considered in light of the industry in question. Some industries will typically require a high degree of purchaser sophistication – as evidenced by the failed remedy of selling a number of Netto grocery stores to Haldanes in the OFT's *Asda/ Netto* 2011 decision (where Haldanes faced financial difficulties shortly after purchasing the stores and went into administration in June 2011).[1] But in other areas, such as the pharmacy sector, sole trading families are the norm, meaning that a more tailored approach could be taken in these circumstances.

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?

2.25 It is clear to us that should the CMA make changes to its approach and process to enable it to be less risk adverse, then more resource will be required, and, in all likelihood, this will need to be a combination of internal and external resource. The merging parties will typically be incentivised to pay for external monitoring resource where this is a condition to clearing the transaction and the CMA should certainly make the most of this incentive in circumstances where relying on an external monitoring trustee is deemed appropriate. In order to ensure that monitoring trustees have deep industry experience, the CMA could seek to identify and retain individuals with industry expertise but with no ongoing roles for third party competitors.

2.26 We would also encourage the CMA to engage with other competition authorities within the International Competition Network on their reliance on monitoring trustees. For example, we are aware that:

(a) in February 2025, the European Commission published an ex post study on the effectiveness of antitrust remedies, which recommended, among other things, making

[1] See archived press commentary from 9 February 2012 (accessed on 12 May 2025), *Ugo sold to Poundstretcher in pre-pack deal*: https://web.archive.org/web/20160304031825/https://www.retailgazette.co.uk/blog/2012/02/22311-ugo-sold-to-poundstretcher-in-prepack-deal/.

more systematic use of monitoring trustees (as well as scrapping the preferential hierarchy between structural and behavioural remedies);[2] and

(b) the French Autorité de la Concurrence recently carried out a consultation on its use of monitoring trustees, both in the context of structural and behavioural merger remedies. The consultation closed in April 2025 and the outcome is pending.[3]

2.27 As mentioned in relation to Section C above, the CMA relied on the compliance monitoring capabilities of concurrent competition and ex ante sector regulator Ofcom in the recent *Vodafone/ Three* JV Phase 2 clearance subject to conditions. This is another way in which the CMA can make sure it has access to the right expertise to assess complex remedies, at least in regulated sectors. Should the CMA explore this option for all UK regulated sectors, we would urge the CMA to transparently set out its approach in its guidance documents. In particular, it would be useful for businesses and their advisers to have visibility over the extent to which each of the various sector regulators would be deemed suitable as monitoring agents for the CMA, and what (if any) characteristics of the relevant sector regulation model in place might affect this view.

2.28 The CMA should also continue to explore use cases for AI tools (for example, web scraping to check transparency requirements are being complied with). We note that the CMA is already making use of AI tools in other areas of its work, including to monitor for bid-rigging activities in public procurement.

3 REMEDY THEME 2: PRESERVING PRO-COMPETITIVE 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?

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?

Questions on the CMA's current approach to Relevant Customer Benefits (RCBs)

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?

---

[2] The report and accompanying factsheet can both be accessed from this European Commission page (accessed on 9 May 2025): https://competition-policy.ec.europa.eu/publications/ex-post-economic-evaluations_en.

[3] See the French Competition Authority's press release here (accessed on 9 May 2025): https://www.autoritedelaconcurrence.fr/en/press-release/launch-public-consultation-status-role-and-resources-monitoring-trustees.

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)?

3.1 We would encourage the CMA to consider whether its approach (until recently) to both rival enhancing efficiencies and RCBs has discouraged merging parties from investing time and effort evidencing efficiencies and RCBs – particularly at Phase 1.

3.2 In our experience, merging parties will undertake a cost/ benefit analysis and spend time and resource developing evidence that is likely to be persuasive; to date, this has rarely been focused on efficiencies and RCBs.

3.3 Whilst *Vodafone/ Three* has generated much interest, it is clear that the CMA considers that the remedies agreed are case specific and a key factor in its decision to validate behavioural remedies was the possibility to rely on Ofcom for ongoing monitoring.

4 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?

4.1 As noted above, both for Phase 1 and Phase 2, we would encourage the CMA to explore:

(a) ways of providing additional reassurance for merging parties that early engagement on remedies will not influence SLC deliberations;

(b) providing for greater scope for a more iterative approach whereby the CMA and merging parties are able to discuss the elements of a remedies package alongside evolving views on theories of harm; and

(c) exploring the possibility of earlier engagement with the market on potential remedies (potentially in parallel with SLC assessment).

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?

4.2 We would encourage the CMA to continue to work closely with other competition authorities and other regulators including detailed sharing of information, thinking, best practice and lessons learnt on set up and monitoring.

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?

4.3 As noted above, to the extent the CMA can identify external consultants who have deep industry knowledge, this will no doubt facilitate both set up and monitoring.