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By email:
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Dear Sir,

CMA Review of Merger Remedies Approach – Call for Evidence

NOCON is pleased to offer this contribution to the CMA's 'Call for Evidence' during its review of Merger Remedies Approach.

NOCON was founded as a specialist monitoring trustee service provider during 2016 and we have experience acting within a range of different jurisdictions and regulatory approaches. We have acted as monitoring trustee for the CMA, the German Federal Cartel Office, the Austrian Federal Competition Authority and the European Commission. We have also provided advice on the design and the evaluation of remedies to the CMA, the European Commission, the German Federal Cartel Office, and the Hong Kong Competition Commission.

Although we do not offer any view on the specific questions the CMA has posed in its call for evidence, we have summarised our thoughts on those specific questions that we discussed with the CMA earlier in its review process, in the attached annex.

We remain available to speak with the CMA for further clarifications or detail on this submission.

Yours faithfully

NOCON

Annex – Discussion with CMA 1 May 2025

1. *Could you talk us through how you support other competition authorities and how that compares to the support you typically give the CMA. We're also interested in better understanding how resource-intensive different types of support are for you (e.g. complex behavioural remedies compared to assessing purchasers' suitability)?*

We first consider it is important to note an important difference between monitoring compliance and the implementation of remedies. In the UK it is most common for a monitoring trustee to be required only for a completed merger and much of the CMA's focus during the merger review, once a monitoring trustee is appointed, is on monitoring compliance with an initial enforcement order. A great deal of effort is allocated to ensuring there are adequate ring-fencing measures and support to ensure the target business remains viable. In our experience, our role overseeing the remedies process is much less involved when compared to the effort spent on maintaining business separation.

Our experience with other competition authorities is that hold separate obligations generally hold much less importance than the implementation of remedies, where most of our effort is instead focused.

Other competition authorities often rely upon us to: supervise the sales process; review potential purchasers and contractual agreements; and monitor the viability of the divestment business. To provide some insight to our role, in respect of the sales process we will: test the feasibility of the divestment timeline; identify transaction documents for our review; ensure that the divestment process does not inappropriately exclude buyers; and we will review the transaction documents to ensure the divestment business is specified consistently with the description specified by the regulatory authority.

We are also relied upon to review the suitability of a proposed buyer(s) against any specifications made by the regulatory authority, the business strategy proposed by the buyer and the financing available to support the transaction. This review takes the form of a recommendation report that we provide to the regulatory authority.

In general, it seems that other authorities rely to a greater extent on our reports regarding substantive matters required to deliver an agreed remedy (i.e. not only reports on non-compliance). That is not to say that the authorities always agree with our reports, but they form a basis from which the authority's own conclusions are formed.

2. *Have other competition authorities asked you to evaluate the effectiveness of remedy proposals? If so, what input did you provide and how did you do this (e.g. consulting with internal or external technical experts)?*

It is a natural extension of our role to share our experience of different remedies in different contexts. Invariably it is at the request of the authority that we provide this type of support (either directly to the authority or through an arrangement with the merger parties).

Authorities have previously requested that we comment on draft versions of a remedy agreement and market test specific elements of a proposed remedy. It is usual practice for us, not only when reviewing remedy agreements, to supplement our core team with industry or subject matter experts depending on the requirements of a mandate. We find this focused model of support to be highly efficient and effective.

3. *What are your experiences on when behavioural remedies are likely to be most effective? For example, are there certain industries / types of behavioural remedies that are particularly resource intensive, where breaches are more common, or where unintended effects (e.g. market distortions) are more common?*

We have observed many different approaches to remedy merger concerns and find it difficult to identify an industry as more suitable to a particular approach over another. However, we have some experience of non-structural commitments in the context of a digital market, and this appears to have worked well as: (i) divestment commitments can be difficult to specify in a digital market; and (ii) measures such as access commitments (via an API) can be monitored effectively and without great difficulty.

We have sometimes experienced difficulties monitoring remedies that promote the non-discrimination of third parties where the criteria for a breach is not sufficiently specified or clear. For example, we have monitored a requirement that third parties have fair access to the free display of events on a website, where only a selection of events can be displayed due to space limitations (i.e. not all events can be displayed all the time). The selection criteria were partly subjective and gave the monitored company flexibility to apply a judgement, which was difficult to monitor effectively. In contrast, we find it comparatively easy to monitor if contractual terms have been offered to third parties in a specified manner.

4. *Thinking through carve-out remedies you have worked on (in the UK or elsewhere), what are the primary risks? Are there any ways in which you have*

found that these risks can be managed? Are there industries where you think they are particularly risky? If so, why?

The CMA is already aware of our contribution to the CMA's own review of carve-out remedies in 2023.

It is our experience that a carve-out of an existing business unit is not overly challenging, for example, a retail store (or groups of retail stores) or an independent country division. Similarly, we have overseen a transfer of utility customers where the non-differentiated product made this a rather simple divestment exercise. However, risk factors for carve-outs could be:

- Where customers are concerned about the identify of their supplier (perhaps for reasons of quality or security of supply);
- A carve-out that anticipates a significant reorganisation of the business, i.e. how it operates, produces and supplies the products / services offered by the business;
- Only a relatively small part of the existing business is divested, and economies of scale are important;

Overall, we think that carve-out remedies generally introduce a number of complexities that require careful consideration on a case-by-case basis.

5. *What differences have you observed in how different competition authorities approach remedies with respect to, for instance, how they assess behavioural remedies / carve-outs? What do you think is behind those differences in approach (ie different statutory frameworks) and to what extent do you think the UK could learn from certain practices you have observed?*

We do not consider that we have any special insight to offer in response to this question. We note that Germany has a statutory prohibition of behavioural remedies in merger investigations (i.e. remedies that require continued monitoring, see §40 (3) of the German Competition Act).

The European Commission often includes provision in commitments agreed with parties to allow for the potential extension of non-structural remedies where a longer timeframe may be required to achieve the objective of the remedy.