ROPES & GRAY

Response To The CMA's Consultation Of March 12, 2025
On Merger Remedies

May 12, 2025

1. Ropes & Gray thanks the CMA for the opportunity to respond to its Consultation on merger remedies. We do not comment below on all the questions the CMA raises in the Consultation, but instead offer targeted perspectives on issues that we regard of significant import.

I. Remedy Theme 1: CMA's Approach to Remedies

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

2. The CMA has traditionally approached carve-out remedies with caution.[1] Although a carve-out transaction is typically more complex than a share sale, carve-out transactions are commonplace,[2] often successful, and capable of being clear-cut. That might suggest that the caution is disproportionate.

3. The concern with carve-out remedies is typically that "*the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively*."[3] This concern is magnified often because of information asymmetries between the divestiture seller on the one hand, and the CMA and the divestiture buyer on the other hand.

4. We consider that uncertainties and asymmetries may be addressed in several ways.

   i. *First*, the CMA could engage, to a much greater extent and earlier in the process, with the proposed buyer to ensure that the scope of the assets is sufficient to enable it to deliver its proposed business plan. This is likely to be more achievable in up-front buyer divestitures.

   ii. *Second*, the CMA may consider accepting, and including in its Guidance its willingness to consider, a divestment that comprises (a) a "core" or "baseline" set of assets necessary to compete (the "**Core Divestment Assets**") (which might be sufficient for an existing rival or industry player), and (b) a defined pool of additional remedy assets (the "**Option Divestment Assets**"), which

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1 Paragraph 5.14 of the Merger remedies guidance (dated 13 December 2018) (the "**Guidance**") ("*a package of assets may also be far more difficult to define or "carve out" from an underlying business, and the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively*").

2 Carve-out deals increased ~200% in 2023 compared with 2022. (Preqin: "Conditions ripe for carve-out deals after record 2023") (February 2024))

3 Paragraph 5.14 of the Guidance

would be available to the divestiture buyer if needed (which might, for example, allow a non-industry player to be a viable divestiture buyer). The option to acquire the Option Divestment Assets could persist for some duration even after a divestiture sale has closed (the "**Option Period**"). During the Option Period, the divestiture seller would be required to use (reasonable) efforts to maintain their value at its cost to ensure the divestiture buyer is not disincentivised from later acquiring the Option Divestment Assets due to degradation and eroding the purpose of the option.[4] The uncertainty of the divestiture buyer exercising the option during the Option Period remains with the parties to the main transaction, who can address this in the commercial / transitional service agreements, and does not have to pertain to the CMA.

5. This construct offers several advantages, including:

iii. Enhanced certainty for the CMA: The CMA has a higher degree of assurance that the buyer will acquire the assets needed to be competitive.

iv. Greater flexibility and reduced entry point for the buyer: The buyer has sufficient time to evaluate the effectiveness of the carve-out business operations, with or without the need for the Option Divestment Assets. And would presumably not have to pay for the Option Divestment Assets in advance (thereby reducing its entry/expansion costs).

v. Increased likelihood of success: The buyer has the ability to acquire the Option Divestment Assets if they turn out to be required, which may only be clear once the buyer has started to operate the Core Divestment Assets. This offers a safeguard for a potentially failing carve-out divestiture.

vi. Wider pool of potential buyers: The proposal may attract a wider range of potential buyers, as they can select assets that best align with their capabilities and business needs.

6. The above proposal has the potential to mitigate many of the risks associated with carve-outs, including where the carve-out comprises "mix-and-match" assets (i.e., assets from more than one party). As the CMA has in the past, other competition authorities have also been receptive to mix-and-match remedies where the merging parties can demonstrate how effective integration can be achieved.[5] We suggest the CMA update its Guidance to reflect this.

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[4] Paragraphs 5.34-5.36 of the Guidance would remain applicable too.

[5] M.10078 – *Cargotec / Konecranes* (2022): the European Commission accepted mix-and-match remedies after market testing showed that the remedy would alleviate all competition concerns.
See also the Administrative Council for Economic Defense's Guide to Antitrust Remedies: "*such concerns do not imply that this type of remedy is not suitable for specific cases.*" See here: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Antitrust-

Is there more the CMA can do within its current legal framework to create opportunities for more complex remedies in Phase 1?

7. One of the constraints to achieving complex remedies at Phase I is time. The Guidance encourages merger parties to put forward possible UILs at any stage (including pre-notification) and to consider possible UILs early in the process, even if not communicated to the CMA.[6] The CMA could further address timing constraints by offering businesses the opportunity to engage in informal without prejudice state of play meetings even in pre-notification. These meetings could allow the CMA to provide informal indications as to markets of no concern, markets where the CMA would like additional information, and markets where remedies might be in scope. Even though it would not be a final determination (and potentially subject to change), businesses will benefit from early indications on substance and early attempts to narrow focus to matters of concern. Those indications might in turn enable remedy discussions. Clearly such discussions would remain exploratory, without prejudice, and explicitly subject to further analysis. However, the time benefits might enable more complex remedies at Phase I.

8. Additionally, and insofar as this is not already its practice, the CMA might consider appointing a dedicated remedy contact/consultant at Phase I for matters where remedies are possible (even if not likely). A clear point of contact for the merging parties may ensure a more consistent and efficient remedy discussion process. And, as is the case already, any remedies contact/consultant should not engage with the Phase I decision maker prior to a decision on the merits.

9. Finally, we encourage the CMA to expand upon paragraph 4.4[7] and footnote 53[8] of its Guidance by incorporating examples of cases where the CMA has issued unconditional clearance notwithstanding early remedy discussions with the merging parties during pre-notification or Phase 1. As the CMA is aware, there is a perception among business and the legal community that early remedy discussions may compromise or prejudice the substantive assessment. Including examples where the CMA issued unconditional approval despite those discussions may help dispel misapprehensions.

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

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6 Paragraph 4.3 of the Guidance

7 Paragraph 4.4 of the Guidance states that "a*ny discussion of UILs prior to the SLC decision will not prejudice that decision*."

8 Footnote 53 of the Guidance states that (in relation to UILs put forward during Phase 1 or pre-notification): "*such discussions with the case team will not impact on the prospect that the decision maker ultimately determines that the test for reference is not met; nor will they prejudice the merger parties' right to decide not to offer any UILs*".

10. The Guidance states that the CMA is generally unlikely to consider behavioural UILs as sufficiently clear-cut to address competition concerns at Phase I.[9] But behavioural remedies can be appropriate, proportionate, and successful when designed robustly, as evidenced by the decisional practice of other agencies. For example, in *London Stock Exchange Group/Refinitiv Business*,[10] the European Commission ("**EC**") designed behavioural remedies that were "*comprehensive and effective from all points of view*."[11] The remedy design included:

i. Open access to data / services on fair, reasonable and non-discriminatory terms, with commitments to avoid any excessive changes to pricing or other commercial terms. These broad and outcome-oriented commitments were designed to ensure that rivals have continued access on the same terms as the merging parties (i.e., no degradation of technology, quality, or service).

ii. Provision of a monitoring trustee (including in its role as a third-party complaint handler) implemented at the buyer's cost. The use of a monitoring trustee addressed concerns on agency resource constraints and added a means to resolve complaints swiftly.

iii. Anti-circumvention provisions (for example, access is granted for *all* use cases that are available to the merging parties and the buyer commits not to reclassify or redefine the input in a way that undermines the commitments).[12] This mitigated informational asymmetries between the access grantor and grantee.

iv. Fast-track, binding arbitration procedure implemented at the buyer's cost. This addressed multiple enforcement concerns, including:

a. Delayed access to inputs that have the potential to reduce competition – remedied by the imposition of time limits for dispute resolution, during which London Stock Exchange Group plc ("**LSEG**") was required to provide continued access to the relevant input.[13]

b. Risk of merging parties retaliating against remedy compliance.

c. Information asymmetries – LSEG was obliged to provide the Monitoring Trustee with all information, including books, records, documents, management or other personnel, facilities, sites, and technical information, as requested.[14]

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9 Paragraph 3.32 of the Guidance

10 M.9564 – *LSEG / Refinitiv Business* (2021), Commission Decision of 13/01/2021

11 Ibid, paragraph 2906

12 Ibid, paragraph 2970

13 Ibid, paragraphs 2882 and 2883

14 Ibid, paragraph 32

d. Lack of credible sanctions – remedied by the binding nature of the arbitral award.

11. The above represented material improvements in remedy design and contributed to the successful implementation of behavioural remedies. The CMA should not readily discount such constructs. Indeed, we could foresee improvements to them too (e.g., the introduction of feedback portals for interested parties (e.g., customers, competitors, suppliers, etc. of the merging parties) to share their views and experience on the efficacy of relevant behavioural remedies post-transaction, which may act as a deterrent against non-compliance by the merging parties).

II. Remedy Theme 2: Preserving Pro-Competitive Merger Efficiencies and Merger Benefits

Does the CMA's current approach to remedies in phase 1 effectively capture RCBs? If not, how can the current approach be improved?

12. RCBs have been used rarely to approve mergers (despite the fact that the CMA may consider RCBs from markets that do not feature an SLC to motivate an approval without intervention in a market that does feature an SLC). Business (and the legal community) would benefit from increased guidance on the ways in which RCBs can feature in the CMA's analysis. This can be achieved by the provision of examples in the Guidance of how non-price related RCBs are to be identified and weighed. This list might include references to sustainability benefits, environmental benefits (including reduced carbon emissions), and labour benefits, which would mirror the approach taken in the CMA's Merger Assessment Guidelines. Providing additional guidance in this area would align with the CMA's objectives to foster UK innovation and investment.[15]

III. Remedy Theme 3: Running an Efficient Process

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?

13. The CMA might commit to publishing more post-mortem reviews of remedies. These reviews are incredibly helpful to the business community, legal advisors, and (likely) the CMA itself. Through systematic evaluation of the outcomes of implemented remedies – structural or behavioural – the CMA can build a body of evidence that informs future decision making and provides learnings for concerned parties.

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[15] A speech by Sarah Cardell, the Competition and Markets Authority (CMA) Chief Executive (2025), See here: https://www.gov.uk/government/speeches/promoting-competition-and-protecting-consumers-in-the-digital-age-a-roadmap-for-growth