SLAUGHTER AND MAY

12 May 2025

Slaughter and May response to CMA Merger Remedies Review

Executive Summary

- We support the CMA's initiative to review its approach to merger remedies, and welcome the opportunity to respond to this call for evidence. Whilst our response is structured thematically to reflect the specific themes and questions on which the CMA is seeking input, some of our observations concerning process (Theme 3) apply throughout and so are included throughout our response.

- Our key observation is that for any review of the CMA's remedies procedures and policies to be effective, it is critical that case teams shift to a more active case-management approach where they are empowered and encouraged to provide parties with meaningful feedback as early as possible from pre-notification. This would be in line both with the 4Ps and with the CMA's commitment in the Mergers Charter to "open and constructive engagement", and would help to build confidence between the case team and the parties to engage in fruitful remedies discussions. See further our comments in response to Theme 1 below.

Theme 1: CMA's approach to remedies

Approach to phase 1 remedies

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?

A.2: Is there more the CMA can do within its current legal framework to create opportunities for more complex remedies in phase 1?

- In order to permit the CMA to consider behavioural or other 'non-standard' (e.g. quasi-structural) remedies in a broad range of scenarios at phase 1, the 'clear cut' requirement should be removed or otherwise the Remedies Guidance should be tailored to enable case teams to apply this standard more flexibly.[1] The CMA should similarly amend the Remedies Guidance to enable case teams to apply the 'capable of ready implementation' standard more flexibly, for example by specifying that it does not require a remedy to be fully "plug and play". In both cases, the principle of proportionality should be paramount and greater deference given to the industry expertise of the parties.

- For any review of its remedy procedures and policies to be effective, it will be critical that case teams are empowered and encouraged to provide the parties with meaningful feedback on which areas are – and are not – likely to be of concern as early as possible in the process, including in pre-notification. A shift in approach here is key to ensuring there is sufficient time for the parties to develop and discuss potential remedies within the phase 1 timeline, with such

[1] Currently, the Remedies Guidance notes that "*at phase 1, the CMA is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns*" (para 3.48).

discussions being significantly more difficult (and less likely to achieve a successful outcome) if the parties do not receive an indication of the areas where a remedy might be required until the state of play meeting in the middle of phase 1. Whilst the CMA should amend the Remedies Guidance (and other guidance documents as required) to empower case teams both to provide this meaningful feedback and to discuss hypothetical remedies candidly and constructively earlier in the process, and whilst earlier and more substantive access to the decision-maker when requested by the parties may similarly help in this regard, a more fundamental shift in the approach of case teams to allow for more active case-management is also required. Such a shift would be in line both with the 4Ps and with the CMA's commitment in the Mergers Charter to "open and constructive engagement", and would help to build confidence between the case team and the parties to engage in fruitful remedies discussions. It would also be more in line with the EC's approach.

- In order to ensure that the CMA has sufficient expertise to engage on complex remedies in phase 1, the CMA should continue to facilitate "teach-ins" with the business and engage with any relevant experts. In our experience, whilst more than one "teach-in" may be required, such engagement is usually significantly more productive than multiple rounds of RFIs.

- The current process of tacking on a discussion on remedies to the end of the Issues Meeting is not conducive to agreeing remedies, both because the parties have typically not had sufficient time to develop remedies proposals in the few days following the receipt of the issues letter (when the focus will have been on preparing for the Issues Meeting), and because they are still in "advocacy mode" at this point. The CMA should therefore introduce an additional "touchpoint" in the timetable at a reasonable point after the Issues Meeting (e.g. five working days), the purpose of which would be for the CMA decision maker to provide feedback post-Issues Meeting. The parties could then choose whether to discuss remedies (on a without prejudice basis) at that meeting or subsequently within Phase 1.

- It is critical for the CMA to engage earlier on, and in a more substantive way, with industry / technical experts. This should not just be limited to sector regulators but could encompass smaller regulators such as Ombudsmen, as well as expert consultants. This would enable case teams to gather the evidence required to get comfortable that the proposed remedy meets the requirements. The CMA should amend the Remedies Guidance to allow for this.

Effectiveness and proportionality

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?

B.2: Has the CMA's approach to effectiveness precluded potentially effective remedies being considered as part of its proportionality assessment?

- The CMA should amend the Remedies Guidance to recognise that it is open to the CMA to recommend a remedy that would mitigate an SLC in circumstances where this is "reasonable and practicable". Such circumstances could include the following (amongst others):

- Cases where the only alternative remedy is prohibition which would be disproportionate in the circumstances.

- Cases where the merger's impact is predominantly ex-UK, and so a prohibition remedy would necessarily have a significant impact outside the UK.

- Cases where the identified SLC is in relation to a small part of the merging parties' activities (e.g. <10%).

- Cases where partial divestment would be sufficient to mitigate the concern.

- In addition, the CMA should alter its approach to assess the effectiveness and proportionality of potential remedies in parallel, rather than assessing these factors sequentially. This would allow for a more nuanced approach, where case teams could consider the benefits and risks of any potential remedy holistically: for example, if there was a degree of risk associated with a particular remedy which was significantly less disproportionate than the alternative options, it would allow the CMA to choose that first remedy in appropriate circumstances. The legislative framework allows for such a change in approach, which would require only changing the Remedies Guidance.

Behavioural remedies

C1: 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?

C2: In what circumstances are behavioural remedies likely to be most appropriate?

C3: 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)?

C4: 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?

C5: Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

C6: 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)?

- The Remedies Guidance should acknowledge that remedies often cannot be categorised only as "behavioural" or "structural".[2] A wide range of remedies exist, many of which will have both behavioural and structural elements, which can make a binary categorisation unhelpful. A more

[2] The CMA recognised this recently in its description of the remedies agreed in *Vodafone/Three* as "quasi-behavioural" (Notice of possible remedies, para. 29).

useful approach would be to acknowledge that aside from a pure divestiture, remedies will usually fall somewhere along the spectrum of "structural" and "behavioural". However if the CMA wishes explicitly to classify different types of remedies, it should include quasi-structural, investment and access remedies.

- The CMA should update the Remedies Guidance to enable behavioural remedies to be considered in a broader set of circumstances. A key factor as to whether behavioural remedies are likely to be appropriate is whether they will be practicable to monitor. In addition to sectors where there is a sectoral regulator, the CMA should consider factors including:
    - Whether compliance would be readily apparent to other market participants. This might be particularly the case in cases where the remedy is consumer-facing.
    - Whether there is an industry Ombudsman who could aid in monitoring the commitment.
    - Whether the CMA could make use of independent adjudicators and a fast-track adjudication process.
    - Whether the only alternative remedy is prohibition – as may typically be the case where the SLC is vertical – and whether that would be proportionate in the circumstances.
- In many cases (in particular but by no means limited to cases involving technologies) a remedy which is not fully structural will be the most effective at resolving the identified concern. For example, in many such cases, granting a licence would wholly solve the CMA's concern whilst also being proportionate in cases where full divestment of the relevant technology is impractical.
- There is historically very little evidence of merging parties breaching their commitments, which reflects our experience that parties are very careful not to do so. However to the extent that concerns about enforcement have previously contributed to the CMA's reluctance to accept 'non-standard' remedies, the CMA's new powers under the DMCCA 2024 to fine companies for breaches should empower the CMA to be less risk averse in this regard and to accept a broader spectrum of remedies at phase 1 and phase 2.
- In line with the 4Ps, if the CMA is likely to accept a behavioural remedy at phase 2 then it should be capable of accepting that same remedy at phase 1. However, for this to be possible, the CMA would likely need to amend/remove the 'clear cut' requirement (as above). In the absence of such an amendment, the CMA should at least in principle be empowered to accept behavioural remedies at phase 1 in circumstances where the parties engage early and present robust monitoring mechanisms. The CMA already has experience of accepting such remedies in practice – but amending the Remedies Guidance to facilitate this would be helpful.

CMA's approach to carve-out divestiture remedies

D.1: In what circumstances are carve-out divestiture remedies likely to be most appropriate?

D.2: Are there specific circumstances (e.g. certain industries) where the risks associated with carve-out divestitures are generally more or less likely to manifest themselves?

D.3: Are there any additional ways in which the risks relating to carve-out divestitures can be mitigated?

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?

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)?

- Carve-out divestiture remedies are likely to be appropriate in a broad range of circumstances, and in our view the CMA's scepticism towards them is misplaced. As a general rule, the CMA should have more faith in the M&A process and give due credit to a business' ability to assess whether a due diligence process is sufficiently robust – so that the very fact that a remedy-taker considers that they have carried out sufficient due diligence to proceed with a purchase should go some way to mitigating any perceived composition risk. This is particularly (but not only) the case in an upfront-buyer scenario. The CMA should amend the Remedies Guidance to recognise this.

- The CMA could further mitigate any perceived risks by involving Monitoring Trustees ("MTs") earlier on as required, such as during the remedy design process.

Assessing, monitoring and enforcing remedies

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?

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?

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?

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?

- The CMA should make greater use of MTs when monitoring and enforcing remedies. MTs can vastly reduce the burden of monitoring quasi-structural and behavioural remedies, at little cost to the CMA, whilst ensuring that the benefits of such commitments are realised – including in vertical cases where these commitments can be lengthy.

- There is no direct cost to the CMA of using MTs when monitoring and enforcing remedies; the only cost is the need to retain a small amount of capacity to read the MT's periodic reports and deal with any issues arising. If the CMA is in other respects open to considering quasi-structural

and behavioural remedies in appropriate circumstances, it would be inconsistent with the CMA's commitment to the 4Ps (in particular, proportionality) to reject such remedies on account of this minor cost.

- As explained in response to section A above, the CMA can ensure that it has the right expertise to assess complex remedies by involving independent technical experts / consultants at an early stage (in phase 1 as well as phase 2). Merging parties will also in most cases have, in-house, the expertise that the CMA seeks which is best accessed via direct conversations (e.g. teach-ins) rather than iterative RFIs. The CMA can also request MTs to involve technical experts / consultants at the expense of the parties, as is standard practice.

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

CMA's approach to rivalry-enhancing efficiencies (REEs)

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

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?

F.3: What are the circumstances in which it would be possible to design effective remedies that can lock-in genuine Rivalry Enhancing Efficiencies?

F.4: What more can the CMA do to ensure that its approach to merger remedies encourages pro-competitive investment?

- In terms of evidence, the CMA should request economic modelling (e.g. GUPPIs) when considering whether a claimed REE is sufficient to prevent an SLC from arising. In circumstances where it may be difficult to "measure" the size of the SLC and REEs in practice, the CMA should be open to receiving qualitative evidence showing that the expected REEs are "greater" than the SLC. This is important to ensure that the CMA does not miss out on these important efficiencies which often support growth and investment (in line with the Government's strategic steer).

- Where the likelihood of claimed efficiencies arising is consistent with merging parties' statements of intent, in line with CMA's commitment in the Mergers Charter to "*engage proactively with an open mind, without prejudice or bias*" the CMA should consider internal documents which evidence the parties' commitment to realise efficiencies with an open mind and without undue scepticism. If the CMA considers internal documents to be of sufficient probative value on which to base an SLC, such documents should also be accepted (or at least considered with an open mind) as the basis for REEs.

- If the CMA accepts an REE as "genuine" and the issue is one of proving likelihood, then it should be possible to design appropriate remedies that "lock in" the REE in almost all circumstances. Any such remedy should include measurable milestones which are within the parties' power to achieve (rather than being outcomes-focused). Whilst these could be

investment milestones (as in *Vodafone/Three*), the CMA should be flexible in approach and not limit itself in this way.

- As above, the CMA's new fining powers under the DMCCA 2024 should enable the CMA to be less risk averse in accepting remedies that "lock-in" REEs.

CMA's approach to Relevant Customer Benefits (RCBs)

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?

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?

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?

G.4: How can the CMA best quantify and balance RCBs on the one hand with the SLC's adverse effects on the other?

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)?

- As a general point, the CMA has scope under the existing legislation to take into account the wider benefits that a merger may bring to promote growth and sustainability (amongst others) out of market. RCBs therefore provide a real opportunity for the CMA to demonstrate its commitment to furthering the Government's strategic steer and the 4Ps. The CMA should amend the Remedies Guidance to make clear that the CMA is willing to engage in earnest on RCBs in a broad range of scenarios (past practice being largely limited to hospital mergers), and that the negative effect of a potential remedy on the RCBs would be a basis for accepting narrower remedy proposals as part of a proportionality assessment. The CMA should also provide additional guidance on how the parties should best substantiate RCB claims in a way that will be persuasive to the CMA (recognising that this will be challenging).

- More specifically, the CMA's approach to RCBs would be improved by recognition in the Remedies Guidance that, despite different legal frameworks, in practice there may be substantial overlap between the facts giving rise to the claimed REEs and RCBs. The CMA should therefore be open to engaging substantively on RCBs earlier in the phase 1 process (before remedy discussions, when engaging on efficiencies). To the extent that the CMA then did not accept the efficiencies, this would enable RCBs to be progressed expeditiously together with remedy discussions at phase 1.

- To enable such discussions, the CMA should also update the Remedies Guidance to allow for "without prejudice" discussions on RCBs (and how these relate to remedies) as early as possible both at phase 1 and phase 2.

- In terms of balancing the potential loss of RCBs – which may occur out of market – with an SLC's adverse effects in a particular market, the CMA should take a more pragmatic and holistic approach, bearing in mind both its commitment to proportionality under the 4Ps and the Government's strategic steer (as noted above). For example, the CMA should give more weight to RCBs in a case where it has identified an SLC in a narrow market whilst recognising RCBs across a much larger – or multiple – markets, affecting significantly more UK customers.

Theme 3: Running an efficient process

Phase 1 remedies process

H.1: What process barriers are there currently to reaching a phase 1 remedies outcome?

H.2: How can the CMA amend its phase 1 process to allow more complex remedies to be assessed within a phase 1 timeframe?

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?

- The current Remedies Guidance explains: "*[g]iven 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*".[3] We recognise the difficulties imposed by the short UIL period, but consider that this guidance (which in our experience, case teams follow closely) represents a key barrier to reaching a phase 1 remedies outcome, and is not consistent with the CMA's 4Ps commitments – and should therefore be removed.

- Earlier and more substantive access to the decision-maker, when requested by the parties, would likely also help to reach a phase 1 remedies outcome in certain circumstances (as above).

Phase 2 remedies process

I.1: What barriers are there currently to reaching a phase 2 remedies outcome?

I.2: Does the current phase 2 process adequately facilitate early remedy engagement? If not, how can it be improved?

- The updated phase 2 process has gone some way to facilitating early engagement and providing additional opportunities for an interactive dialogue on remedies before and after the interim report. However (as at phase 1) it remains critical that the case team is empowered to provide insight into the CMA's developing thinking in order to build the necessary trust between

[3] Remedies Guidance, para 4.9.

the case team and the parties to enable constructive discussions and steer remedies discussions appropriately.

- In addition, while we recognise the benefits in the merging parties engaging in early remedies discussions with the CMA where appropriate, merging parties should not be penalised for following what should be the default position, i.e. where parties discuss remedies only after the CMA has reached a negative conclusion.

Working with other regulators

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?

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?

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?

- Inter-agency cooperation on cross-border remedies in global deals is important for businesses and is a good way for the CMA to demonstrate its commitment to proportionality. We understand that it is already standard practice for the CMA to engage regularly with other competition agencies carrying out parallel actions (where appropriate waivers have been provided). The CMA should formalise this contact in its Remedies Guidance, including by specifying that such discussions: (i) should take place regularly (e.g, at a minimum, once every fortnight during pre-notification and once a week during phase 1 and phase 2); and (ii) should involve the competition agencies sharing their developing thinking on all aspects of the case, including remedies, on an open and ongoing basis.

- The CMA should consult any relevant government departments or sector regulators early in the process (ideally as early as pre-notification, or otherwise at the start of phase 1). Such consultation should be via oral discussions instead of RFIs.

- In terms of whether the CMA should make more use of making recommendations to others to take action to remedy an SLC, there may be circumstances where a sector regulator might be well placed to take the relevant action. There may also be circumstances where a remedy that the parties have already offered to a sector regulator is sufficient to dispel any competition concerns, and the CMA should continue to accept briefing papers setting out the parties' arguments in this regard. In both cases the CMA should avoid creating a situation of "dual regulation".

Any other processual changes

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?

- See responses above.

External support

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?

- See responses above.