A&O SHEARMAN

RESPONSE TO CMA CALL FOR EVIDENCE

REVIEW OF MERGER REMEDIES APPROACH

1. INTRODUCTION

1.1 This response represents the views of Allen Overy Shearman Sterling LLP on the Competition and Markets Authority (CMA)'s call for evidence on its approach to remedies in merger cases, dated 12 March 2025 (Call for Evidence).

1.2 We welcome the opportunity to respond to this Call for Evidence and would be happy to discuss any of the points made in this response if the CMA would find it helpful to do so.

1.3 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

1.4 Overall, we welcome the CMA's review of its approach to merger remedies to ensure that it embodies the '4Ps'. We look forward to reviewing and inputting on specific proposals for change later this year.

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?

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?

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?

2.1 In our view, there are two principal ways in which the CMA could improve its approach to phase 1 remedies. First, by better aligning its practice with the Enterprise Act 2002 (Act). Second, by taking a more flexible approach to the timing of implementation of UILs.

Removing a disconnect between the Act and the guidance

2.2 We encourage the CMA to adopt a less restrictive and conservative approach to UILs and to amend the Merger Remedies Guidance (CMA87) to better align it with the requirements of the Act. This would enable more mergers to be resolved at phase 1, facilitating both investment and innovation.

2.3 The CMA has typically applied a more conservative approach to accepting UILs than is required under the Act.

2.4 The Act provides that UILs can be accepted "for the purpose of remedying, mitigating or preventing" the SLC and that, when considering UILs, the CMA "shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it" (section 73(3)).

2.5 Under the Merger Remedies Guidance (paragraph 3.27), the CMA prescribes that the remedies must be "clear cut" and "capable of ready implementation", which means that "the CMA is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns" (paragraph 3.32). Moreover, the CMA's experience (and that of its predecessor, the OFT) is that "devising a workable and effective set of behavioural commitments within the context of a short, Phase 1 timetable is difficult" and "UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted" (paragraph 3.28(b)).

2.6 In practice, the requirement for clear cut remedies capable of ready implementation means the CMA has strongly favoured comprehensive structural remedies to address competition concerns at phase 1, especially in horizontal mergers. It has rejected behavioural UILs in a number of cases (e.g., Boparan/ForFamers Burston and Radstock mills, LSEG/Quantile, NVIDIA/Arm). Indeed, the only examples in the Merger Remedies Guidance of purely behavioural UILs being accepted concern the award of rail franchises (see footnote 36) (although we note that there are a handful of more recent examples where the CMA has accepted purely behavioural UILs).

2.7 In our view, the combination of the Merger Remedies Guidance and the CMA's practice is discouraging merging parties from investing the potentially considerable time and resources to devising and proposing proportionate remedies at phase 1 (other than the most comprehensive divestitures), even though alternative remedies may be sufficient to satisfy the CMA's statutory obligations as set out in the Act.

2.8 Unless the CMA's guidance is amended to align more clearly with the standard set out in the Act, and to specifically acknowledge that the CMA will be willing to accept behavioural and otherwise more complex remedies to mitigate concerns so far as is reasonable and practicable, merger parties will invariably be deterred from proposing such UILs and possibly from pursuing transactions, given the very significant costs involved in a CMA phase 2 review, and therefore investment, altogether.

2.9 While the CMA's current approach may be considered consistent with the principle of predictability, this comes at the expense of it adopting an overly conservative position on the remedies it will accept at phase 1. While there is clearly a benefit in having clear guidance and established practice, we are of the opinion that such an approach comes to the detriment of the CMA's other objectives of pace, proportionality and process.

2.10 The principles of pace, proportionality, and process can be better served if the CMA adopts a more flexible approach to UILs. In particular, it is likely that the CMA could clear more cases at phase 1, with fewer draconian interventions, if it adopts a more permissive view of (relatively) more complex UILs across a broader range of cases. Reflecting this approach in the Merger Remedies Guidance would encourage engagement by merging parties on the proposal, scope and design of acceptable remedies. While we acknowledge that enhancing flexibility may result in less predictability, at least in the short term, our view is that the overall benefits to the UK economy in terms of growth by promoting pace, proportionality and process are likely to outweigh any downsides.

2.11 The Act also provides that UILs can be accepted "for the purpose of remedying, mitigating or preventing" the SLC. However, the Merger Remedies Guidance states that "the CMA considers that at Phase 1, it is appropriate for it to seek to remedy or prevent competition concerns rather than simply mitigate concerns" (paragraph 3.31) – again, a narrower approach than envisaged by the Act. This suggests that the CMA's approach is skewed to avoiding 'type 1 errors' in its merger review process in a way not envisaged under the current legislative framework and to the detriment of growth in the wider UK economy.

2.12 Specifically, under this more restrictive approach to the assessment of the effectiveness of remedies, it is possible that the CMA may preclude potentially effective remedies from being assessed – or even proposed – under the proportionality assessment. In our view, there is no support under the legislative framework for the CMA to take this approach. While clearly not all cases will be suitable for UILs, we believe there is greater scope for assessment on a case-by-case basis, particularly with regard to behavioural remedies and carve-out or 'mix-and-match' divestments.

2.13 On this basis, we support the CMA revisiting its guidance on UILs in order to better promote the 4Ps and to achieve closer alignment with the standard set out in the Act.

<u>More flexibility on timing of UILs implementation</u>

2.14 We believe that the CMA could create better opportunities for more complex UILs to address competition concerns if it did not require full implementation of the remedy package within the statutory time periods for accepting the UILs. Sections 73A(3) and (4) of the Act provide that "the CMA shall decide whether to accept the undertaking before the end of the period of 50 working days" from the date of the phase 1 decision, and that such period may be extended "by no more than 40 working days, if it considers there are special reasons for doing so".

2.15 The Act therefore only requires the CMA to accept the UILs within the specified time period, rather than require that the UILs are unconditional and fully implemented within that period, which has been the practice of the CMA. It is our view that the CMA has scope within the legislative framework to agree UILs within the statutory period, including upfront buyer commitments, but to allow the parties greater time to implement them. This would allow for more complex UILs to be agreed within 50 (or 90) working days of the phase 1 decision, subject to full implementation outside this period. The CMA would still retain its powers under section 75 of the Act to prohibit a transaction where it considers that the agreed UILs have not been or will not be fulfilled. Any such change in approach should be clearly reflected in the Merger Remedies Guidance.

2.16 We discuss this point further in relation to theme 3 below.

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)?

2.17 In its approach to behavioural remedies, as with UILs above, we would encourage the CMA to consider the statutory standard within the current legislative framework to be the primary guiding principle and to amend the Merger Remedies Guidance so as to better align with the requirements of the Act. This legislative standard offers the CMA significant flexibility in accepting behavioural remedies. While the prescriptive approach in the Merger Remedies Guidance offers the benefit of predictability, this is at the significant cost of proportionality, which is essential if the CMA looks to achieve an optimal merger control enforcement environment that encourages investment and innovation.

2.18 In more recent years we have seen innovative approaches to theories of harm taken by the CMA, in response to the increasing variety of business models of merging parties and the fast-moving nature of the markets in which they operate. As the CMA responds to the challenges of reviewing transactions in increasingly complex sectors, the CMA should be equally open-minded about innovative remedies to address competition concerns, which will increasingly include a broader range of behavioural or combination remedies.

2.19 Regarding the distinction in the current Merger Remedies Guidance between behavioural and structural remedies, we note that what should be important is finding an effective solution to the issues raised in a specific case rather than a formalistic categorisation of remedies.

2.20 While maintaining flexibility regarding remedy design, the CMA can look to a playbook of behavioural remedies that are effective in other regulatory contexts, for example FRAND commitments or the principles of the new UK digital markets regime. Tried and tested behavioural remedies should also not be restricted to regulated industries – where sectoral regulators may or may not have the time, resources and/or experience to act as a 'monitor' – as they can play a role in a variety of transactions and industries.

2.21 We see constructive dialogue between the CMA and international competition authorities in relation to theories of harm in merger control cases and consider this should be replicated in the design of behavioural remedies. Dialogue between the CMA and market participants is also needed to formulate effective and proportionate remedies, in particular in sectors where sophisticated customers and market players can assist the CMA in monitoring and enforcing remedies, i.e., through complaints where they feel that remedies are not adequately being complied with.

2.22 The same approach to behavioural remedies should apply across phase 1 and phase 2. A key consideration will be the practicalities of devising an effective behavioural remedy within the phase 1 statutory timeline. We refer to our suggestion above (see 2.15) that the CMA could inject more flexibility into the UIL process by not requiring UILs to be fully implemented within the statutory period. As noted below, the CMA's new enforcement powers under the DMCC Act 2024 to fine merging parties for breaches of their remedy obligations should give the CMA additional comfort that behavioural remedies will be implemented in practice.

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)?

2.23 Carve-out divestiture remedies are likely to be particularly appropriate in circumstances where the CMA's concerns relate to a business line with limited integration with the broader business of the merging party to which the divestment relates, and in circumstances where there is no standalone business smaller than the merging party.

2.24 The CMA should not preclude *ex ante* the prospect of carve-out divestment remedies for any specified circumstances or industries. Such remedies are, in principle, capable of addressing competition concerns across industries and should in all cases be considered on the merits.

2.25 The CMA can most effectively mitigate the risks of partial divestiture remedies by ensuring the assets are sold to a suitable upfront purchaser, engaging with relevant stakeholders and carrying out robust market testing to ensure the remedies will be as effective as possible. In terms of composition risks, the CMA should entrust an approved purchaser to conduct appropriate due diligence to mitigate this (discussed further below).

2.26 The complexity and risk associated with a partial divestiture will depend on the level of integration it has with the retained business of the merging party. However, strategic carve-out sales occur regularly and successfully outside the merger remedies context (e.g., where the seller is motivated to divest a noncore business line, exit a geographical market, or reallocate financial resources). They are effective provided appropriate procedures are put in place to ensure "business as usual" and a smooth transition. There is therefore no reason in principle that these types of divestments cannot be equally successful as a merger remedy.

2.27 The CMA's starting position should be that any well-resourced remedy purchaser will be sufficiently economically motivated to ensure the continued success of the business post-acquisition and is better placed than the CMA to identify composition risks. To the extent an approved purchaser does identify composition risks, these are typically capable of being addressed through various mechanisms, including transitional services arrangements, supplementing a partial divestiture with time-limited behavioural remedies, or redefining the scope of the proposed divestment, if required.

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?

2.28 The use of Monitoring Trustees by other authorities globally shows that complex remedies can be implemented without additional cost to the CMA, as the parties bear the cost of the Monitoring Trustees. Therefore, enforcement and monitoring considerations should not be a barrier to the CMA accepting more complex or innovative remedies where the parties are willing to bear the cost.

2.29 We recognise that there may be circumstances where the CMA will need to take a more direct role in monitoring and enforcing remedies. Where this results in additional resources being required from the CMA, this should not outweigh the benefits of accepting more complex or innovative remedies. In addition, the CMA's new enhanced enforcement powers under the DMCC Act 2024 to fine merger parties for breaches of their remedy obligations gives an additional layer of enforcement protection.

2.30 Regarding the expertise required to assess complex remedies in a broad range of industries, in many cases the CMA can take comfort in the feedback from sophisticated customers and market participants during the market testing of these remedies.

2.31 The CMA has also committed to develop a deeper understanding of business and build up a deep knowledge of industries. This same body of evidence used for the substantive assessment of the case and substantial lessening of competition (SLC) will also equip the CMA to assess complex remedies in these industries.

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?

3.1 We encourage the CMA to evolve its approach to rivalry enhancing efficiencies in three ways: being more flexible, using remedies to give greater certainty that efficiencies will be realised, and giving clear guidance to parties on how efficiency claims will be assessed.

<u>A more flexible approach</u>

3.2 Unlike relevant customer benefits (RCBs), the criteria currently applied by the CMA for determining whether rivalry enhancing efficiencies result from a merger are not statutory requirements. The CMA has discretion as to which criteria are applied, and how.

3.3 For example, under the current Merger Assessment Guidelines (MAGs), rivalry enhancing efficiencies must be merger specific. The MAGs state (paragraph 8.15) that the CMA may "investigate whether there are significant barriers to the merger firms achieving the same improvements without the merger". However, in our view, the CMA should take into account post-merger

investments/improvements even if these could theoretically have been made absent the merger but have been made more likely as a result of the merger. The fact that these actions result in efficiencies that will benefit UK customers and improve competition and ultimately benefit growth in the wider economy should be sufficient.

3.4 Applying the criteria flexibly is also necessary to enable the CMA to identify situations where (like in Vodafone/Three) there is the potential for efficiencies, but the CMA considers that remedies are needed to deliver greater certainty that these efficiencies will be realised. Conversely, simply following the criteria set out in the MAGs could prevent rivalry enhancing efficiencies from materialising in these cases.

3.5 Considering efficiency claims requires a forward-looking assessment. The MAGs state (paragraph 8.6) that "[m]any efficiency claims by merging parties are not accepted by the CMA because the evidence supporting those claims is difficult to verify and substantiate". The MAGs go on to say that studies indicate the "difficulty in accepting prospectively that a merger is likely to lead to efficiencies". By contrast, when discussing the prospective assessment of whether there is an SLC, the CMA accepts in the MAGs (e.g., at paragraphs 2.10, 2.27 and 7.37) that the presence of some uncertainty does not in itself preclude the CMA from finding competition concerns on the basis of all the available evidence. Again, this suggests that the CMA is biased toward minimising the risk of 'type 1 errors'. We encourage the CMA to explicitly acknowledge that the same principle applies when it considers the likelihood and materiality of rivalry enhancing efficiencies, i.e., that a degree of uncertainty does not preclude a finding that a merger results in efficiencies.

3.6 Finally, the CMA should take a flexible approach to the types of evidence it requires to support the materiality and likelihood of rivalry enhancing efficiencies.

3.7 The evidence to substantiate such efficiencies will vary depending on the case in question, and in particular on the industry/markets affected by the merger. We urge the CMA to openly consider a broad range of evidence put forward by the parties. This could include both quantitative and qualitative information, for example costs information and plans for research and development. Evidence of efficiencies realised from previous transactions or in analogous markets (as recognised in the MAGs at paragraph 8.13) is likely to be extremely informative. This could relate to previous transactions by the merging parties, or to other mergers in the same or similar markets where efficiencies have been assessed and accepted by the CMA.

3.8 In our view, the process for assessing evidence of claimed rivalry enhancing efficiencies should be iterative. Where it feels it needs further details, explanation or evidence to assess claimed efficiencies, the CMA should discuss this with the parties and should not reject claims outright on the basis of the initial evidence submitted by the parties. This will help to ensure that genuine rivalry enhancing efficiencies are fully explored and identified.

<u>Using remedies to deliver certainty</u>

3.9 We agree with the CMA that merger remedies can be used to maximise potential procompetitive efficiencies from a transaction and, as a result, support growth and investment. We welcome the CMA's consideration of how it can evolve its approach to remedies in this way.

3.10 Remedies that enable efficiencies to be realised will usually be behavioural in nature and will often require a degree of monitoring and oversight. For this reason, they are suited to mergers in regulated sectors where there is a regulator which has the expertise to help the CMA oversee implementation of the remedies (such as Ofcom in Vodafone/Three).

3.11 However, such remedies should not be limited to regulated sectors. Independent Monitoring Trustees paid for by the merging parties (see our comments above), as well as quasi-administrators and voluntary organisations, could be well-placed to oversee implementation in non-regulated sectors. This could especially be the case where it is in the interests of other stakeholders in the market, such as rivals, customers and suppliers, to monitor and report compliance.

3.12 In our view, it is also possible to design effective remedies that lock in rivalry enhancing efficiencies in any situation where, for example, there may be a time-lag before efficiencies materialise, and remedies can be used to "plug the gap" in the interim. This is analogous to cases such as Schlumberger/ChampionX, where the proposed UILs involve the parties licensing IP and knowhow to support a new rival, but in the interim until this new rival materialises, the parties will grant Schlumberger's rivals access to the relevant products of ChampionX.

3.13 In some cases, particularly where the efficiencies will result from straightforward actions by the parties (such as commitments to invest a certain sum, or to invest in a scheme that is already in place), formal ongoing monitoring may not be necessary. Instead, the CMA could require the parties to commit to certifying that they have complied with the remedy in question by submitting evidence of the investment/spend.

Clear guidance to parties

3.14 Merging parties will be encouraged to put forward well-developed and substantiated efficiency claims if they have a clear idea of the CMA's approach to rivalry enhancing efficiencies and the evidence the CMA expects to see to substantiate these. The CMA should therefore ensure that its revised approach is reflected in its guidance. Any decisions where the CMA accepts that rivalry enhancing efficiencies offset an SLC, or where remedies are used to help deliver such efficiencies, should clearly and fully set out the CMA's analysis and conclusions.

3.15 There is currently no mention in the current Merger Remedies Guidance of the possibility of designing remedies to give greater certainty that rivalry enhancing efficiencies will be delivered. This should be added, giving examples of the situations in which remedies may be used in this way.

3.16 We suggest that the MAGs are updated to reflect the CMA's approach to rivalry enhancing efficiencies and remedies. For example, paragraph 8.15 of the MAGs states "At Phase 1, the evidence must be sufficient to satisfy the CMA within the time available in an initial investigation that efficiencies would prevent the realistic prospect of an SLC". This should be amended to refer to the fact that UILs may be used to deliver greater certainty that efficiencies will be realised. The MAGs should cross refer to the Merger Remedies Guidance.

3.17 Finally, we encourage the CMA to update its guidance regularly to incorporate any future developments to its approach. In particular, the CMA should add further references to decisions where efficiencies claims were successful, and on what basis.

Questions on the CMA's current approach to 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?

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)?

3.18 We encourage the CMA to amend its approach to RCBs by lowering the perceived and actual barriers to successful RCB claims and by providing more detailed guidance on the evidence required to substantiate those claims.

Lowering the threshold

3.19 The fact that there have been so few successful RCB cases, with the majority concentrated in the hospital sector, evidences the high threshold applied by the CMA for accepting RCBs. Indeed, at paragraph 3.53 of the Merger Remedies Guidance, the CMA states that instances where the CMA will conclude that no remedial action should be taken to minimise the loss of RCBs are expected to be "extremely rare". In our view, this position is not justified as a matter of principle and in practice discourages parties from raising RCBs. We believe this position should indeed be revisited to ensure (as per the Call for Evidence) that merger benefits "can be preserved wherever possible".

3.20 In addition, we consider that the CMA's historic preference for structural remedies has reduced the likelihood of parties evidencing and the CMA accepting RCBs. As we note above in relation to rivalry enhancing efficiencies, remedies that enable RCBs to be realised, or not lost, will usually be behavioural in nature. The CMA notes at paragraph 3.48 of the Merger Remedies Guidance that it will only accept behavioural remedies where "RCBs are likely to be substantial compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies".

3.21 This also reinforces our position that the CMA should be more receptive to behavioural remedies offered in both phase 1 and phase 2. Resistance to accepting behavioural remedies means RCBs are less likely to be effectively captured.

3.22 Finally, we note that paragraph 4.21 of Mergers: Exceptions to the duty to refer (CMA64) states: "It is not possible for the CMA both (i) to apply relevant customer benefits as an exception to the duty to refer, eg in relation to certain affected markets, and (ii) to accept an undertaking in lieu in respect of other affected markets." The reasons for this approach are not clear and will inevitably deter RCB claims at phase 1.

Clear and consistent guidance to parties

3.23 Guidance on RCBs is currently included in three CMA publications: the MAGs, the Merger Remedies Guidance, and CMA64. As a general point, it is important that the guidance across these publications is consistent and that the three publications comprehensively cross-refer to each other.

3.24 In relation to the substantive assessment, for example, unlike the Merger Remedies Guidance (at paragraph 3.18), CMA64 does not explain that the term "relevant customers" includes "future customers".

3.25 In relation to procedure, while CMA64 notes that evidence of RCBs should be presented to the CMA "at the earliest possible opportunity during the pre-notification period" (paragraph 4.6) and that providing evidence of RCBs "in no way implies" that the parties accept the existence of an SLC (paragraph 4.15), the Merger Remedies Guidance is silent on both these important aspects.

3.26 Collecting evidence to substantiate RCBs can be burdensome and time-consuming for the parties. In addition, as we note above in relation to rivalry enhancing efficiencies, the process for assessing RCBs should be an iterative one, involving CMA feedback. Therefore, to increase the likelihood of the CMA being able to properly assess and take account of RCBs (especially at phase 1), all relevant CMA guidance should explicitly encourage parties to engage with it on RCBs during pre-notification.

3.27 Similarly, explicit comfort in the Merger Remedies Guidance that raising RCBs does not imply the acceptance of an SLC would encourage parties to assert compelling RCB claims with the CMA in sufficient time.

3.28 We would also welcome greater detail and clarity on the CMA's approach to the types of evidence required to substantiate RCBs and how it will take different types of RCB into account. The Merger Remedies Guidance simply states at paragraph 3.20 that the parties "will be expected to provide convincing evidence regarding the nature and scale of RCBs they claim to result from the merger and to demonstrate that these fall within the Act's definition of such benefits". Given the dearth of precedent cases, we encourage the CMA to provide worked examples of the evidence the CMA expects will assist RCB claims, including and expanding on relevant parts of CMA64 (e.g., paragraphs 4.14 and 4.20).

3.29 In terms of assistance with quantifying the benefits of RCBs and then balancing those benefits against the SLCs identified, we consider that in many cases the CMA could usefully call on the expertise of sector regulators and other industry experts. We understand that the CMA successfully liaised with Monitor/NHS England in the hospital RCB cases.

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?

4.1 As the CMA notes in the Call for Evidence, there are clear benefits to both pace and proportionality from achieving a phase 1 remedy outcome and avoiding the time and cost of a phase 2 reference. We consider that there are elements of the current phase 1 process that could be improved to allow for more (and earlier) interaction with the CMA and greater flexibility during the phase 1 remedy process.

Earlier engagement and articulation of concerns

4.2 We welcome the CMA's encouragement of early discussion/consideration of possible UILs during phase 1. However, the current process can sometimes discourage parties from engaging early with the CMA on UILs, even on a without prejudice basis. To foster more constructive and timely discussions, we encourage the CMA to explore options for providing the parties with greater insight into the case team's thinking regarding the likelihood of an SLC as early as possible. This would allow the parties more time to tailor their UIL proposal to directly address the CMA's concerns.

4.3 We appreciate that the decision maker will not typically be involved in UIL discussions until the decision on the existence and scope of the SLC has been made (paragraph 4.5 of the Merger Remedies Guidance). However, the limited timeframe for submitting a UIL offer – particularly for cases where

complex remedies may be proposed – can create a tension. We encourage the CMA to explore options that would allow for the decision maker to be involved in earlier remedy discussions with the parties. For example, the establishment of a separate remedies team, independent from the main investigation, could facilitate earlier engagement and provide timely briefings to the decision maker, not limited to the ten-working day period following the SLC decision.

4.4 At paragraph 4.6 of the Merger Remedies Guidance the CMA says it will consider whether "additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC decision". We welcome further guidance on the nature of these safeguards, to provide assurances to parties that any pre-SLC decision remedies discussions will be on a strictly without-prejudice basis.

More flexibility on implementation of remedies

4.5 As noted above in response to theme 1, the current phase 1 remedy process requires that any proposed remedy be fully implemented within a relatively short timeframe.

4.6 For example, where an up-front buyer is required, the purchaser must be identified and approved by the CMA and a sale agreement put in place within the 90-day period available for the acceptance of UILs. In practice, this leaves the parties with approximately two and a half months following the CMA's 'acceptable in principle' decision to implement the UILs by completing the sale process and securing the necessary approvals.

4.7 As we describe above, this is a more restrictive approach than is permissible under the Act. In addition, this compressed timetable stands in contrast to the approach taken in other jurisdictions. Under the European Commission (EC)'s procedure, for example, in an up-front buyer scenario, clearance is granted on the condition that the parties do not close the transaction until a binding agreement is reached with an EC-approved purchaser. The parties are then typically afforded a period of six months to complete the sale process, with the possibility of extensions where appropriate. This provides a more practical and commercially viable framework for implementing remedies.

4.8 The CMA's current process may give rise to several challenges that could undermine the effectiveness of phase 1 remedies:

(a) **Disincentive to offer remedies**: The limited time available may discourage parties from offering remedies at phase 1, as they may consider the timeframe insufficient to develop and implement a credible remedy proposal.

(b) **Compromised sale value**: Where parties do proceed, the need to complete the sale within a short period may result in unfavourable outcomes, including the need to accept a lower sale value in order to meet the deadline.

(c) **Premature strategic decisions**: The process may force parties to make early decisions about whether to focus on the substantive merits of the transaction or to pivot towards remedy discussions. This can result in remedies being offered in cases where they may not be necessary, or conversely, in transactions being referred to phase 2 unnecessarily because the parties have prioritised substantive arguments (and failed) and run out of time to propose remedies.

4.9 In light of these concerns, and as noted above, we encourage the CMA to adopt a more flexible approach to when UILs are implemented. This would allow parties a more reasonable period in which to conduct a thorough and commercially sound sale process.

4.10 We believe that such flexibility would better align the CMA's process with other authorities, ultimately supporting the effectiveness and credibility of the phase 1 remedies process. It should be clearly reflected in the Merger Remedies Guidance.

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?

4.11 We acknowledge that recent amendments to the phase 2 merger investigations process – including those relating to earlier engagement on potential remedies – have only recently come into force. These changes appear likely to enhance the effectiveness of the phase 2 remedies process. In our view, it is prudent to allow sufficient time to observe how these reforms operate in practice before considering any further modifications.

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?

4.12 We welcome the CMA's ongoing efforts to cooperate with other competition agencies investigating the same mergers. We encourage the CMA to explore further opportunities to align its timelines with those of other agencies, in order to facilitate the development and implementation of coordinated remedies.

4.13 We also welcome the CMA's current practice of consulting with sector regulators and encourage it to continue engaging with these bodies as early as possible in the process, drawing upon their sector-specific expertise during the assessment of potential remedies.

4.14 We agree that, in certain circumstances, it may be appropriate for the CMA to recommend that other bodies take action to address competition concerns arising from a merger, and we note that this approach is already employed in the context of market studies.[1] The regulated sectors are an obvious example of where this could be appropriate.

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?

4.15 None beyond the points raised above.

[1] See, for example, the CMA's recommendations to governments as part of its market study into housebuilding (see here).

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?

4.16 Also see our comments in relation to theme 1 above on Monitoring Trustees.

4.17 In terms of industry experts, we welcome the CMA's engagement with such experts to ensure that decisions on remedies are informed and robust, particularly in areas of significant technical complexity. We recognise that, in certain cases where remedies are particularly complicated, the appointment of Monitoring Trustees may assist the CMA in overseeing the effective implementation of such remedies and in providing assurance that the remedies will address the identified concerns. However, we would question the appropriateness of involving Monitoring Trustees in the CMA's initial assessment of proposed remedies. In our view, the use of Monitoring Trustees should be reserved for implementation and only in situations where it is proportionate, taking into account the specific complexity and nature of the remedies put forward by the merger parties.

Allen Overy Shearman Sterling LLP

9 May 2025