CMA REMEDIES CALL FOR EVIDENCE
PERSONAL SUBMISSION

1. This brief response is submitted in a personal capacity.[1] It does not represent the views of Latham & Watkins LLP or any of its clients.

2. The following key points are suggestions aimed at recalibrating CMA remedies policy for the contemporary environment and apply to Phase 1 and Phase 2 remedies policy standards.

3. As a general matter, the following should not be read as supporting withdrawal by the CMA of review of deals in global markets nor a horizontal merger remedies policy that would durably replace competition with ossifying regulation to any material degree (*e.g.*, on a non-transitional basis and absent exceptional circumstances).

4. The principles below are relevant considerations that the CMA legitimately can and should take into account. Formal adoption in CMA guidance should increase the CMA's flexibility and align it more with peer regimes without detracting from robust and fair merger enforcement.

A. Restore the flexibility of a more holistic assessment of effectiveness and proportionality in conjunction

5. The CMA's statutory duty under the Enterprise Act 2002 (EA02; e.g. s. 36(3)) with regard to remedies is to consider "*as comprehensive a solution as is reasonable and practicable for the purpose of remedying, preventing or mitigating the SLC and [its] adverse effects*". This allows broad holistic discretion of weighing candidate remedies for:

   - their effectiveness, including risk profile (*as comprehensive a solution*)

   alongside

   - their proportionality (*as is reasonable and practicable*).

   EA02 does *not* mandate assessment of their former in isolation of the latter. In practice, the CMA's two-step approach of assessing effectiveness before proportionality, and only considering proportionality when it has deemed there to be more than one effective remedy, has narrowed its discretion, sometimes unduly.

6. In some cases, the only effective remedy will be prohibition or unwinding (and that may also (easily) be proportionate in the circumstances). But in many cases, there will be more than one remedy, and the CMA should consider both effectiveness and proportionality.

7. At present, there is a default assumption that the zero-risk-tolerance option (i.e., with the least residual SLC risk) is the "*most effective*" which may be treated as being the "*only*" effective remedy, such that there is no choice of effective remedies. This precludes meaningful consideration of proportionality and leaves the CMA failing to consider whether the most "*comprehensive" solution* (e.g. prohibition) is indeed *"as reasonable and practicable*" as it should be (emphasis added).

8. It should be open for the CMA reasonably to choose a remedy that may entail slightly more risk tolerance due to its complexity or nature, for sake of argument, but is much more proportionate. Such remedies may include preservation of customer benefits and efficiencies but – given the stricture of positive findings on these issues in CMA policy – should not be a necessary condition to invoke such analysis.

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[1] It reflects over 25 years' experience advising clients on UK and EU merger control including over five years at the Office of Fair Trading involved in developing merger policy on remedies and efficiencies and deciding relevant cases at Phase 1.

B. Rely less on formal remedies categories and discriminate more between the nature of the SLC concern the remedy proposal seeks to resolve

9. The CMA's strong preference for structural remedies over behavioural ones is shared by the peer regimes for resolving **horizonta**l concerns save for relatively exceptional circumstances. That is a sensible general policy.

10. By far the largest deviation between the UK and the peer regime norm was the policy view that this preference should apply equally to **non-horizontal** concerns (e.g. preserving access to key input or, less commonly, to customers). All else equal, a behavioural remedy to a non-horizontal SLC that preserves access to inputs (or to customers) is much more likely to be effective than a remedy to a horizontal SLC that directly purports to restore competitive dynamics or generates equivalent effects. It is also likely to be much more proportionate than an outright prohibition which would eliminate any efficiencies and customer benefits.

11. Of course, the CMA must consider monitoring and circumvention risks but preserving access does not distort competitive outcomes in any way remotely comparable, for sake of argument, to replacing competition on price or quality with price caps or quality regulation.

12. One size should not fit all, therefore, in terms of the posture of CMA remedies policy toward non-divestiture remedies. CMA policy and practice has not expressly or regularly (to sufficient degree) differentiated between non-horizontal and horizontal concerns in its attitude to remedies. The CMA should adopt the more nuanced approach of peer regimes not (only) for comity reasons but because that approach has sound logic in effectiveness and proportionality consistent with the EA02.

13. It would also eliminate the "binary" problem that the CMA would sometimes find itself in choosing between the two extremes of unconditional clearance and prohibition, because it had for policy reasons, not legislative ones, deprived itself of a middle-way that could in principle have been a reasonable holistic solution in terms of effectiveness and proportionality.

C. Introduce at least three distinct relevant considerations based on proportionality

1. Sliding scale factor 1: error cost analysis and the strength of belief in SLC above the minimum legal threshold

14. The CMA should consider a sliding scale principle that the less certain (relatively more speculative) the SLC finding, the greater the appetite should be to consider remedies that carry some, perhaps modest, degree of risk.

15. This was a principle long employed not in relation to remedies but in relation to the *de minimis* exception to the duty to refer (from 2007 to 2024). The December 2018 CMA *Mergers: Exceptions to the Duty to Refer* guidance (CMA64) explained:

> **CMA's belief regarding the likelihood of a SLC**
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> 38. The CMA will take into account the strength of its belief regarding the likelihood that the merger will have an anti-competitive effect when deciding whether to exercise the de minimis exception. As the Court of Appeal ruled in *IBA Health*, the CMA's duty to refer can in principle be triggered by a belief as the likelihood of a SLC that may be no higher than 'more than fanciful' at one end of the spectrum but may alternatively extend to, at the other extreme, a very high degree of confidence.
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> 39. The CMA considers it appropriate to attach weight to the belief it holds regarding the likelihood of a SLC. This is because customers in the relevant market will receive no direct benefit if a benign merger is subject to in-depth scrutiny and is then cleared, a scenario which becomes increasingly likely the lower the likelihood that a SLC will occur.

16. The sample principle can be applied to another exception to the duty to refer, Phase 1 remedies or Undertakings in Lieu (UIL). More complex structural remedies, or behavioural remedies, both of which can carry some degree of risk, can in appropriate circumstances capture mitigation of the error cost of false positives (which may arise in prohibition) as well as false negatives (which may arise in an unconditional clearance).

17. Of course, it must be the case that to consider remedies the CMA has met the minimum legal threshold of belief to establish an SLC to begin with. That said, the lower the strength of belief in SLC above the requisite legal threshold, the greater the risk, all else equal, of false positives (Type I error, or over-enforcement), while the greater the certainty of SLC, all else equal, the greater the risk of false negatives (Type II error, or under-enforcement).

18. As noted above, at Phase 1 there is wide spectrum of conviction captured by "*realistic prospect*" of SLC but below a 50% probability, and the test for reference also includes, of course, an expectation (more likely that not finding, or above 50% likelihood). *De minimis* practice (see CMA64, para. 40) shows that it is perfectly possible to calibrate the standard of belief at the very least into "*is the case*" (over 50% likely) and "*may be the case*" (under 50% likely) categories. The degree of conviction in the SLC is relevant to the error cost analysis. Error cost analysis was expressly adopted in the OFT's Report to the Secretary of State in *BSkyB/ITV* to weigh whether to refer and could be used in the exercise of discretion of whether to accept a Phase 1 remedy.

19. While at Phase 2 the CMA must find an SLC to be "*more likely than not*", it also does not follow that this must be treated as certainty (or that "*more than 50%*" equals "*beyond reasonable doubt*" or 100%) especially in circumstances where prohibition would result in lost customer benefits/efficiencies. Again, therefore, there is a spectrum of probability, and the CMA can take the degree of conviction (including a "finely balanced" case that is nonetheless SLC) into account, especially when also considering the probability of customer benefits/efficiencies.

20. More generally, the EA02 does not mandate complete certainty and the acknowledgement that predictions carry error cost is intellectually honest and does not undermine the integrity of the regime or substantially increase the CMA's litigation risk; on the contrary. The CMA will *increase* regime legitimacy if it is intellectually honest and transparent and does not, for sake of argument, assume infallibility or unrealistic certainty in relation to SLC judgments.[2]

2. Sliding scale factor 2: proportion of deal affected by the SLC finding

21. When an SLC finding relates to a small part of a transaction, it inevitably follows that a large part of the transaction is either competitively neutral or pro-competitive.

22. A greater tolerance for pragmatism and some degree of risk may be appropriate where a transaction, by and large, does not pose SLC concerns and where the CMA should be cautious to prohibit. It also suggests, all else equal, that market power was not the rationale for the transaction (see also earlier *de minimis* guidance) and so deterrence factors should not weigh in the analysis.

23. This approach is taken by some peer regimes and influenced the thinking in the two IP licence remedies cited by the Call for Evidence. In *Tetra Laval/Carlisle,* the first IP licence remedy under EA02, the OFT declined to consider it necessary to include production facilities in the perimeter of any UIL where those facilities largely produced non-overlap products;[3] nor was a reverse carve-out considered necessary. A similar combination of effectiveness and proportionality factors applied in *Unilever/Alberto Culver* where concerns were limited to the

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[2] No more so than in relation to remedial judgments (hence the recognised value in *ex post* remedial efficacy studies which demonstrate that some predictions and assumptions turn out to be incorrect).

[3] See para. 75(iii) of that decision.

bar soap overlap, a small proportion both of the deal and of products sold under the *Simple* brand.[4]

3. Sliding scale factor 3: UK nexus as proportion of total deal nexus to regimes conducting merger review of the same deal

24. This proportionality principle captures appropriate caution that respects comity. All else equal, when the UK nexus of a transaction is relatively small, the CMA should be much slower to impose outcome-determinative remedies. This is particularly the case when regimes such as the US and EU are also looking at a transaction and these jurisdictions account for a much larger share of deal (parties') nexus. In practice, the most obvious outcome-determinative remedy is to prohibit a global transaction where other regimes do not.

25. Taking this principle into account is not a binding obligation to clear every transaction (including on dubious grounds) and is not, as has sometimes been suggested, an abrogation of the CMA's remedial duties towards consumers and the competitive process in the UK. Neither is it a suggestion that the CMA should not be reviewing global transactions.

26. Assessing whether a CMA prohibition is outcome-determinative can also be achieved by stopping the clock under the CMA's new powers, as peer regimes are able to manage their own processes in ways that typically allow them to factor in developments in parallel reviewing jurisdictions. This should be viewed as a feature – not a bug – of a mature regime that reviews transactions that may affect transnational or global markets and are being reviewed in parallel.

27. The duty of expedition should not mechanically be used to plough ahead regardless of what is happening in other jurisdictions as conflicting outcomes – on common fact patterns on one and the same relevant market – should be mitigated as it erodes perceptions of merger control regime legitimacy (whether that conclusion is fair or not).

D. Adapt interpretation of the Phase 1 standard correspondingly

28. It is normal and sensible to have a more restrictive remedial standard at Phase 1 than Phase 2, all else equal. Over time, in the 21-plus years of EA02, a large variety of remedies of differing complexity and profile beyond vanilla divestments of a stand-alone business have been determined to be "*clear cut*" and "*capable of ready implementation*" so it is not obvious that the problem is with the choice of terminology as being unduly restrictive. On balance, this paper suggests the formulation of the standard remains fit for purpose as such.

29. However, the interpretation of that standard can be adapted: the tolerance for complexity should be adjusted given that the CMA's jurisdictional remit is far broader post-Brexit, including its extended jurisdictional powers since 1 January 2025.

30. The above principles could be used to shape how to interpret the Phase 1 remedial standard, irrespective of whether the CMA prefers to retain the existing wording or choose new wording.

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[4] See para. 187(i) of that decision.