Weil

Response to the CMA's call for evidence on its approach to remedies in merger cases

May 12, 2025

I. Introduction

(1) Weil, Gotshal & Manges (London) LLP ("**Weil**") welcomes the opportunity to respond to the CMA's call for evidence as part of its review of its approach to remedies in merger cases ("**Call for Evidence**").

(2) As an overarching point, we welcome the steps the CMA is taking to improve its processes and the proportionality and predictability of the UK mergers regime. Reform to the CMA's approach to remedies is a vital aspect of this programme, to ensure that no merger is unnecessarily referred to an onerous Phase 2 investigation, or ultimately prohibited, where suitable remedies are available.

(3) Based on our recent experience advising on some of the most complex remedies cases in recent years, both in the UK and elsewhere, we provide comments below on certain specific aspects where we see significant room for improvement in the CMA's current approach to assessing proposed remedies. We have grouped these comments under the following themes:

a) Engagement between case teams and merging parties.

b) The CMA's framework for assessing remedial options.

c) Assessment of behavioural and 'fix-it-first' contractual remedies.

II. Engagement

(4) The CMA states in the Call for Evidence that, where potential competition concerns are identified, "*we want to work constructively with businesses to identify as quickly as possible whether there is an effective and proportionate remedy that will resolve our concerns and enable them to get on with implementing their deal and running their business*".[1]

(5) Having recently implemented changes to its Phase 2 processes aimed at increasing the likelihood of a successful remedy outcome, we are encouraged that the CMA is now focusing on how its remedies processes, including at Phase 1, can be further improved to enable effective engagement to take place on remedies at the earliest possible stage.

(6) In our experience, this will require a step change in Phase 1 case teams' typical approach to engaging with merging parties. Identifying potential remedial options is only possible where the parties have a clear indication of which competition concerns the CMA is exploring. While this is clear at the outset of a Phase 2 investigation, during pre-notification and Phase 1 merging parties are often provided little, if any, feedback on the CMA's emerging thinking prior to the 'state of play' meeting. This leaves little time for discussions regarding potential undertakings in lieu ("**UILs**"), in particular

[1] Call for Evidence, paragraph 3.

given the time pressures which both merging parties and case teams are under by this stage of the process.

(7) We see no reason for the CMA to maintain its current guidance that "*the case team will not be able to inform the parties of the CMA's decision or direction of thinking on whether there is a realistic prospect that the merger gives rise to a SLC prior to the announcement of the decision*" (emphasis added).[2] This is out of line with peer authorities and not conducive to effective and efficient outcomes. A more constructive approach would be for case teams to provide greater transparency on which substantive issues they are investigating as early as possible during pre-notification, and to update this as necessary as the CMA's investigation progresses (both to explain any additional issues identified but also any which have been deprioritised).

(8) We see only upsides to such an approach. Enhanced and earlier engagement would not only provide merging parties with a better opportunity to identify the evidence most relevant to the concerns the CMA is investigating, but also to give early consideration to potential remedies should those concerns not be allayed. Such engagement during pre-notification is particularly important for global deals, where merging parties are often seeking to coordinate parallel reviews (and potentially parallel remedy discussions) with multiple competition authorities.

(9) Equally, where the parties signal early on in the process that they would be willing to put forward remedies to resolve certain issues, the CMA should be open to such discussions in parallel with its substantive assessment. We note that the current guidance states that parties can put forward possible UILs at any stage during pre-notification or Phase 1.[3] Nevertheless, until recently, case teams have typically been reticent to engage in any constructive discussion around potential UILs unless the parties indicate a willingness to concede an SLC.

(10) We are however encouraged by a more constructive approach taken by case teams in recent matters and believe that the CMA's revised guidance should put in place a clearer framework for such discussions during pre-notification and the early stages of Phase 1.

III. Framework for assessment of remedies

(a) Effectiveness and proportionality

(11) Under the current remedies guidance, the CMA follows a two-stage assessment of proposed remedies (at both Phase 1 and Phase 2)[4]:

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2 Remedies Guidance, paragraph 4.4.
3 Remedies Guidance, paragraph 4.3.
4 Remedies Guidance, paragraphs 3.4-3.6.

a) First, an assessment of a remedy's **effectiveness**, with the CMA seeking a "high degree of certainty" that a remedy will be effective in addressing the relevant SLC and its resulting adverse effects.[5]

b) Second, for those remedies which CMA considers to be effective, it will assess their **proportionality**. This involves selecting the least costly and intrusive remedy and ensuring that no remedy is disproportionate in relation to the SLC and its adverse effects.[6]

(12) This two-stage approach is not required under the Enterprise Act 2002 ("**Act**"), and is liable to unduly limit the range of potential remedies which the CMA may accept "*for the purpose of remedying, mitigating or preventing"* an SLC. We note the following points in particular:

a) First, the CMA's current guidance and approach in practice effectively requires that a remedy be capable of *fully* remedying an SLC (with a high degree of certainty) in order to pass the first stage of its assessment.[7] However, as the Call for Evidence recognizes, the Act provides that mitigation of any SLC may be sufficient, and the CMA need only 'have regard' to achieving as comprehensive a solution to the SLC and any adverse effects arising as is 'reasonable and practicable'. The CMA's revised guidance must clearly reflect this.

b) Second, there is no good reason to separate the assessment of effectiveness from proportionality. Rather, these factors should be assessed together, in the round (i.e. the degree of effectiveness of each potential remedy should be weighed against its costs), to evaluate which remedy is the most proportionate in each case. The CMA's current approach is liable to preclude suitable remedies from being considered as part of its second-stage proportionality assessment.

c) A linked concern is the manner in which the CMA has in recent years applied a 'precautionary' approach in assessing the effectiveness of proposed remedies. Under this approach, any doubts regarding the effectiveness of a proposed remedy (including, for example, potential distortions of competition) has been seen as a reason to reject it, or to require a far more onerous version[8], without proceeding to any balancing of the benefits of the remedy against the risks identified. This is seen both at Phase 1, where the CMA's "clear cut and comprehensive" standard has been set at a very high level, and also at Phase 2, in particular in the CMA's assessment of behavioural remedies. This approach sets the bar too high for a remedy to be accepted and could lead to pro-

5 Remedies Guidance, paragraph 3.5(d).

6 Remedies Guidance, paragraph 3.6.

7 This is evident, for example, from paragraph 3.12 of the guidance which states that it will only be in "unusual situations" that the CMA would consider remedies that are partially effective in remedying an SLC, where such remedies are the only ones available.

8 For example, the divestment of a whole business rather than a particular division or business line.

competitive remedies which would secure significant customer benefits being rejected on the basis of a theoretical prospect of a minor distortion to competition.

(13) We would therefore encourage the CMA to move away from a two-stage assessment of effectiveness and proportionality, and provide greater clarity on how it will weigh the benefits and potential risks of proposed remedies in its revised guidance.

(b) Taking account of parallel actions by other competition authorities

(14) Consistent with the draft strategic steer from government, the CMA should have regard to remedies proposed in other jurisdictions, in particular where they have already been accepted by another competition authority. This may mean tailoring the remedial action the CMA takes to reflect remedies in other jurisdictions, or accepting that no UK remedy is required where the CMA assesses that such remedies are sufficient to protect UK customers and consumers. This is open to the CMA under the Act, which requires the CMA to consider "whether" any action should be taken to address an SLC (i.e. it is open to the CMA to take no remedial action even where it identifies an SLC).[9]

(15) Even where the CMA decides that specific remedial action is required in the UK, in order to deliver on the CMA's '4Ps' we would urge the CMA to show due deference to other competition authorities when reviewing global mergers and only adopt a materially different approach where the competitive assessment in the UK can be clearly distinguished. The CMA should also be mindful of the extraterritorial effects of any remedy it imposes.

(16) In order for the CMA to adopt this approach, the onus will be on the merging parties to ensure that they keep the CMA sufficiently abreast of remedy discussions with other regulators. However, it will also be important for the CMA to engage with those

[9] Sections 35(3) and 36(2) of the Act.

regulators to understand how they are evaluating the remedies proposed, the likelihood of them being accepted and the potential impact on competition in the UK.

(c) Relevant Customer Benefits

(17) Under the Act, RCBs may in principle be relevant to the CMA's decisions at both Phase 1 and Phase 2:

a) At Phase 1, the CMA has a discretion not to refer a merger to Phase 2 if it believes that any RCBs outweigh the SLC concerned and any adverse effects.[10]

b) The CMA may have regard to the effect on RCBs when considering UILs at Phase 1 and determining the question of remedies at Phase 2.[11]

(18) The CMA's current guidance sets out a high bar for any RCB to be accepted, which in practice is applied much more strictly than that which the CMA applies to finding an SLC (for example, in relation to the likelihood of pass-through of any cost reductions to consumers in the form of lower prices). As a result, to date, merging parties' arguments around RCBs have only very rarely been accepted or (even where accepted, at least in part) influenced the remedial outcome.

(19) In our experience, even where detailed evidence is put forward to substantiate claims of RCBs, there is typically limited engagement from case teams and such evidence is often dismissed in a relatively high level manner in CMA decisions without prior discussion with the merging parties or their advisers. This approach acts as a significant barrier to merging parties engaging on RCBs and their willingness to devote significant resources to proving such claims. The result is that an important element of the assessment which the CMA is required to undertake under the Act is routinely being overlooked.

(20) We therefore consider it important that the CMA's revised guidance provides a more balanced approach. Moreover, reflecting the points made above, of equal importance to the wording of the CMA's guidance will be case teams' willingness in practice to engage in constructive discussions with parties and their advisers around the types of evidence that would be required to convince the CMA of an RCB claim on a case-by-case basis.

IV. Behavioural remedies

(21) We welcome the CMA's engagement on the circumstances in which behavioural remedies are likely to be appropriate. We hope to see the CMA's revised guidance build on the constructive approach taken in *Vodafone/Three* to designing remedies that

[10] Sections 22(2)(b) and 33(2)(c) of the Act.
[11] Sections 35(5), 36(6) and 73(4) of the Act.

lock in merger-specific efficiencies and preserve customer benefits. We limit our observations at this stage to the following:

a) We believe that the 'hierarchy' in preference of structural remedies set out current guidance is unhelpful. It appears to have led in practice to an inherent scepticism of any behavioural remedies put forward by merging parties, which it can be difficult to overcome. Yet, as the Call for Evidence recognises, there is no clear-cut distinction between structural and behavioural remedies.[12] In our view, any remedy proposed by the parties should be assessed on its merits, and its assessment should not depend on whether it can be labelled as 'structural', 'quasi-structural' or 'behavioural'.

b) The circumstances in which the CMA will currently accept behavioural remedies, as set out in the current guidance[13], are too restrictive. While these may be relevant factors for the CMA to take into account in assessing the suitability of a behavioural remedy, we see no reason why such remedies should not be considered even where a structural remedy is available or an SLC is expected to have a longer duration. For example, the only structural remedy (or remedies) available may be disproportionate to the SLC identified, with a carefully tailored behavioural remedy offering a more effective outcome. Equally, behavioural remedies can be suitable over a longer term provided suitable monitoring arrangements are available.

c) As the current guidance recognises, behavioural remedies can be effective in particular where the company operates in a regulated environment and where there are expert monitors. However, we do not consider that behavioural remedies should *only* be considered in such circumstances, as the nature and extent of monitoring that will be required will differ in each case. We also note that the CMA's Digital Markets Unit should be well placed to monitor the implementation of remedies in digital markets, regardless of whether the company in question has been designated as having strategic market status.

V. 'Fix-it-first' contractual remedies

(22) An important area not covered by the Call for Evidence, or the CMA's current remedies guidance, is the CMA's approach to steps taken by merging parties to pre-empt competition concerns by entering contractual arrangements either prior to or during the course of a merger investigation. This can include structural measures, such as divestment of certain assets or businesses, or behavioural measures, such as long-term supply agreements with key customers.

(23) The CMA's typical approach to such efforts by merging parties has been to discount them entirely on the basis that they are not sufficiently certain. For example, the CMA's Merger Assessment Guidelines states, in the context of input foreclosure concerns, that

12 Call for Evidence, paragraph 31.
13 Remedies Guidance, paragraph 7.2.

the CMA is "*unlikely to place material weight on contractual protections*"[14] and the CMA has in practice applied this even where the contract in question has been entered into in contemplation of the merger in question.

(24) In our view, where merging parties are willing to take proactive steps to resolve competition concerns, the CMA should be encouraging this. The constructive approach taken by the CMA in *Vodafone/Three* to recognising the benefits of the agreement between Vodafone and Virgin Media O2 to extend and enhance the Beacon arrangements is a positive step in this direction, and should provide a template for future cases.

(25) We also believe the CMA's revised remedies guidance should give consideration to, and provide further guidance on, the circumstances in which the CMA may require a formal remedy to support or cement a contractual arrangement of this nature, as seen for example in *Microsoft/Activision Blizzard (ex-cloud streaming rights)*.

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[14] Merger Assessment Guidelines, paragraph 7.15.