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The Competition and Markets Authority
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Dear Competition and Markets Authority (the "CMA")

Merger Remedies Review – 2025 public consultation (the "Call for Evidence")

Following the CMA's Call for Evidence, we are pleased to submit our comments in respect of the three remedy themes under consideration. We attach responses to specific questions raised in the Call for Evidence document.

We would be happy to discuss our views further if this would be helpful.

Yours faithfully

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Questions on the CMA's current guidance approach

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?

Our view is that the requirement for phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' should not be changed. These criteria are necessary to ensure that remedies: i) address any identified SLC; and ii) are capable of being implemented and monitored effectively.

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?

No response.

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?

No response.

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

No response.

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?

In our view the current distinction between behavioural and structural remedies is appropriate. Each case anyway requires that potential remedies are assessed taking into account the specific issues and facts, and the design and application of necessary measures is not dependent on the definitions.

Q C.2: In what circumstances are behavioural remedies likely to be most appropriate?

Our view is that the key factors to be assessed in determining whether behavioural remedies are appropriate are whether they: i) meet the specified objectives in dealing with the SLC; and ii) are capable of being implemented and monitored effectively over a potentially extended period of the undertakings.

We have acted as Monitoring Trustee on numerous cases with behavioural remedies over significant periods and, whereas we believe that they are appropriate in certain circumstances, we highlight a risk that over time the

‘corporate memory’ of undertakings, and the consequent necessary practical measures which require to be followed, can fade. This reflects the natural turnover of personnel and is particularly the case in the event of corporate reorganisations. We believe that this risk can be mitigated, and that it is good practice (it can also be a formal obligation) for an individual to be appointed who is responsible for ensuring the undertakings are fulfilled (a “Compliance Officer”), and, for example, that processes are put in place to ensure that relevant personnel (including new hires) receive training and regular updates / reminders, and that confidentiality / ring-fencing measures are maintained (including in respect of IT applications).

We also consider that, even where the reporting cycle to the CMA is infrequent (for example, annually), there should be a protocol for the Monitoring Trustee and the party / parties giving the undertakings to have regular contact (not only at the time of the formal reporting requirements). This would not add materially to costs and would reduce the risks of non-compliance and unexpected ‘surprises’.

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)?

The CMA could involve parties with experience of the practical operation of complex remedies, for example Monitoring Trustees who have dealt with similar remedies / industries previously, in order to obtain their views prior to finalising remedies (although this may give rise to conflict issues with any ultimate monitoring role). These parties’ experience of whether remedies are, in practice, effective, and the sort of issues which have arisen, would inform the design of future remedies.

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?

Our view is that remedy undertakings and orders should be designed with the intention that they can and will be fulfilled (i.e. that they ‘clear-cut’ and ‘capable of ready implementation’), and that the potential to impose fines under the CMA’s new enforcement powers should not change these objectives. We note that the CMA anyway issues fines in certain circumstances under the current regime, and any change to the approach to remedy design may lead to complexity in assessing compliance and a potential increase in fines imposed.

Q C.5: Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

As set out in our response to Q C.2, we consider that the key issues are whether behavioural remedies can address the SLC and can be effectively implemented and monitored. We consider that these criteria can be satisfied at either phase 1 or phase 2, however note that, particularly where remedies are complex, phase 1 may provide insufficient time fully to assess the impact and practical application of such remedies.

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)?

No response.

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?

In our experience carve-out divestments remedies are appropriate where: i) a divestment business is capable of being clearly delineated, for example: customer contracts, supply contracts, physical assets, property leases, management / key employees, current and necessary support functions (including IT applications); and ii) the issues and processes required to ensure proper transfer / divestment are fully understood and managed, for example: fulfilling change of control requirements, agreeing personnel contracts / incentives, agreeing necessary TSA arrangements (including data transfer) and other ongoing arrangements (for example long-term supply of key inputs).

We have been involved in carve-outs where the divestment business is first transferred / demerged to a newly incorporated company (or companies), which is then divested. This provides benefits in respect of the certainty of the successful transfer of all necessary elements (intra-group) prior to final divestment.

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?

Although capable of being addressed (through due diligence and contractual protections), where complex carve-out divestment businesses are dependent on multiple IT applications, with the divesting party holding all divestment business data on (potentially myriad) systems, this increases divestment risks.

Where divestment processes are lengthy due to the complexity of the business being sold (and / or to restricted buyer interest), in our experience it can become difficult to retain key personnel (who understandably are concerned regarding their futures during an uncertain period, where information can be limited for confidentiality reasons). In these circumstances, appropriate incentive mechanisms should be agreed and potential fall-back options assessed.

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

In our experience, high-quality Hold Separate Managers are helpful in ensuring that carve-out businesses are successfully divested, for example they can: i) ensure that purchasers are informed of potential issues (commercial and practical); and ii) manage the divestment business during the divestment phase as 'one business', with a cohesive management team / operating unit (even if the purchaser ultimately decides to integrate it under a different structure).

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?

Although case dependent, our experience of the characteristics of successful divestment processes is that they should be designed such that: i) comprehensive data rooms are established; ii) discussions between potential purchaser(s) are arranged with specialist matter experts (e.g. on contracts, IP, HR, ongoing business support

functions / TSAs); and iii) sufficient time is allowed for bidders to assess the information, including raising questions. Monitoring Trustees can assess these matters, for example by reviewing the proposed sale process and timelines, having access to data rooms and q&a documentation, and having insights into key aspects of transactions (e.g. change of control issues; risks associated with the transfer of contracts and rights; personnel transfers (under relevant labour laws), sale agreements (and protections such as warranties, closing balance sheet mechanisms, and wrong-pocket arrangements).

We note that (unlike other agencies) the CMA does not require the Monitoring Trustee to give an opinion on a proposed purchaser(s)' ability to meet specified purchaser criteria. Our view is that this is a helpful function as the Monitoring Trustee can: i) assess issues early in the process i.e. prior to formal submission of a proposed purchaser / transaction documentation, and sometimes in respect of multiple potential purchasers, so that parties can consider and address any issues before formal submission; and ii) discuss with the proposed purchaser(s) their business and management plans in good time, and provide the CMA with an independent view of a purchaser's understanding of and plans for the divestment business, and its capabilities to deliver on these plans. This would not require any dilution to the CMA's approach but would provide additional insights.

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)?

No response.

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?

We believe that Monitoring Trustees have an important role in ensuring that: i) parties meet their obligations; and ii) the CMA is provided with clear and independent assessment of how remedies are being implemented.

We also believe that parties can and do benefit from working closely with the Monitoring Trustee, who – based on their previous experiences - can assist in assessing how parties propose to implement measures (for example hold-separate and ring-fencing mechanisms, derogation requests, divestment processes, incentive arrangements) and deal with issues which can arise (for example the departure of key personnel, unintended data flows, business plan 'misses'). In our experience the costs of this are usually outweighed by efficiencies achieved, both in terms of timing (e.g. by 'getting it right' the first time and thereby reducing questioning and iterations) and complexity (e.g. having to redesign / reimplement measures which were not effective), and we find that parties are happy to work on this basis.

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?

Our view is that it would likely be challenging for the CMA to take on a fuller monitoring role. This reflects, for example that: i) the role requires a dedicated, 'hands-on' approach, working closely with the parties, which would be difficult for the CMA given its other commitments; ii) it is helpful for the CMA to have third-party Monitoring Trustees to provide independent and objective reporting - which often requires the analysis and summary of significant volumes of data, and discussions with multiple parties over long periods - allowing the CMA to focus on the key issues and raise questions from a more 'remote' perspective before reaching a conclusion. This is particularly the case when there are potential or actual breaches of undertakings; iii) Monitoring Trustees can assess the application of undertakings in the context of practical aspects of running businesses, and can assist parties in considering appropriate mechanisms to fulfil obligations in that context; and iv) Monitoring Trustees have considerable experience of acting on cases / remedies, which would be difficult to replicate, which can be applied in considering relevant matters on new cases.

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?

As set out in our response to Q C.2, the CMA could involve parties with experience of the practical operation of complex remedies, for example Monitoring Trustees who have dealt with similar remedies / industries previously, to utilise their experience (albeit this may give rise to conflict issues with the ultimate monitoring role).

Separately, in our role we can appoint independent 'Technical Experts' in certain circumstances (for example, where we are monitoring remedies in a highly technical / specialist industry) to help with our ability to assess industry-specific issues. The CMA could also use this resource to consider how complex remedies would operate.

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?

As noted at Q E.2 above, we believe this would likely be challenging for a number of reasons.

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?

No response.

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?

No response.

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?

No response.

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

No response.

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?

No response.

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?

No response.

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?

No response.

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?

No response.

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)?

No response.

Phase 1 remedies process

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

No response.

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?

No response.

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?

No response.

Phase 2 remedies process

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

No response.

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

No response.

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?

No response.

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?

No response.

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?

No response.

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?

No response.

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?

Our view is that Monitoring Trustees have an important role in overseeing remedy implementation and compliance, including divestment processes, reflecting for example their experience of: i) how remedies can be implemented practically in a dynamic operating environment; ii) issues which may be problematic and how they can be effectively dealt with; iii) assessing numerous commercial activities and data in an often complex business environment, allowing the CMA and the parties to focus on the key issues; and iv) assisting the CMA and parties in dealing with problems if they arise.

As set out in our response to Q D.4, the CMA does not require the Monitoring Trustee to give an opinion on the proposed purchaser(s)' ability to meet specified purchaser criteria. As summarised above, our view is that this is a helpful function.