EUCLID LAW

NON-CONFIDENTIAL VERSION

MERGER REMEDIES REVIEW: CALL FOR EVIDENCE
RESPONSE FROM EUCLID LAW

1. INTRODUCTION AND SUMMARY

Euclid Law welcomes the opportunity to comment on the Competition and Markets Authority (**CMA**)'s call for evidence document. We look forward to continuing the engagement once the CMA has developed its thinking based on the responses from this call for evidence.

By way of summary, we consider it would be helpful to:

- Give parties the opportunity to engage earlier on potential undertakings in lieu (**UILs**) in phase 1 for more complex cases.
- Maintain flexibility in remedy design, engaging with parties on a case-by-case basis on the type of remedy that may be most appropriate to address any substantial lessening of competition (**SLC**).
- Consider proportionality – applying a proportionate approach to remedies to address the type of SLC.
- Provide more case studies to illustrate the impact of efficiencies and relevant customer benefits in particular, which may encourage additional engagement between the parties and the CMA on potential pro-growth arguments.

2. REMEDY THEME 1: CMA'S APPROACH TO REMEDIES

2.1. CMA's current guidance approach

As highlighted in the consultation document, the CMA is required under EA2002 to have regard to the need to achieve "*as comprehensive a solution as is reasonable and practicable for the purpose of remedying, preventing or mitigating the SLC and any adverse effects resulting from it*". It is the CMA's own interpretation of the legislative requirement that has meant that UILs are not accepted unless they are 'clear cut' and 'capable of ready implementation'. Therefore, there is clearly more that the CMA could do to create additional opportunities for more complex remedies to be accepted in phase 1.

We consider that these two requirements do (intentionally) set a high bar for acceptance of UILs at phase 1, which do therefore impact on the number of cases that progress to the time-intensive and costly phase 2. Even within these two requirements, there is room for the CMA to interpret these concepts more broadly than it currently does. [**CONFIDENTIAL**]

Whilst we appreciate that the timing and other constraints of the phase 1 process necessarily mean that the CMA may not be able to consider UILs at phase 1 in as much detail as remedies in phase 2, it should be open to the parties to raise possible UILs, both divestment and behavioural, early on in the process (based on possible theories of harm that may result) – even in pre-notification on a clear, without prejudice basis. The current de facto process, whereby UILs are only discussed at the Issues Meeting does not facilitate this process: it tends to be a one-way presentation by the parties rather than an opportunity for meaningful engagement. We suggest that certain changes, similar to those made for phase 2, could also be made to the phase 1 process to enable early consideration of UILs in more complex cases, perhaps even in pre-notification, where that is appropriate and the deal is public. We would recommend that the CMA adopt, as a matter of standard process, a step whereby it invites

discussions in cases with possible issues, making it clear that this is part of a discussion in the round on the substance/understanding the market. In short, there is a need to give merging parties greater confidence in the without prejudice nature of the discussions and more ready access to discussing the same with the decision maker on all types of possible remedies.

We agree that the CMA should consider both a remedy's effectiveness and proportionality, as this broadly reflects the legislative requirement for remedies. As noted, the CMA currently ensures that it only allows remedies with a high degree of certainty of being effective, which appears to go beyond the legislative standard. Whilst we understand the need for effectiveness, we consider that proportionality should be brought more to the forefront, so that the remedy's proportionality to the SLC is given greater importance (e.g., if an SLC is found in a small market, or which only affects a small proportion of the overall transaction, this fact should also be given due weight, which may not be possible if proportionality is only considered after effectiveness).

2.2. CMA's approach to behavioural remedies

We consider that the distinction between structural and behavioural remedies continues to be helpful and meaningful. It is the approach to each of these that may need to be reconsidered rather than the classification itself. In particular, while structural remedies will continue to be appropriate in many cases, the CMA has often engaged to only a very limited extent on other types of remedies at phase 1, which may have precluded more proportionate solutions being accepted. Behavioural remedies, including commitments to provide access, interoperability, or non-discriminatory conduct, can be effective in preserving competition when carefully designed, and well-monitored. It is also the case that the CMA has been less confident in accepting remedies offered if it is a 'new' market to it – see e.g. *Cardtronics/DCP*.

Whilst behavioural remedies are more likely to be the most appropriate remedies for non-horizontal mergers, in reality, we note that these may remedy a range of issues in all types of transactions. Indeed, we note that behavioural undertakings may also be relevant in horizontal transactions (e.g., *Bouygues SA / Equans SAS* at phase 1) and therefore, the type of remedy that is appropriate is likely to be case-specific.

That said, there may be circumstances (and related evidence) which may make behavioural remedies more appropriate. While the existing guidelines cite, for example, whether the sector is already regulated and the available expertise of a sectoral regulator, the absence of such factors should not be seen as excluding the appropriateness of remedies in a given case. Other factors (and related evidence) may include:

- The sophisticated nature of customers and their ability to detect a breach of undertakings;
- Factors incentivising compliance, including:
    - the presence of the same (sophisticated) customers in other markets – even if the threat of retaliation is not sufficient to deter foreclosure and thus eliminate the SLC, it may nonetheless be sufficient to incentivise compliance;
    - the likely impact on the merged firm's reputation of non-compliance;
- The experience of other authorities (e.g., the European Commission) in monitoring and enforcing similar undertakings from the same parties and/or in the same sector;
- The availability of monitoring trustees with sector-specific expertise and/or experience of monitoring similar undertakings from the same party and/or in the same sector;

- The narrowness or breadth of the competition concerns/foreclosure risk – the narrower the concerns, the more likely a behavioural remedy will be effective; and
- The ability of the parties to demonstrate that they have or will have effective internal systems, processes and safeguards in place to detect and deter breaches of the undertakings.

When the parties offer UILs or when remedies are imposed, it is, in our experience, not the parties' intention deliberately to breach these remedies. While the CMA's enforcement powers are unlikely therefore to be determinative in deterring breaches, the possibility of fines may have some influence in how these are implemented and monitored within the parties. Of more importance, as noted above, is assurance that the parties have or will have effective internal systems, processes and safeguards in place to detect and deter breaches of the undertakings.

Where the CMA has composition or circumvention concerns, for example in dynamic markets where business models may evolve over the duration of the undertakings, a carefully tailored review clause – with appropriate checks and balances – enabling the CMA to adapt the undertakings, may resolve such concerns in a more proportionate way than prohibition. Naturally, such adaptation must be necessary to address the SLC originally identified in the decision and not any new SLC.

As noted in section 2.1, we consider that the nature of the phase 1 process necessarily means that there will be different approaches to remedies as a whole, even though the legislative framework does not set out a difference in the standard to be applied for remedies. Nevertheless, within these constraints, we do not consider that behavioural remedies should be singled out and treated differently. We note that, historically, the European Commission has tended to be more willing to accept behavioural remedies than the CMA, which has at times caused a divergence in approach between the CMA and the Commission with the CMA either unconditionally clearing or blocking transactions and the Commission appearing more willing to accept remedies (including behavioural) at phase 1 or 2.

Commentators suggest that the Commission has historically been more ready to identify competition issues (an SIEC) in cases where it believes a behavioural remedy is likely to be available, while the traditionally stricter approach of the CMA against behavioural remedies may have led it to take a more robust approach to conclude that there is no SLC in the first place. *Meta/Kustomer* is arguably a good example of this, where the transaction was cleared with behavioural remedies in phase 2 by the EC, but unconditionally by the CMA in phase 1. The CMA should take care not to dilute its approach to a finding of SLC in such cases if it were to adopt greater flexibility towards behavioural remedies in future.

2.3. CMA's approach to carve-out remedies

Carve-out remedies are likely to be most appropriate where there are horizontal competition law concerns, which can be addressed by the sale of certain assets short of a standalone business. In these instances, it may be more proportionate to consider a carve-out remedy than prohibit the transaction altogether.

We note the challenges highlighted by the CMA's 2023 merger remedy evaluation relating to carve-out remedies, including the issues surrounding challenges to due diligence as a result of the absence of historic financial accounts/business records for the package, and the fact that the package may still be under negotiation. Whilst each transaction will need to be dealt with

case by case, identifying purchasers with sufficient expertise and, potentially engaging a divestment trustee to assist in the process would assist the CMA in mitigating the risks in the process. In particular, where a category of purchasers already possesses the necessary infrastructure in which the carve-out business can be readily integrated, this should mitigate many of the concerns attached to carve-out remedies. While we acknowledge that the interests of purchasers and those of the CMA are not always perfectly aligned, early and sensible engagement with potential purchasers would mitigate many of the perceived risks.

We note that, whilst not common, carve- out remedies have been more readily accepted by the European Commission, with the most obvious case being *Cargotec / Konecranes* where the Commission accepted a carve-out remedy including assets from both parties, whilst the CMA ultimately rejected the carve-out remedy and blocked the transaction. The CMA did accept a carve out remedy in *Sika/MBCC*. That experience, and the requirements relating to the carve out to make it acceptable, should become a template for carve-out remedy considerations, with the CMA addressing this transparently.

2.4. Assessing, monitoring and enforcing remedies

We see there being benefits to the CMA in the use of monitoring trustees, especially where this enables the CMA to agree certain types of remedies it may otherwise have concerns about monitoring and enforcing. These are provided at the expense of the parties, but report to the CMA, so whilst their use should be proportionate, they can act as the CMA's 'eyes and ears' without the resources required to carry out this role themselves. In addition, monitoring trustees can be selected based on relevant experience, including in specific sectors, which may have the benefit of ensuring that the monitoring trustee (and the CMA) is able to monitor more effectively, including with respect to behavioural remedies. The monitoring trustee is thus a way in which the CMA can practically monitor and enforce complex remedies (including behavioural) without materially increasing its own resourcing costs or giving rise to conflict-of-interest issues or ongoing day-to-day enforcement issues.

Outside of the monitoring trustee expertise, it is challenging to see how the CMA could have access to the right expertise in all industries. We would, however, argue that this may not be necessary. In relevant sectors, the CMA can rely on sector expertise provided by the sectoral regulators. Outside of these, as it does now, the CMA is able to assess the evidence provided by the parties to the merger, as well as by third parties, that are all experts in the sectors in which they are active. Customers and suppliers, in particular, are often able to provide an independent view, which should be given due weight by the CMA.

3. REMEDY THEME 2: PRESERVING PRO-COMPETITIVE MERGER EFFICIENCIES AND MERGER BENEFITS

We welcome the CMA's consideration of rivalry-enhancing efficiencies in the consultation – and its consideration of efficiencies in the recent *Vodafone/Three* case. However, that case is highly fact-specific and, historically, the CMA has been resistant to engage with the parties' arguments on efficiencies. Opportunities to engage with the CMA on this topic and develop best practice have therefore been limited. With respect to *Vodafone/Three*, we consider this to be a good test case of the impact of the remedies and would encourage the CMA to carry out further reviews as to the effectiveness of the remedies and the lessons to be drawn for future remedies design/acceptance.

Efficiencies are addressed in the Merger Assessment Guidelines, rather than the Remedies Guidance. It would be helpful to include the impact of efficiencies on remedies in any revised remedies guidance to assist the parties in putting forward these arguments, where appropriate and relevant. We suggest that the CMA should more explicitly factor efficiencies into its remedies analysis, particularly where parties can demonstrate a credible prospect of lower prices, improved innovation, or service quality resulting from the merger. This may also include circumstances in which the CMA may feel the need to "lock-in" efficiencies if it considers that the parties may not have the incentives to implement the efficiencies (although we expect that there should also be circumstances which do not require this "locking in" of efficiencies).

In order to encourage pro-competitive investment, the CMA should engage with parties on efficiencies and relevant customer benefits (which it has arguably only done in extremely limited occasions and circumstances previously). It should also provide further guidance on when these arguments may be considered. Indeed, we consider that this would be an area ripe for further detailed guidance, including case studies, as to when these may be appropriate outside of the highly fact-specific cases in which they have been applied previously.

The consideration of efficiencies and relevant customer benefits should also tie in with the principle of proportionality – and therefore their consideration should not relate only to the consideration of the SLC, but also in the approach to remedies. In cases where relevant customer benefits are established, this should have a clear impact on how the CMA assesses the proposed remedies, e.g. the CMA should be encouraged to accept remedies in order to allow the deal to go ahead and achieve the relevant customer benefits that have been identified. All remedies incur risks of one kind or another to their effectiveness; the CMA should be rightly expected to tolerate a greater degree of risk where substantial relevant customer benefits have been identified (and especially where these exceed the detriment to competition caused by the merger).

4. REMEDY THEME 3: RUNNING AN EFFICIENT PROCESS

The phase 2 process has recently been reformed to address feedback in relation to that process, including in relation to remedies. We consider that a similar process redesign would benefit phase 1, within the constraints of the shorter timeframe– including the desired shortened pre-notification process.

In particular, we suggest that the CMA should engage with the parties early in relation to remedies, in particular in complex cases as a matter of course, potentially as early as pre-notification. Where the theories of harm have not yet been decided upon, it would be possible to focus on the widest competition concern, in order to focus efforts to establish enough clarity to have a discussion on remedies. This would enable both the parties and the CMA to prioritise their resources. If the CMA adopts initiating such discussions as standard, while keeping it at the parties' choice as to whether to indeed offer UILs, it would remove the 'nervousness' of the parties as to discussing remedies in phase 1/at pre-notification on a without prejudice basis.

Given the recent changes to the phase 2 process, we would not suggest implementing further reforms at this stage, to allow the current process to bed in.

In terms of working with other regulators, both international and sectoral, the CMA should remain open to discussions with the parties on these points, as well as engaging with the other regulators directly. In our experience, this is already happening to some extent, with sectoral regulators providing input to the CMA and with engagement already taking place between merger authorities on key issues.

Whilst making recommendations to others may be an appropriate remedy in market studies or investigations, we consider it is unlikely – at least on its own – of being sufficient to meet the test to remedy an SLC, unless in very specific circumstances.