NON-CONFIDENTIAL VERSION

CMA MERGER REMEDIES REVIEW - CALL FOR EVIDENCE

Response from Baker & McKenzie LLP

12 May 2025

1. Introduction

1.1 Baker & McKenzie LLP ("**Baker McKenzie**") welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA's**") review of its approach to merger remedies and associated Call for Evidence of 12 March 2025.

1.2 Specifically, the review addresses three themes:

(a) Theme 1: How the CMA approaches remedies, including circumstances in which behavioural remedies may be appropriate.

(b) Theme 2: How remedies can be used to preserve any pro-competitive effects of a merger and other relevant customer benefits.

(c) Theme 3: How the process of assessing remedies can be made as quick and efficient as possible.

1.3 The review also follows the unveiling of the CMA's new Mergers Charter and the clear principles and overarching framework for engaging with businesses during merger investigations, the '4 P's': Pace, Predictability, Proportionality and Process. We firmly agree that *"every deal that is capable of being cleared either unconditionally or with effective remedies should be and only a truly problematic merger, where the harm to businesses and consumers cannot be effectively addressed through remedies, should not proceed"*,[1] and consider that this will result in benefits to all relevant stakeholders.

1.4 Baker McKenzie welcomes the CMA's review of merger remedies in line with its overall commitment to update the UK's merger regime.

1.5 We set out below our comments on Remedy Themes 1 and 3 together with evidence from Baker McKenzie's experience engaging with the remedies process at Phase 1.

1.6 While we recognise that, ultimately, there will be some remedies that are not appropriate for Phase 1 and should rightfully be considered at Phase 2, we think there are transactions that have been referred to Phase 2 that could have been resolved at Phase 1. Our response focuses on ways to enable more transactions to be approved at Phase 1, saving both the merger parties and the CMA from having to engage with the costly and burdensome Phase 2 process.

1.7 Cases are often referred to Phase 2 primarily due to time constraints, *i.e.,* merger parties find it difficult to devise an appropriate remedy and/or the CMA does not have enough time to consider the remedy proposed within the Phase 1 timetable. As it is not possible to extend the Phase 1 timetable without legislative change, meaningful engagement on remedies must occur earlier in the review process to allow sufficient time to work out remedies at Phase 1.

[1] Sarah Cardell, *Key Note Speech at Competition Policy 2024*, Chatham House (November 2024).

1.8 Our response to this call for evidence therefore explains, from our experience, what prevents merger parties from early engagement with the CMA and what steps the CMA can take to encourage early engagement and an open dialogue with merger parties.

1.9 We would be happy to discuss any of our comments in more detail and contribute to any further thinking or analysis on these topics.

1.10 Please note that this response represents the views of Baker McKenzie as a firm and does not represent the position of any of our clients. This response also does not represent the position of any individual partner or associate of Baker McKenzie. This is a non-confidential version of our response which we are happy for the CMA to publish on its website. Confidential information that has been excised has been marked "✂".

2. Theme 1: The CMA's approach to remedies

*Relaxing the CMA's current requirement for Phase 1 remedies to be "**clear cut**"*

2.1 The CMA's current approach to undertakings in lieu of reference to Phase 2 ("**UILs**") is that they are "… *appropriate only where the remedies proposed to address any competition concerns raised by the merger are **clear cut**. Furthermore, those remedies must be **capable of ready implementation**"*[2] (emphasis added).

2.2 Baker McKenzie considers that the CMA's clear-cut requirement imposes an overly burdensome standard on merger parties that is incongruous with the CMA's Pace and Proportionality goals under its '4 P principles'. The strictness of this requirement does not create incentives for merger parties to engage in early remedies discussion with the CMA, which we believe is critical to ensuring that the CMA's remedies process is streamlined and predictable for merger parties.

2.3 The clear-cut requirement, as set out in the CMA's Merger Remedies Guidance ("**CMA87**"), requires that *"there must not be material doubts about the overall effectiveness of the remedy"*[3] which in practice results in the CMA avoiding "complex" remedies which cannot be readily implemented within the Phase 1 timetable. While we appreciate the CMA's basis for taking this approach, Baker McKenzie considers that this means that the CMA does not, at Phase 1, explore remedies which may in reality bring about commercially efficient outcomes and prevent cases from unnecessarily being referred to Phase 2.

2.4 Under the clear-cut standard, "*the CMA may accept a more extensive remedy offer at Phase 1 through UILs than might be needed if the merger were to receive a detailed Phase 2 investigation*".[4] As merger parties generally do not wish to divest more than necessary to resolve a competition concern, they are accordingly hesitant to engage with a regulator that is not willing to consider a remedy the parties would consider more proportionate to the potential harm caused. If the CMA were to change its approach, merger parties would be more likely to feel that they will get a "fair deal" at Phase 1 and thus engage with the CMA earlier in the process. This earlier engagement also has the added benefit of creating more time for the CMA to review and get comfortable with the effectiveness of more complex remedies.

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[2] CMA87, paragraph 3.27.

[3] CMA87, paragraph 3.28 (a).

[4] CMA87, paragraph 3.7.

2.5 We consider that, at Phase 1, the CMA should be more open to accepting (a) remedies that mitigate competition concerns; (b) behavioural undertakings; (c) carve-out remedies; and (d) 'mix-and-match' divestitures. These prosed changes are explained more fully below.

(a) Accepting UILs that "mitigate" competition concerns

2.6 The CMA's current approach at Phase 1 is that it only considers and accepts UILs *"that remedy or prevent the competition concerns rather than those that simply mitigate concerns"*.[5] Baker McKenzie would urge the CMA to consider at Phase 1 UILs that are capable of mitigating competition concerns, not just those that remedy or prevent the competition concerns. Adopting this approach would not require any legislative change, as the Enterprise Act 2002 ("**Enterprise Act**") recognises that mitigation of any SLC may be sufficient, and that 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*".[6]

2.7 An openness by the CMA to UILs that mitigate the substantial lessening of competition ("**SLC**") will help remove the barriers preventing merger parties from discussing remedies at an early stage of the Phase 1 process.

2.8 CMA87 provides that, for acceptance of UILs, "*[t]he CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC*".[7] Baker McKenzie acknowledges that this is a reasonable starting point, but urges the CMA not to be too rigid in adhering to this standard.

2.9 For example, ✂.

2.10 If the CMA had rigidly adhered to its "starting point" of requiring divestment of the entire overlap at Phase 1, this transaction would likely have resulted in a conditional Phase 2 decision – with precisely the remedy that the parties were willing to offer at Phase 1. The fact that this case did not proceed to Phase 2 is an efficient, positive result for both the CMA and the merging parties.

(b) Accepting behavioural remedies

2.11 The CMA's current approach indicates that it *"is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns"*[8] and that from the CMA's experience *"devising a workable and effective set of behavioural commitments within the context of a short, Phase 1 timetable is difficult."*[9] CMA87 also states that structural remedies are preferred on the basis that they do not require monitoring and are more likely to comprehensively tackle the change in market structure which could lead to the SLC. We submit that the CMA should be more open to behavioural remedies at Phase 1.

2.12 Merger parties that believe a behavioural remedy would resolve a potential SLC are unlikely to proactively offer a structural remedy. If the CMA were more receptive to behavioural remedies

[5] CMA87, paragraph 3.31.

[6] Section 73(3) of the Enterprise Act.

[7] CMA87, paragraph 3.30.

[8] CMA87, paragraph 3.32.

[9] *Ibid.*

at Phase 1, merger parties would be more likely to engage in early remedy discussions with the CMA. This longer engagement would provide the CMA with more time to assess the effectiveness of such a remedy, further undermining the basis for the presumption against behavioural remedies at Phase 1 – namely, that "*devising a workable and effective set of behavioural commitments within the context of a short, Phase 1 timetable is difficult*".[10] Where such a remedy is ultimately accepted at Phase 2, it is potentially a missed opportunity for the CMA not to have accepted it at Phase 1 in order to improve its commitment to Pace. Further, greater amenability to accepting behavioural remedies where appropriate is consistent with the principle of proportionality and the text of the Enterprise Act, which requires decisions to *"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"*.[11]

2.13 In our experience, the CMA's approach to behavioural remedies at Phase 1 can dissuade merger parties from even offering potentially appropriate remedies at Phase 1. ✂.

2.14 We consider that behavioural remedies will likely be more appropriate in markets that are (i) dynamic and innovative, and (ii) subject to low entry barriers given such markets are more likely to change materially, making permanent structural remedies less effective or necessary. In innovative technology markets, access to data, apps and platforms or IP are likely to be more important to preserving competition than maintaining market structure through a transfer of assets. The CMA's approach to accepting UILs in *Vodafone/Three*, noting the CMA's position that behavioural remedies may be more acceptable at Phase 1 in regulated markets, is a welcome step forward in this regard.

2.15 To aid in the assessment of behavioural remedies at Phase 1, we submit that the CMA should consider the use of an independent advisor. Where merger parties propose a behavioural remedy at an earlier stage of the Phase 1 process (even during pre-notification) before the CMA is able to appoint a monitoring trustee, the CMA could appoint an independent advisor (remunerated by the parties). This independent advisor would serve a similar role as a monitoring trustee, advising on the sufficiency and suitability of the proposed behavioural remedy, thus reducing the burden on the CMA and potentially expediting the assessment of the remedy. Should the behavioural remedy ultimately be accepted, the independent advisor could become the monitoring trustee. The European Commission has adopted this practice with positive results.

2.16 We agree with the CMA's suggestion in the call for evidence that the CMA's enhanced powers under the Digital Markets, Competition and Consumers Act 2024 may influence the type of remedies that are viable at Phase 1 and Phase 2. In particular, the imposition of reporting obligations and penalties for non-compliance with remedy obligations will help ensure that merger parties are incentivised to comply with remedies, thereby reducing the cost to the CMA of enforcing compliance. Baker McKenzie hopes reduced enforcement costs will also make the CMA more open to behavioural remedies, especially at Phase 1.

(c) Removing the presumption against carve out remedies at Phase 1

2.17 The CMA's clear-cut and capable of ready implementation standard has a significant impact on the extent to which the merger parties can propose effective carve-out remedies at Phase 1. CMA87 notes that "*[t]he CMA will generally prefer the divestiture of an existing business,*

[10] *Ibid.*

[11] Section 41(4) of the Enterprise Act.

which can compete effectively on a standalone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets".[12]

2.18 The CMA adopts this position on the basis that "*divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed*", that a package of assets may also "*be far more difficult to define or 'carve out' from an underlying business*" and, resultantly, the CMA "*may have less assurance that the purchaser will be supplied with all it requires to operate competitively*".[13]

2.19 The CMA's default position should not be to assume that carve-out remedies are not feasible at Phase 1. The ability to implement carve-out remedies is largely contingent upon the process of engaging on UILs as early as possible in the Phase 1 process. Our experience in ✂ demonstrates that engaging with the CMA early – in this case during pre-notification – can allow sufficient time for the CMA to identify and the merger parties to address potential issues with a proposed carve-out remedy within the Phase 1 timetable. Please also see our comments at paragraph 3.5 below on the duration of pre-notification.

(d) Accepting 'mix-and-match' divestitures

2.20 CMA87 states that, where the merger parties propose a divestiture remedy, the CMA has a clear preference for *"all the assets to be provided by one of the merger parties unless it can be demonstrated to the CMA's satisfaction that there is no significant increase in risk from a mix-and-match alternative"*[14]

2.21 Baker McKenzie would urge the CMA to be more open to considering 'mix-and-match' remedies where the remedy proposed does not create any additional composition risk.

2.22 In our positive experience in ✂. The CMA should be more open to mix-and-match remedies, particularly where the SLCs are based on local effects and the businesses to be divested have no connections or interdependencies – ✂ – making mix-and-match remedies less likely to raise composition concerns. Baker McKenzie would encourage the CMA to adopt a similar approach in other cases with similar facts.

3. Theme 3: Running an efficient process

3.1 We welcome the CMA's focus on Pace and Process in its new Mergers Charter and agree that there are aspects of the CMA's merger process which could be amended to remove barriers to reaching a Phase 1 remedies outcome. Besides the changes described above, the CMA could take other steps to encourage merger parties to seek early engagement with the CMA on remedies, thus allowing more complex remedies to be assessed within a Phase 1 timeframe.

(i) Without prejudice consideration of remedies

3.2 In cases where the SLC has not been conceded, despite the CMA's assurances, merger parties are often sceptical that remedy discussions are truly "without prejudice" and therefore unwilling

[12] CMA87, paragraph 5.12.

[13] CMA87, paragraphs 5.12 and 5.14.

[14] CMA87, paragraph 5.16.

to begin early engagement with the CMA on remedies. The CMA could consider the following to address this issue.

- If the CMA were to create a separate remedies case team that is ring-fenced from the primary case team, this would allow merger parties to discuss potential remedies with the CMA on a confidential basis with assurances that the decision on the SLC and discussion on remedies can run in parallel and genuinely without prejudice. Although the remedies case team would not benefit from being directly involved in the substance of the investigation, it could have access to the main case team's file, which could enable sufficient efficiencies for reviewing proposed remedies.

- **Historical examples.** The CMA's merger remedies guidance should be updated to include examples of cases where the merger parties have engaged on remedies in parallel with the CMA's investigation of the main transaction and the CMA ultimately found no SLC. This would demonstrate to merger parties that without prejudice review is more than theoretical and may help encourage merger parties to engage with the CMA on remedies at an earlier stage.

(ii) Increased transparency on substantive issues

3.3 We consider that if the CMA provides merger parties more – and regular – feedback on its substantive competition concerns earlier in the Phase 1 process (especially during pre-notification and long before an Issues Meeting), it will foster earlier engagement on remedies.

3.4 For example, the CMA could provide regular status updates during which it could indicate which concerns are still on the table and which are no longer being considered. We appreciate that the CMA would not be in a position to make definitive statements on the disposition of issues at an early stage and so suggest that any conclusions would be preliminary and subject to, e.g., new evidence coming to light, confirmation from market testing, etc. If merger parties have a better understanding of which competition concerns are still on the table, they are better able to design remedies to address them.

(iii) Extend pre-notification

3.5 We welcome the CMA's new focus on Pace – in particular, the 40 working day KPI for pre-notification. However, as noted by the CMA, the pre-notification period can serve as an invaluable period for consultation on remedies and lengthening this period can allow time for consideration of more complex remedies that can be achieved at Phase 1 – yet still be significantly shorter than a Phase 2 review. As such, pre-notification should be extended where it is likely to result in an outcome that would otherwise be achieved through a Phase 2 process. This is particularly given that the CMA, unlike the EC, does not offer a "pull and refile" mechanism for merger parties. Statistical reporting for Pace purposes could distinguish between cases where remedies were being discussed in pre-notification and those where they were not.

3.6 We therefore fully support providing merger parties with the option of opting out of the CMA's KPI in order to engage in fulsome remedy discussions in pre-notification. Otherwise, the 40 working day KPI may force merger parties into a formal Phase 1 before they have had sufficient time to engage with the CMA on remedies.

(i) Market testing in pre-notification where SLC conceded

3.7 In cases where the merger parties have conceded the SLC, the CMA should consider market testing the remedy and providing the resulting customer feedback to the merger parties as early as during the pre-notification process. This early feedback would help merger parties devise appropriate remedies within the Phase 1 timeframe.

Conclusion

3.8 The above proposals aim to normalise and encourage negotiation of remedies earlier in the Phase 1 process, particularly during pre-notification, to allow the CMA and the merger parties to fully work through a remedy proposal that might not be acceptable under the current CMA approach to Phase 1 – but would ultimately be acceptable at Phase 2. The intention is to make early negotiations a routine aspect of the review process, rather than an exceptional measure applied only in cases where there is a clear SLC. This would equally support earlier due diligence for prospective buyers and in-depth analysis of the viability of remedy packages during Phase 1 to ensure that composition and purchaser risks are reduced.

3.9 Baker McKenzie considers that the above procedural proposals will place the CMA in line with other regulators, most notably the European Commission, which allows for engagement with remedies earlier in the process. This would further mitigate the risk of the CMA being out of step with other authorities on global deals that are remedied elsewhere at Phase 1 whilst requiring a disproportionate Phase 2 investigation in the UK only.

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Baker McKenzie remains at the CMA's disposal to discuss any of the points raised in this response.

Baker & McKenzie LLP

12 May 2025