MERGER REMEDIES REVIEW
Cleary Gottlieb's Contribution to CMA Call for Evidence

1. INTRODUCTION

1.1 Cleary Gottlieb Steen & Hamilton LLP (Cleary Gottlieb) welcomes the Competition and Markets Authority's (CMA) willingness to re-evaluate its approach to remedies in merger investigations and the opportunity to respond to this call for evidence.

1.2 This consultation is a valuable opportunity to ensure that the UK's merger control framework continues to support effective enforcement, while also promoting investment, innovation, and pro-competitive transactions. We agree that the CMA's remedies policy should be guided by the principles of pace, predictability, proportionality, and process—and believe there is scope for meaningful improvement on each of these fronts.

1.3 Our experience engaging with global merger control regimes suggests that the CMA could increase its flexibility in remedy design, make fuller use of its existing statutory discretion, and bring greater alignment with international best practice. The Enterprise Act 2002 (Enterprise Act) gives the CMA broad powers to accept remedies that are reasonable and practicable, including those that mitigate—rather than entirely eliminate—competition concerns. In our view, the CMA can use these powers more effectively to resolve concerns in a proportionate, commercially viable, and innovation-friendly way.

1.4 This submission identifies several practical reforms that we believe would enhance the effectiveness, credibility, and efficiency of the CMA's remedies regime. In summary, we recommend:

- **Adopting a more flexible approach to remedy design**, with greater willingness to accept non-divestment remedies where appropriate, particularly at Phase 1.
- **Integrating proportionality into the assessment of remedies from the outset**, rather than applying it only after identifying remedies that comprehensively address an SLC.
- **Making better use of behavioural and carve-out remedies** to allow targeted solutions that address the competitive harm without disrupting the broader benefits of a transaction.
- **Addressing concerns about monitoring and enforcement** of non-divestment remedies by accepting that remedies can be effectively monitored through independent trustees, compliance audits, and the CMA's enhanced fining powers under the Digital Markets, Competition and Consumers Act 2024 (DMCC Act).

- **Coordinating more closely with international regulators** in global transactions where effective remedies may address any UK concerns.

- **Giving greater weight to rivalry-enhancing efficiencies and relevant customer benefits**, including at Phase 1, and providing clearer guidance on evidentiary expectations.

- **Enhancing procedural transparency**, with earlier engagement on competition concerns and a more constructive approach to remedy discussions throughout the review process.

2. CMA'S APPROACH TO REMEDIES

2.1 The CMA's current approach to remedies has, in practice, confined Phase 1 undertakings to simple divestments of pre-existing businesses, made it difficult to secure clearance even at Phase 2 without some form of divestiture, and narrowed the proportionality assessment to a choice between equally effective remedies. This approach is flawed—as a matter of both law and regulatory policy. It overlooks the statutory discretion to accept remedies that *mitigate* rather than comprehensively address a substantial lessening of competition (SLC), and it undervalues more targeted, flexible solutions that may address the harm without undermining the transaction's commercial rationale and wider benefits to other businesses and consumers.

2.2 Under the Enterprise Act, the CMA may accept remedies "*for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect.*" The Act establishes no hierarchy among these objectives, and it applies the same criteria at Phase 1 and Phase 2. The explicit reference to "*any adverse effect*" makes clear that the CMA has discretion to clear a transaction and accept remedies that do not restore the pre-merger market structure—such as behavioural undertakings.

2.3 In deciding on remedies, the CMA need only "*have regard*" to achieving as comprehensive a solution as is "*reasonable and practicable*." There is no statutory obligation to eliminate the SLC entirely if doing so would be disproportionate or not practicable. When read together with the CMA's express power to *mitigate* (not only remedy or prevent) an SLC, the legislative framework points toward an assessment grounded in proportionality. That assessment should weigh the likely harm against the deal's potential benefits (including in adjacent markets), and the extent to which the proposed remedies would reduce the identified harm.

2.4 Instead, the CMA has traditionally focused on restoring or maintaining competition at the level that would have prevailed absent the transaction,[1] typically requiring remedies to comprehensively address any lessening of competition. This can result in disproportionate outcomes. For example:

a. The CMA has typically rejected behavioural remedies at Phase 1, opting instead for structural undertakings or a reference to Phase 2. The CMA's recent position in the *Schlumberger/ChampionX* merger inquiry, where it was

[1] Merger Remedies (CMA87), paragraph 3.5(a).

prepared to accept a licensing agreement to support the growth of a specific rival, together with access agreements for other rivals, is a welcome departure from this position.

b. In local merger cases, the CMA often requires remedies that maintain or restore the pre-merger conditions of competition, rather than accepting partial divestments below relevant filter/decision rule thresholds in each local area.[2] As a result, if a buyer acquires only part of a seller's sites in a catchment area and stays below the threshold, the transaction proceeds without issue. But if the buyer acquires all sites and then proposes to divest only enough to fall below the same threshold, the CMA is likely to reject the remedy—even though the competitive outcome is effectively the same. This rigid approach prioritises form over substance and can preclude remedies that are proportionate and effective.

c. At Phase 2, the CMA has often rejected behavioural remedies that may have been acceptable and, indeed, were acceptable to other regulators. Drawing from the *Microsoft/Activision* case, proportional remedies successfully implemented by the EU, and eventually by the CMA, demonstrate how competition concerns can be narrowly addressed without unnecessary harm to merger-related efficiencies.

2.5 The CMA's current approach to remedies is too rigid. It treats effectiveness and proportionality as sequential rather than integrated considerations—first identifying a remedy it deems "effective," and only then assessing whether that remedy is proportionate. This sequencing brings proportionality into the process too late and limits its practical relevance.

2.6 Instead, the CMA should evaluate effectiveness and proportionality in tandem. A remedy should not only address the identified competition concern but should do so in a way that avoids unnecessary disruption to the transaction's innovation or efficiency benefits. A holistic assessment ensures that the remedy chosen is not merely sufficient, but also appropriately tailored.

2.7 The Enterprise Act permits this more flexible approach. It requires the CMA to have regard to achieving as comprehensive a solution as is "reasonable and practicable." This language supports a concurrent assessment of effectiveness and proportionality and allows the CMA to calibrate its remedy choice to the nature of the merger and the theory of harm. A rigid, one-size-fits-all model—particularly the default to stand-alone divestitures at Phase 1—is neither reasonable nor proportionate in all cases.

3. BEHAVIOURAL REMEDIES

3.1 The CMA's binary classification of remedies as either structural or behavioural is overly simplistic and fails to reflect the realities of modern markets. Many remedies do not fall neatly into either bucket. For example, divestments often require transitional support, ongoing access to infrastructure, or shared intellectual property,

[2] For example, in Greystar/Student Roost (2023) and Vet Partners/Goddard (2022), the parties offered partial divestments in local areas, aiming to reduce their combined share of supply to below the CMA's local threshold for a substantial lessening of competition. The CMA rejected these partial divestments, requesting that remedies cover the entire local increment brought about by those transactions.

while some licensing or access commitments function more like one-off structural remedies than ongoing conduct obligations.

3.2 Traditional behavioural remedies—such as those involving temporary and ongoing commitments (such as technology licensing or market access) can, in some cases, be well-suited to addressing concerns in vertical and technology-driven mergers. They allow the CMA to resolve specific competitive risks without unwinding the broader efficiencies and innovation gains the transaction may deliver. In such contexts, structural remedies may be disproportionate and unnecessary.

3.3 The CMA's historic reluctance to accept non-divestment remedies rests largely on enforcement concerns. But, those concerns can be managed through well-established mechanisms. Other major authorities, including the European Commission, regularly use independent monitoring trustees, compliance audits, complaint procedures, and penalty frameworks to ensure effective oversight. The CMA could do the same.

3.4 The CMA's new powers under the DMCC Act further strengthen its enforcement toolkit. The ability to impose fines for breaches of remedy obligations provides a credible deterrent and addresses any lingering doubts about parties' incentives to comply.

4. CARVE-OUT REMEDIES

4.1 Carve-out remedies—where specific business segments or assets are divested rather than entire stand-alone businesses—offer a more targeted means of addressing competition concerns. When properly designed, they allow the CMA to preserve the strategic and operational integrity of a merger while resolving the identified harm.

4.2 The principal risks associated with carve-outs—such as the commercial viability of the divested package or the suitability of the purchaser—can be managed through precise remedy design and a robust purchaser approval process. Clearly defined asset bundles, transitional arrangements, and careful buyer selection are standard tools for mitigating these risks.

4.3 Carve-out remedies must be proportionate. They should not be drawn so broadly that they reduce the pool of credible buyers or negate the innovation and efficiency gains the merger is intended to produce. Nor should the CMA reject a carve-out at Phase 1 solely on the basis of concerns about replicability of global innovation capabilities or scale efficiencies—especially where purchasers are not themselves deterred by such considerations.

4.4 The CMA can also take practical steps to improve the viability of carve-out remedies. These include enhancing transparency during remedy discussions, ensuring access to relevant due diligence materials for prospective purchasers, and providing greater clarity on the process and standards for purchaser approval.

4.5 We encourage the CMA to publish clearer guidance on the design of carve-out packages and the characteristics it considers essential in prospective buyers. This would help parties anticipate and address concerns earlier in the process, supporting more timely and effective remedy implementation.

5. MONITORING AND ENFORCEMENT

5.1 We recognise that monitoring and enforcement are essential to the long-term success of merger remedies, particularly where commitments impose ongoing obligations on the merged entity. Effective oversight ensures that remedies are implemented as intended and that competitive conditions are preserved over time.

5.2 A range of well-established tools can support robust compliance. These include the appointment of independent monitoring trustees, periodic compliance audits, clearly defined complaint mechanisms for affected third parties, and enhanced transparency in the implementation process. Such mechanisms not only reinforce compliance but also promote business certainty and market confidence.

5.3 The CMA should make more consistent and proactive use of monitoring trustees, particularly in complex or technical cases. Appointing trustees with relevant industry expertise—capable of assessing practical compliance and remedy effectiveness—can reduce the burden on the CMA while providing credible, independent oversight. This model is routinely employed by other leading authorities, including the European Commission, and could support greater confidence in the viability of non-structural remedies in the UK.

6. INTERNATIONAL CONTEXT

6.1 The CMA has indicated that it may adopt a more selective approach to multi-jurisdictional transactions—particularly where the UK effects are limited and other authorities are already engaged in detailed review. This principle of regulatory restraint could usefully extend to the CMA's approach to merger remedies. Where competition concerns arise in global or regional markets, and other authorities have imposed remedies to address those concerns, the CMA should consider whether those remedies sufficiently protect UK consumers. It need not actively participate in every element of global remedy design if the overall package achieves an outcome that is reasonable and practicable in light of the UK's position.

6.2 This would allow the CMA to take account of effective remedies accepted elsewhere, and—where appropriate—refrain from imposing UK-specific conditions unless clearly necessary. In practice, this means the CMA could conclude that a transaction no longer raises UK competition concerns following a divestment negotiated with another authority, provided the remedy adequately addresses the relevant theory of harm in the UK context. This approach is consistent with international practice; other competition authorities routinely assess whether remedies negotiated by their counterparts render further intervention unnecessary.[3]

6.3 A parallel principle should apply in regulated sectors. For instance, under the DMCC Act, which came into force in January 2025, firms designated with Strategic Market Status (SMS) will be subject to binding codes of conduct enforced by the CMA's Digital Markets Unit (DMU). These codes are likely to prohibit forms of conduct—

[3] For example, acknowledging that the European Commission had already accepted remedies offered by the parties, Brazil's Administrative Council for Economic Defense (CADE) did not carry out a separate remedies process to address similar competition concerns in Brazil in *United Technologies Corporation/Rockwell Collins* (see paragraphs 225 and 239 of CADE's Phase 1 decision) This approach was later formalized in CADE's merger remedies guidance.

such as self-preferencing, discriminatory access, or bundling—that have been central to past merger concerns.

6.4 Although the DMCC Act does not amend the legal test for UK merger control, the existence of a binding code of conduct should bear directly on the CMA's competitive effects analysis. Where a code clearly prohibits conduct that would otherwise support an SLC finding, the CMA should treat compliance with that code as rebuttable evidence that the merged firm will not engage in the conduct in question. This presumption would reduce the need for duplicative or pre-emptive behavioural remedies and ensure coherence between the CMA's merger enforcement and its ex post regulatory powers under the DMCC Act framework.

7. EFFICIENCIES AND RELEVANT CUSTOMER BENEFITS

7.1 The CMA has historically applied a highly restrictive approach to efficiencies and Relevant Customer Benefits (RCBs). In practice, this has deterred merging parties from presenting well-founded efficiency arguments—particularly at Phase 1—because the likelihood of such arguments succeeding has appeared vanishingly low. While many transactions may give rise to a substantial lessening of competition, they also generate rivalry-enhancing efficiencies or consumer benefits. The CMA's current framework does not give adequate weight to these considerations, especially where they are capable of offsetting limited competitive harm.

7.2 Efficiencies play a particularly important role in technology sectors, where innovation, integration, and investment can deliver significant improvements in price, quality, and product development. These benefits often arise directly from the combination of complementary assets and capabilities. The CMA should adopt a more balanced and pragmatic approach to assessing efficiencies in these markets. That includes considering a broader range of evidence—including expert opinion, product roadmaps, integration plans, and economic analysis—rather than relying solely on contemporaneous internal documents prepared before the merger was in contemplation. Such documents are often designed to maximise standalone valuations and may exaggerate each party's ability to compete effectively absent the transaction.

7.3 A more constructive approach would also involve assessing effectiveness and proportionality in tandem, recognising that a merger may produce efficiencies even if not all are precisely quantifiable.[4] In many cases, it will be obvious that anticipated efficiencies are likely to outweigh the limited harms to competition, particularly where the predicted price effect or loss of choice is small and the potential for innovation is substantial. Investment remedies—such as binding commitments to fund development or expand capacity—can serve to lock in these benefits. The CMA's willingness to explore this model in *Vodafone/Three* is a welcome sign that such remedies need not be confined to regulated sectors and should be considered more broadly.

7.4 The same logic applies to RCBs. The Enterprise Act provides a broad definition of RCBs, including lower prices, improved quality, greater choice, and increased

[4] The CMA has already introduced a similar pragmatic approach to efficiencies, for example, in relation to sustainability agreements. *See* Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (CMA185), paragraph 5.24.

innovation. Yet the CMA has adopted a narrow interpretation in practice, clearing only three mergers on RCB grounds—each involving NHS hospital transactions and predicated on preserving life-saving capacity.[5] That standard far exceeds what the statute requires. A broader, more commercially realistic interpretation would bring the CMA's practice into line with its legal framework and facilitate more timely decisions in cases where mergers offer demonstrable consumer benefits.

7.5 We encourage the CMA to consider RCBs and rivalry-enhancing efficiencies earlier in the merger review process—particularly at Phase 1 and in the context of undertakings in lieu (UILs) of a Phase 2 reference. There is no statutory reason to delay this analysis until Phase 2. Doing so would allow the CMA to reach earlier clearance decisions in cases that offer pro-competitive and pro-consumer outcomes and would complement the more flexible remedies framework we advocate for elsewhere in this submission. The CMA should also provide greater clarity on the evidentiary standard it applies to RCBs, ensuring that merging parties understand what is required and are not discouraged from raising them early.

7.6 Any residual uncertainty can be addressed through remedies that secure the delivery of claimed efficiencies and RCBs. For example, investment commitments can be monitored and enforced through independent trustees, regular reporting, and defined milestones. These mechanisms would allow the CMA to accept efficiencies-based remedies with confidence, even within the constraints of the Phase 1 timetable.

8. PROCESS

8.1 The CMA should consider targeted procedural enhancements to improve the efficiency and effectiveness of merger remedy negotiations. In particular, it should facilitate more detailed and timely engagement on remedies at an earlier stage in Phase 1. This includes serious and open-minded consideration of non-divestment remedies proposed by the merging parties, especially in cases involving vertical or innovation-related concerns where structural solutions may be disproportionate or unnecessary.

8.2 The CMA should also encourage earlier and more transparent disclosure of the case team's competition concerns. Rather than waiting for the state of play call or the formal Issues Letter, the CMA should be willing to identify key concerns at an earlier stage—ideally during prenotification—so that parties have sufficient time to consider and formulate potential remedies. Constructive, without-prejudice remedy discussions should be available throughout the Phase 1 process, with flexibility for parties to opt out of any internal CMA KPIs linked to the length of prenotification. This would help avoid last-minute remedy proposals and improve the prospects for effective UILs.

8.3 At Phase 2, the CMA should build on recent procedural reforms by engaging with parties more proactively and earlier in the process on potential remedies. This would help reduce uncertainty, avoid unnecessary delay, and focus the investigation on whether a remedy can address the identified concerns. Timely and transparent remedy

[5] *See*, for example, ME/6666-17 University Hospitals Birmingham NHS Foundation Trust/Heart of England NHS Foundation Trust, paragraphs 221-222: "t*he CMA has given material weight to the reduction in mortality and complications and morbidity for a significant number of patients which are likely to result from the Merger… which the CMA considers to be extremely significant benefits…* [that] *outweigh the SLC and any adverse effects of the SLC.*"

discussions also reduce the risk that viable solutions are dismissed due to process constraints or misunderstandings about the CMA's expectations.

8.4 Greater alignment and coordination with international competition authorities during multi-jurisdictional merger reviews should also form part of a modernised remedy process. Close cooperation can reduce the risk of inconsistent outcomes, avoid duplicative or conflicting remedies, and enhance predictability for global businesses navigating parallel reviews.

8.5 Ultimately, transparent and predictable remedy negotiations—backed by clear communication of remedy expectations and early stakeholder engagement—are critical to improving outcomes and preserving market confidence in the CMA's merger review process. These enhancements would support better, more proportionate remedies and help ensure the CMA remains an effective and credible authority in the global regulatory landscape.

9. CONCLUSION

9.1 We welcome the CMA's review of its approach to merger remedies and support its stated ambition to improve the pace, predictability, proportionality, and process of UK merger control. In our experience, many transactions that raise legitimate competition concerns can nonetheless be resolved through targeted, proportionate remedies—particularly when the CMA is willing to consider a broader set of tools beyond structural divestitures.

9.2 The Enterprise Act gives the CMA significant flexibility to accept remedies that prevent, mitigate, or remedy a substantial lessening of competition, provided they are reasonable and practicable. A more integrated approach to effectiveness and proportionality, greater openness to behavioural and hybrid remedies, and earlier, more transparent engagement with parties would allow the CMA to resolve concerns more efficiently—especially at Phase 1—while preserving the innovation and efficiency gains that many mergers are designed to deliver.

9.3 In our view, the CMA should also give greater weight to rivalry-enhancing efficiencies and relevant customer benefits at all stages of the merger review process. These considerations should not be reserved for Phase 2. By allowing parties to raise and evidence such benefits earlier—particularly in the context of UILs—the CMA would be better positioned to resolve cases swiftly where mergers are likely to deliver significant consumer and innovation benefits. Remedies that lock in those benefits should be considered alongside those that address harm.

9.4 In addition, the CMA's remedies framework must reflect the evolving global landscape in which it operates. Coordination with other competition authorities—particularly in multi-jurisdictional mergers—can help avoid duplicative or conflicting remedies and reduce burden on both regulators and businesses. In many cases, the CMA should assess whether remedies accepted elsewhere sufficiently address UK concerns before imposing additional UK-specific obligations.

9.5 We encourage the CMA to adopt a more case-specific, outcomes-focused approach, to make fuller use of its expanded enforcement powers under the DMCC Act, and to provide greater clarity on acceptable remedy types and evidentiary standards. Clearer

guidance on remedy design, carve-outs, monitoring, efficiencies, and relevant customer benefits would further strengthen the UK's regime and better align it with the realities of global, innovation-driven markets.

9.6 We are grateful for the opportunity to contribute to this consultation and would welcome further engagement with the CMA as it refines its remedies policy.

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