Response of Forvis Mazars LLP to the CMA's Call for Evidence

Non-Confidential Version

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Forvis Mazars LLP is very pleased to respond to the CMA's call for evidence in the context of its ongoing Merger Remedies Review. The CMA's consultation raises many important questions at a critical time where future policy is at the forefront of the minds of business and policy makers internationally. We have reviewed the questions posed by the call for evidence with interest and consider that while all topics identified are critical to inform the CMA's future policy direction, we have decided to focus our responses on areas where we can provide our perspective based on our practical experience gained over several years of acting as a monitoring trustee and independent advisor to the world's leading competition authorities, including the CMA, the European Commission ("**EC**"), the US Federal Trade Commission ("**FTC**") and China's State Administration for Market Regulation ("**SAMR**").

As an overall comment, in our experience, rigorous monitoring by the authority often with the support of a monitoring trustee is a key element in ensuring the success of structural and behavioural remedies. Lessons from regulatory frameworks demonstrate that even the most well-designed remedies can fall short without future-proofing and sufficient enforcement mechanisms. This includes the establishment of robust monitoring processes and clear consequences for non-compliance. In the case of divestments, the EC typically regards the monitoring trustee as being closer to the divestment business and best placed to assess obstacles and ongoing risk on a preliminary basis. In our experience, the EC works closely with the monitoring trustee to address potential non-compliance issues and to evaluate proposed variations to the remedy where required.

I. Remedy Theme 1: CMA's Approach to Remedies

A. Questions on the CMA's approach to behavioural remedies

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)?

An important element to be considered when assessing the overall effectiveness of behavioural remedies is whether the remedy is resilient to changing market dynamics, enforceable over time, and adaptable to emerging risks. Remedies should be clearly defined, proportionate, and include mechanisms to monitor compliance and reassess effectiveness as market conditions evolve. Future-proofing should be prioritised during the design phase, including a mechanism to review the effectiveness of commitments, particularly where market dynamics might shift significantly, enhancing flexibility and long-term impact.

Our general observation is that, as a result of a lack of consideration of future developments in the market during the design phase, behavioural remedies may not always achieve their intended effect during their lifetime. In some instances, the market conditions that gave rise to the competition concerns persist even after the expiry of remedies, due to a lack of meaningful structural change. This underlines the need for remedies to be both effective while in force and targeted towards delivering lasting competitive outcomes. Failures during implementation often stem from commercial conditions that are not sufficiently attractive for remedy-takers to establish viable competing businesses. This may be evident from the outset or develop over time, especially in fast-moving sectors such as telecommunications, where technological advancements and price changes can erode the practical value of

commitments. Remedies must therefore be commercially realistic, technically relevant, and capable of compensating for future-market developments such as entry of new technologies.

Additionally, remedies perceived as simple can mask implementation challenges. For example, price commitments may appear straightforward, yet raise complex issues around scope, coverage (e.g., new customers or products), and compliance assessment. Commitments should therefore be sufficiently detailed and include a clear monitoring methodology to address these risks. Even where remedies function adequately, authorities must be clearer about the expected outcome at the end of the remedy term. There is a requirement for a robust and transparent 'exit strategy' to evaluate whether the remedy successfully facilitated market entry and sustainable competition. It is not common practice for authorities to include review mechanisms to assess effectiveness over time or allow for the extension of remedies should a lack of structural change materialise in the market. Introducing such mechanisms could help ensure remedies evolve with market conditions and remain aligned with their original objectives.

Formal market testing, structured interviews, and requests for information ("**RFIs**") can all play a role in validating whether the remedy is workable in practice, and what future developments may be imminent in the relevant market, the emergence of which could render the remedy less effective. Key evidence could be requested from sector experts. Structured market testing (e.g., RFIs and interviews) can help anticipate circumvention risks or obsolescence. Remedies that include implementation detail and review triggers, within the commitments text, would enable ongoing assessments of effectiveness during the term of the remedy and reduce long-term enforcement risks.

B. 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?

Carve-out remedies are usually most appropriate in a horizontal merger where the overlap between the acquirer and the target leads to competition concerns in a certain area where the activity of the overlap business does not constitute a stand-alone business. Hence, a carve-out divestment is most appropriate where a structural remedy is required to address the competition concern, but a carve-out divestment would be more proportionate than the divestment of a standalone entity or where the divestment of a standalone entity is not practical or possible.

If the business has distinct, identifiable operations or assets that can be sold and maintained as viable, competitive and marketable assets without disrupting the continuity of the carve-out and retained businesses, carve-out divestitures might be feasible. An assessment will need to be performed to confirm whether product lines or geographic operations can be effectively carved out and reintegrated into the assets of a potential purchaser whilst maintaining the viability of the carved-out assets.

Q D.2. Are there specific circumstances (e.g., certain industries) where the risks associated with carve-out divestitures are generally more or less likely to manifest themselves?

There are certain industries and circumstances that can influence the risks associated with carve-out divestitures. We have included below some key factors to consider together with some comments describing our experience:

Operational Dependencies

Businesses that have significant interdependencies with the parent company (e.g., shared services, supply chains, or R&D) face higher risks. Carving out a business unit that relies on the parent company for critical support functions may lead to operational disruptions.

It is therefore crucial that the remedy ensures the merging parties bear the risk associated with operational dependencies, particularly in areas like the transfer of key contracts. These contracts are often essential to the divested

business's ability to operate independently and compete effectively. If such transfers are not secured, the carve-out may fail to establish a viable competitor, undermining the overall effectiveness of the remedy.

[…]

Financial Health

A non-viable carve-out business is a further risk which we have observed in some instances across markets more generally, e.g., where it had been assumed that the divestment business was financially viable but the financial information about the divestment business was not provided until after the approval decision, and this showed that there were historical losses.

One way to mitigate this is to require the financials of the proposed carve-out business early in the process to confirm it is a viable business. An independent advisor or monitoring trustee might assist with this assessment.

Legal and Compliance Risks

Highly regulated industries create additional challenges for carve-outs and may:

(i) delays in gaining regulatory approvals could impact the timeline to closing;
(ii) increase the support required from the seller during the post-closing period; and
(iii) restrict the pool of potential buyers (e.g., if the purchaser is required to conform to specific regulatory requirements).

In industries such as the manufacturing of medical devices and pharmaceuticals, legal and compliance risks can significantly affect the success of carve-out remedies, particularly where the divested business includes products still under development or pending regulatory approval. For example, delays in securing approval from regulatory bodies (such as the FDA) can arise due to concerns over product design or clinical data requirements. These delays can postpone product launches by years, directly impacting the commercial viability of the divested assets and the effectiveness of the remedy.

This can lead to risks in remedy implementation, highlighting the importance of assessing regulatory risks when designing and implementing structural remedies in highly regulated sectors. Where, for example, an FDA approval process is underway, it may be necessary to consider transfer or secondment of personnel responsible for liaison with the FDA concerning the file for the continuity of critical processes, to ensure regulatory approvals are obtained without delay.

Employees

Risks are heightened in sectors involving highly skilled labour, such as engineering and life sciences. It is important when assessing the completeness of the remedy, to verify that the transfer includes any personnel required to secure the long-term viability of the divestment business. Remedies can, in exceptional circumstances, include provisions for secondment and training of employees to support a partial transfer of personnel, should the characteristics of the purchaser allow for this.

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

Mitigating purchaser risk

Purchaser risk is a critical consideration in the design and implementation of carve-out remedies, since such remedies rely more heavily on the resources, expertise and existing assets of the purchaser. In some circumstances, uncertainty concerning the viability of the carved-out business can be mitigated by specifying additional criteria for purchaser suitability, which may need to be factored into the assessment of the proposed purchaser (if relevant). Additional criteria may reduce the available pool of suitable purchasers, which is a further factor to consider in

deciding whether to move forward with a carve-out remedy proposal. This risk could be managed through the use of an upfront purchaser or by conducting a screening and identification of potential purchasers during the remedy assessment phase, strengthening the authority's ability to monitor and enforce the purchaser's due diligence (strengthening the CMA's merger remedies guidance[1]). Although the identity of the purchaser may not be known, certain critical factors relating to the purchaser pool can be understood more generally and more specific purchaser criteria can be required as a result. In the Hitachi Rail / Thales GTS[2] case, for example, the purchaser criteria included specific customer transfer requirements which were key to establishing a strong competitor.

A further risk arises when the purchaser lacks the capability or incentive to operate the divestment business as a viable and competitive force. This risk is magnified in carve-outs where personnel are not transferred, placing greater importance on the purchaser's existing industry knowledge and experience.

As discussed further below, prospective buyers must be provided with all required information to conduct reasonable due diligence in a timely manner. Preparing detailed carve-out plans and financial documentation in advance can improve the purchaser's ability to assess the business. The monitoring trustee can play a crucial role in this context, including identifying areas where the seller may not be providing adequate information. For example, having access to the data room where requests for information and responses are shared can provide the monitoring trustee with increased visibility.

Risks related to incomplete asset transfer

Incomplete asset transfer poses a significant risk in the implementation of carve-out remedies. During the assessment of the perimeter of the divestment business, there is a possibility that certain essential assets may not be identified to transfer. Additionally, there is a risk that assets identified cannot then transfer for practical reasons post approval of the remedy. This can be mitigated through the use of catch-all clauses to ensure that essential assets which are identified at a later stage in the process will be transferred, or assets that are not capable of transfer for an unforeseen reason are replaced. This is standard practice in EC cases. This approach helps to ensure that all assets necessary for the operation, viability and competitiveness of the divestment business transfer. It is standard practice for commitments accepted by the EC to provide "If there is any asset or personnel which is not covered [by paragraph […] of this Schedule but which is both used for the [Divestment Business] and necessary for the continued operation, viability and competitiveness of the Divestment Business, that asset, personnel or an adequate substitute will be offered to the Purchaser." The EC has routinely required that provisions which are identical to these terms are included in transaction agreements to ensure that this provision is contractually enforceable between the parties and the purchaser, as well as being enforceable under the commitments.

Should contracts of the divestment business that are key to its continued viability be subject to restrictions in order to transfer, the merged entity should carry the risks associated with this. Such provisions are consistent with the EC's Remedies Notice at paragraph 11, which places the risk of non-transferability of third-party contracts on the merging parties.

Should the CMA choose to adopt a similar approach, in order to be enforceable, mitigations such as those suggested above could be explicitly included in the text of the undertakings in lieu ("**UILs**"). This could include:

(i) standard clauses requiring that all assets and personnel necessary for the viability and operation of the divestment business are made available to the purchaser;
(ii) ensuring that a monitoring trustee oversees the due diligence process; and
(iii) flexibility for the CMA to approve transactions with a substitution of one of more assets, provided viability of the divestment business is maintained.

Implementation risks

[1] CMA, Merger Remedies Guidance, 13 December 2018, paragraph 5.14
[2] Case M.10507 – *Hitachi Rail / Thales GTS* – assessed by the EC and CMA

Implementation challenges, such as the transfer of production, customers and other key operational elements, represent a significant risk in divestiture remedies. These risks can be mitigated through the submission of a divestment plan which identifies key assets (e.g., assets, personnel, contracts and agreements), how these assets will be transferred, any regulatory hurdles, and a timeline for resolution. […]

Frontloading the remedy assessment

It is important to frontload work during the assessment of the remedy proposal, rather than deferring it to a later stage. The parties proposing remedies can develop (i) robust financials at an early stage that are capable of monitoring in order to ensure the proposed divestment business is viable; and (ii) a detailed transition plan that outlines the transfer of assets, employees, and operational responsibilities. Coupling frontloading efforts with the flexibility to adapt the divestment business to meet the buyer's needs throughout the sales process, up to the point of divestment closing, increases the possibility of a smoother transition and successful implementation.

In instances where the merging parties may propose a novel remedy concept to address competition concerns, the use of an independent advisor to assess the completeness of the assets prior to the remedy being accepted can be instrumental in identifying potential gaps and ensuring the remedy is effective. Drawing on our experience, independent advisors can support the competition authority in specifying additional purchaser suitability criteria, if there are risks around the carved-out business' viability.

Engaging the expertise of an independent advisor during the assessment phase can more broadly contribute to improving overall quality of the remedy and supporting the CMA in its assessment. This can be further supplemented by the early appointment of an industry expert, typically appointed by the independent advisor. In our experience, there have been many examples in complex cases, often in phase II, where an early appointment of an independent advisor has improved remedy quality and identified implementation risks at an early stage, which allowed for development of the remedy proposal with these risks in mind and mitigations being incorporated into the commitments text.

[…]

In summary, additional mechanisms to address the risks associated with carve-out remedies include:

(i) in complex cases, engaging an independent advisor to assess the suitability of the potential remedy and make proposals to ensure any identified risks are mitigated;
(ii) engaging technical experts early in the process to identify potential risks;
(iii) the inclusion of clear mitigation measures into the UILs and transaction agreements to ensure they are legally binding and enforceable; and
(iv) ensuring that a monitoring trustee is appointed and given sufficient authority to monitor viability and oversee the implementation of the remedy.

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?

Conducting robust due diligence during carve-out divestitures can indeed present challenges, particularly when attempting to ensure that the divested business remains viable and competitive post-transaction. We have observed a number of effective practices that could serve to overcome these challenges and potentially strengthen the CMA's merger remedies guidance[3].

Comprehensive information disclosure by the selling entity is essential. This includes the provision of transparent and detailed information about the divestment business, such as historical financial performance, stakeholder details, operational metrics, customer base and any legal or regulatory issues. This would ensure potential purchasers are more informed about the business and can make decisions accordingly. The EC's Template for

[3] CMA, Merger Remedies Guidance, 13 December 2018, paragraph 5.14

Divestiture Commitments includes specific provisions to ensure that the buyer has access to sufficient information needed for its due diligence (including a meaningful version of the commitments), which is monitored by the trustee.

A clear definition of scope is critical. This involves explicitly describing the assets, liabilities and the personnel associated with the divested entity which help in identifying any potential liabilities or limitations that may affect the attractiveness of the divestment package.

A customised due diligence framework can significantly improve the quality of the due diligence process. This involves establishing a tailor-made due diligence scope of work that focuses on the critical areas of concern for the specific divestiture, considering industry nuances, economic conditions, legal aspects and competitive landscapes. Transaction agreements can facilitate an in-depth due diligence process e.g., including clauses that set out the due diligence periods, require regular RFIs, data sites for providing information, physical inspection of assets etc.

Stakeholder engagement is crucial in assessing the viability of the divestment entity. Actively engaging with key stakeholders can provide valuable insights into the ongoing operations and future prospects of the divestment business.

Establishing a post-transaction support structure is also essential to ensure a smooth transition and maintain business continuity and the potential for this support should be explored at an early stage during the due diligence period. This involves developing a support structure that aids the transition of divested assets, enhancing their viability and making it easier for the transition of the business. This may include transitional services agreements, transition of the employees, or operational support for a specific period of time. […]

C. 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?

In our experience in working with the EC, the use of a monitoring trustee has become standard practice in both merger and antitrust cases where divestitures are required.

In our view, the CMA could make greater use of monitoring trustees generally, and we have included some comments on the two main issues mentioned within this call for evidence: (a) complex carve-outs and (b) behavioural commitments.

Complex carve-outs

In complex cases where a thorough assessment of the remedy is required for the CMA to decide if it is possible to approve the transaction, the CMA could consider the appointment of an independent advisor. An independent advisor can support the assessment of the remedy either pre- or post-submission to ensure its efficacy. This allows for an unbiased assessment wherein remedy proposals can be independently reviewed and negotiated between the authority and the parties in order to find a workable solution. Unless public funds are available, the costs would be borne by the parties.

In other jurisdictions, typically once the approval has been granted, the role of the monitoring trustee would usually encompass (i) overseeing the sales process, (ii) monitoring the hold separate arrangement, (iii) overseeing the appointment of an HSM who would report to the monitoring trustee at regular intervals (usually on a weekly basis initially), and (iv) setting up reporting mechanisms to monitor viability. The monitoring trustee is usually required to submit a report to the authority which details its ongoing monitoring of these elements on a monthly basis, with a non-confidential version sent to the parties in parallel. In some complex cases, the monitoring trustee has been required to oversee progress of the carve-out against a divestment plan that has been submitted by the parties and approved by the monitoring trustee and the authority.

A further function that we observe as generally falling within scope of the role of monitoring trustee is to carry out purchaser suitability assessments. In our experience with the EC, having a monitoring trustee review potential purchasers of the divestment business can effectively support the EC in its assessment of the potential purchaser and its specific experience and characteristics against the assets transferring as part of the carve-out. The monitoring trustee will generally possess the resources to work closely with the parties and the divestment business to identify risks, discuss these with the parties, and provide potential solutions. Commitments to the EC require the monitoring trustee to submit a detailed assessment of the purchaser within a very tight timescale. Producing this report is resource intensive and involves gathering information directly from the stakeholders involved, for example, meeting with and sending RFIs directly to the purchaser (and any financial investor who is involved), and potentially discussions with a HSM and management team. A detailed review of the transaction agreements to ensure these accurately and fully reflect the requirements of the commitments will also be performed which may result in changes to the agreements, executed usually through a side letter, or the signing of an amended or addendum agreement, which reflects the changes required to align agreements with the commitments.

The monitoring trustee is also well placed to ensure the complete transfer of assets during the period following purchaser approval, prior to the divestment closing taking place.

A monitoring trustee can also effectively support any use of an alternative divestment strategy[4] to motivate the parties to follow through on the complete transfer of the initial divestment that may be considered as an adequate remedy, but where risks of improper implementation are high. In our view, based on our review of the CMA's guidelines, there may be some hesitance on the part of the CMA to employ this strategy due to concerns of what may happen practically in the event that the alternate divestment package is ultimately utilised. By contrast, the appropriate cases EC regards the "crown jewel" as a powerful motivating tool to ensure the parties use best efforts to avoid its divestment. This is further reinforced with the presence of a monitoring trustee to monitor the crown jewel itself and ensure that it continues to be an attractive asset.

Behavioural commitments

In the context of long term behavioural commitments, the appointment of a monitoring trustee can be useful in cases where the practicalities of the implementation are complex, unclear, or where interpretation issues are likely to arise. In these circumstances, the monitoring trustee can be a useful resource to agree and implement the methodology for monitoring and can mediate between the parties and the authorities when questions around implementation arise.

The monitoring trustee is also well placed to ensure that the competition authority is aware of any gaps in the efficacy of behavioural commitments during the term of the remedies, especially where there are changes in the market, unforeseen in the design of the remedies.

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?

We have been appointed in other jurisdictions to assess potential remedies as an independent advisor, in cases where the parties were willing to assist the competition authorities to take all measures to achieve a clearance. Having an advisor with experience of the industry, either in-house or through a technical expert, is crucial to identifying risks and fully examining the proposed remedy before it is accepted.

We also note that the EC has recently engaged five firms (monitoring trustees and economics consultancies) to serve as independent experts in the context of a four-year framework contract, who can be called upon to provide an assessment of a particular remedy proposal or aspect of the process in antitrust and merger cases (e.g., remedy sufficiency). The EC will bear the costs, and the firm will be awarded work on the basis of winning a competitive

[4] CMA, Merger Remedies Guidance, 13 December 2018, paragraph 5.17

tender process. We note that this is in the early stages of development and it is not yet clear how this support mechanism will evolve.

A monitoring trustee whose experience spans a wide range of industries can provide valuable insights to assist the competition authority in understanding the technicalities of a specific market in order to properly assess the risks of accepting a remedy. Having worked on multiple cases in the same industry with a similar application of remedies, a monitoring trustee is well placed to provide an assessment that is comprehensive and effective, and draw from prior experience to propose pragmatic and realistic solutions to any foreseen risks.

In our independent advisor appointments, where even deeper specific sector expertise is required, we have engaged technical experts to ensure that the requisite level of knowledge is available to assess any risk associated with accepting the remedy. We consider it to be particularly important that this expertise is engaged early in the process for such cases, ideally from the outset of the independent advisor's appointment to ensure that the remedy is appropriately scoped and structured and any risks are identified and mitigated if possible at an early stage.

We have previously engaged economists, engineers, regulatory specialists, IT systems experts, scientists, etc. depending on the industry. Combining the independent advisor's expertise in competition law and remedies, with specific industry knowledge from the technical expert provides the competition authority with a comprehensive understanding of the complexities of any given case. In our experience, competition authorities have greatly benefited from being able to consult with technical experts for cases in highly specialised industries.

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?

The appointment of a monitoring trustee can reduce the burden on the CMA in overseeing complex and behavioural remedies while ensuring that the parties duly comply with their commitments. If the CMA does not wish to increase its own resourcing costs then the cost of compliance may fall upon the parties to transactions, who are the parties bringing about the change to the market structure with their transaction. To the extent possible it is important for a monitoring trustee to be independent of the parties and not be in a position of conflict of interest as determined on a case by case basis.

II. Remedy Theme 3: Running an Efficient Process

A. 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?

The CMA may wish to consider the use of monitoring trustees as independent advisors, appointed and remunerated by the parties, who may be motivated by the fact that such an assessment will increase the likelihood of the remedy being accepted. This assists the CMA in ensuring a proper and thorough review of the proposed remedy ahead of its implementation. In our capacity as independent advisor […], we have used our insights from our experience as monitoring trustee to assist the authority in understanding the risks, thereby streamlining the process. Alternately, the early appointment of a monitoring trustee before the approval of the commitments (with the agreement of the parties) in cases involving divestments can ensure detailed oversight of the sales process, even in cases where an upfront purchaser is identified, to ensure the sale runs smoothly.

As mentioned above, other authorities also face challenges with the proportionality aspect of the costs associated with monitoring trustee appointments and hence the CMA may wish to consider the use of a tender

process, similar to the one recently initiated by the EC, to aid in its assessment of potential remedies. The EC invites, from a pre-selected pool, professional service firms, economic consultancies and academics to bid for the opportunity to evaluate and refine remedy proposals in antitrust, merger and state aid cases, to be remunerated by the EC itself. The EC is thus able to benefit from a competitive process involving highly qualified entities to conduct the necessary assessments ahead of accepting a given remedy proposal, without imposing additional costs on the parties. The cost to the authority is minimised as the independent expert is engaged to carry out a specific task, for example a purchaser assessment, rather than to provide a broader assessment.

Finally, in our experience as monitoring trustee, there are cases where we have engaged technical experts to support our monitoring, to ensure the highest level of expertise, especially in cases where a high level of sector and industry knowledge is required, such as in telecommunications, aviation and pharmaceuticals. These technical experts supplement our in-house legal and economics expertise with deep sector knowledge which the competition authorities have found greatly beneficial to consult, particularly in assessing complex carve-outs and monitoring long-term behavioural commitments.