Merger Remedies Review - response to the CMA's call for evidence

A submission by Frontier Economics

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1. Frontier Economics is an economic consultancy that regularly advises clients on both national and European merger investigations, including a significant number of cases before the UK Competition and Markets Authority (**CMA**).

2. We welcome the CMA's call for inputs as part of its Merger Remedies Review. The CMA has identified three key themes for consultation: (i) its overall approach to remedies; (ii) preserving pro-competitive merger efficiencies and benefits; and (iii) ensuring an efficient process. In this submission, we set out our comments and recommendations on each of these themes, with a particular focus on the role that economics can play in informing and supporting the remedies process across all stages of a merger investigation.

Theme 1: The CMA's approach to remedies

3. The CMA has historically expressed a strong preference for structural (divestment) remedies in its merger control practice.[1] While we recognise the rationale for this, particularly in horizontal mergers, we believe a more flexible and integrated approach is warranted — especially in vertical or conglomerate mergers, where structural remedies may be impractical or disproportionate.

4. We set out three recommendations:

   (i) Reassess the limited role afforded to behavioural remedies in non-horizontal cases.

   (ii) Adopt a more integrated framework for assessing remedy effectiveness and proportionality.

   (iii) Refocus guidance to prioritise structural outcomes, rather than structural remedies per se.

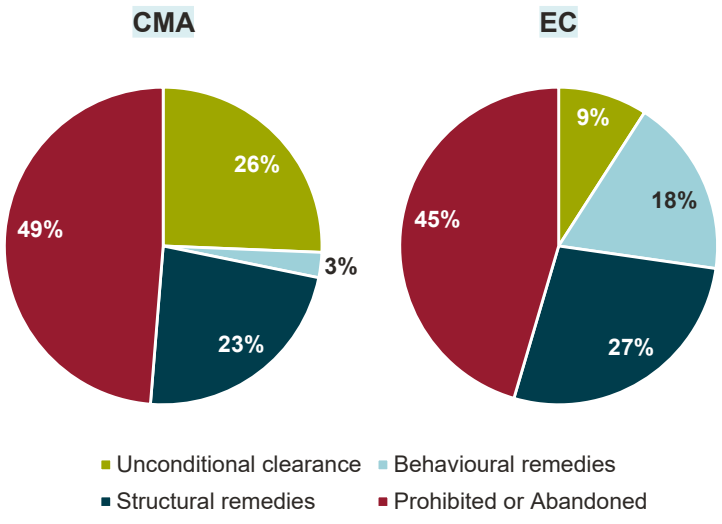
[1] See CMA, Merger Remedies: CMA87 (2018), para 3.46.

Expanding the role of behavioural remedies in non-horizontal cases

5. Over the last five years, around a quarter of CMA Phase 2 merger investigations have resulted in remedies, with the majority of remaining cases being prohibited or abandoned. This contrasts with the cases in front of the European Commission (**EC**), which cleared nearly half of its Phase 2 investigations over the same period with remedies. The divergence is largely due to the CMA's scepticism toward behavioural remedies. As the chart below illustrates, both the CMA and EC have imposed structural remedies in approximately 25% of Phase 2 cases, but behavioural remedies have featured in ~20% of EC cases and almost never in CMA cases.

6. While this has led to criticism that the CMA takes an overly strict approach, the data suggest a more nuanced picture. In the last 5 years, nearly 50% of CMA Phase 2 cases have resulted in the deal being prohibited or abandoned, but a similar proportion (45%) of EC Phase 2 cases have also resulted in these outcomes. By contrast, the CMA cleared a materially higher share unconditionally (26%) than the EC did (9%). This implies the CMA is, in some cases, more willing to clear deals outright – as seen in *Meta/Kustomer (2021)*, where the EC required behavioural commitments while the CMA unconditionally cleared the deal at Phase 1. Similarly, for *LSEG/Quantile (2022)* the CMA rejected a behavioural remedy proposal put forward by the parties in Phase 1, but ultimately decided to clear the deal unconditionally in Phase 2. These examples highlight that the CMA is capable of taking principled decisions to clear transactions without remedies where the evidence supports it – a practice we would encourage it to retain under any future reforms.

Figure 1 Comparison of CMA and EC Phase 2 merger investigation outcomes, 2020-2024 inclusive



Source: Frontier Economics analysis.

7. Nonetheless, there are cases – particularly vertical or conglomerate mergers, but also in some digital markets mergers where the target firm has a single product – where no structural remedy short of prohibition is realistically available. In such cases, authorities like the EC have cleared deals by accepting behavioural commitments (e.g. commitments to maintain access to critical inputs on fair, reasonable, and non-discriminatory terms). The CMA's hard line on behavioural remedies therefore risks resulting in a higher proportion of such transactions being prohibited. There would be no economic justification for this, especially since non-horizontal transactions are often pro-competitive and deliver greater efficiencies for consumers than horizontal mergers between direct rivals (e.g. through elimination of double marginalisation or unlocking innovation synergies).

8. We recommend the CMA update its guidance to explicitly acknowledge the circumstances in which behavioural remedies may be appropriate – particularly for vertical and conglomerate mergers.

A more integrated assessment of effectiveness and proportionality

9. The CMA's current guidance adopts a sequential approach to assessing remedies – first determining whether a remedy is effective, and – only where it identifies more than one effective option – picking the "least costly and intrusive" of these.[2] This framework risks relegating proportionality to a secondary role, rather than recognising it as a core part of the effectiveness assessment.

10. In multiple cases on which we have advised, behavioural proposals have been rejected due to concerns about potential specification, circumvention, distortion, or enforcement risks. While we agree that these risks warrant careful scrutiny, we believe the CMA should embed the principle of proportionality directly into its assessment of remedy effectiveness. In a Phase 2 investigation, an effective remedy should reduce the likelihood of a substantial lessening of competition (**SLC**) below the balance of probabilities threshold (i.e. below 50%). This implies that the evidentiary threshold for a remedy to be considered effective should be proportionate to the strength and severity of the underlying SLC finding. Where the SLC is clear-cut and severe, even remote risks of specification, circumvention, distortion, or enforcement may need to be fully addressed. By contrast, applying the same standard in cases where the SLC finding is more marginal would risk a disproportionate approach.

11. We therefore recommend that the CMA instead adopt an integrated approach – one that fully reflects the interplay between effectiveness and proportionality and applies the same evidentiary standard as used in the SLC assessment. We believe this approach would facilitate greater use of behavioural remedies by the CMA, particularly in non-horizontal cases where they may offer a proportionate solution to competition concerns. It would

[2] See CMA, Merger Remedies: CMA87 (2018), para 3.4.

also provide greater clarity in local markets mergers, making it clear that parties need only divest assets sufficient to bring them below the threshold at which the CMA identifies a concern, rather than being required to divest the entire overlap. Requiring divestment of the full local overlap – even in cases where a smaller set of sites would not have triggered concerns – risks creating an outcome where the same market structure is deemed acceptable or unacceptable solely based on the path by which it was achieved.

Emphasising structural outcomes over structural remedies

12. While we agree that remedies which bring about structural changes can be particularly effective in restoring competition, we encourage the CMA to draw a clearer distinction between *structural remedies* and *structural outcomes*. In some cases, behavioural remedies can achieve structural outcomes just as effectively – and in a more flexible, market-driven manner.

13. Examples include:

    (i) **Catalytic remedies** that stimulate entry and expansion by third-party rivals. These may include commitments to share intellectual property with rivals, establish a customer-accessible 'prize fund' to support new entrants, or underwrite the switching costs faced by customers when moving to alternative suppliers. While such remedies may require more time to take full effect than an immediate divestment, they are inherently more market-oriented. By placing decision-making power in the hands of customers rather than the regulator, they avoid the need for the CMA to 'pick winners'. This approach may be particularly well-suited in business-to-business (**B2B**) markets, where customers are often sophisticated firms capable of identifying the most credible entrants.

    (ii) **Remedies that unlock or support rivalry-enhancing efficiencies**, where the merging parties commit to specific investments that improve their competitiveness, enabling them to offer stronger competition to incumbents. These are discussed further under Theme 2 below.

14. We therefore recommend that the CMA update its guidance to place greater emphasis on identifying remedies that deliver structural outcomes, regardless of whether they take the form of a divestment or a behavioural commitment. This would allow for more proportionate and tailored interventions – particularly where divestments are unworkable, unnecessary, or risk undermining merger efficiencies.

Theme 2: preserving pro-competitive merger efficiencies and merger benefits

15. The CMA has rarely accepted arguments around rivalry-enhancing efficiencies (**REEs**) in past merger cases and this has led to a view that:

    (i) the value of building and presenting efficiencies arguments is highly uncertain, as there is a material likelihood that they will be dismissed; and

    (ii) to the extent that efficiencies arguments are put forward by the merging parties, the CMA will only meaningfully engage with them during the Phase 2 investigation, limiting the scope for in-depth discussions and the opportunity to address potential concerns around such arguments.

16. We set out three recommendations:

    (i) Begin assessing any potential REEs earlier on in the process (i.e. during the Phase 1 investigation), including recognising circumstances where REEs and merger benefits may be more or less likely.

    (ii) Set out a clear framework for assessing how to quantify REEs compared with any potential SLC.

    (iii) Focus on behavioural remedies that are more likely to reinforce the incentive of the parties to deliver any REEs.

Assessing REEs as early as possible in the process

17. The current merger review process considers REEs as a countervailing factor to offset an SLC. This has contributed to a view that merging parties are disinclined to put forward efficiencies arguments at an early stage of the process for fear of this being seen as an acceptance (even in part) of any SLC. As a result, substantive discussions around any efficiencies typically occur only after the SLC assessment is well-progressed and this can lead to the risk that there is insufficient time to assess these fully, particularly in advance of any remedies being put forward.

18. We think it is important to embed any REEs into the assessment of the SLC and would propose that the CMA increases scope for such discussions on a "*without prejudice*" basis early on in the merger review process. For example, in *Vodafone/Three (2024)*, the merging parties made a number of detailed submissions on efficiencies during the course of the Phase 1 investigation and this opened the door for more in-depth discussions on REEs early on in Phase 2. Ultimately, behavioural remedies that served to "lock in" these

REEs were accepted in this case, rather than structural remedies that would have undermined such benefits.

19. Inevitably, there will be some mergers that are more likely to deliver REEs than others. In order to identify early on in the process circumstances where REEs are likely, it may be helpful to assess explicitly the scope of the merging firms' capabilities (e.g. technological knowledge, patents, relationships with suppliers) and the extent to which these are complementary or overlapping. Where these capabilities are more overlapping, particularly if they are scarce, merger benefits are typically less likely to arise.[3]

A clearer framework for assessing the balance between REEs and an SLC

20. The CMA's current guidance sets out the criteria against which REEs are assessed – including that they must be sufficient to prevent an SLC – but does not provide a clear framework for examining the balance between any potential REEs and an SLC.

21. In recent cases, including *Vodafone/Three*, the CMA's assessment of pricing effects has been based on the standard upwards pricing pressure (**UPP**) framework, in particular the Gross Upwards Pricing Pressure Index (**GUPPI**). Such assessments only analyse the impact of a loss of rivalry between the merging parties and assume that post-merger quality and capacity remain unchanged, which is often not the case in the presence of REEs.

22. However, it is critical to measure the impact of any assumed loss of rivalry *net* of the REEs. In *Vodafone/Three*, the merging parties submitted analysis that addressed this question explicitly. The CMA concluded that, in the presence of an investment commitment remedy, REEs would be sufficient to prevent any SLC. However, the CMA's decision in that case states that it placed limited weight on the merging parties' models, even though the alternative evidence assessed the SLC only without considering any REEs. As such, it would be useful to provide more clarity on how this type of evidence – particularly absent any alternative evidence assessing the balance between REEs and an SLC – is factored into consideration and how it can be deployed.

Focusing on remedies that reinforce the incentive of the parties to deliver any REEs

23. Investment commitment remedies can play a valuable role in supporting the delivery of relevant customer benefits, particularly where such benefits depend on the parties making specific investments post-merger. This type of remedy is most effective when it operates

[3] A Capability Approach to Merger Review (2023), Boa, Elliott and Foster (available at https://www.janeway.econ.cam.ac.uk/working-paper-pdfs/jiwp2303.pdf)

to lock in an incentive that is already strong, rather than attempting to reverse or override a weakening incentive that arises from the transaction.

24. A good example is the recent *Vodafone/Three* merger, where the merging parties argued that the transaction would unlock substantial relevant customer benefits by enabling investment in a high-capacity 5G network. The joint business plan prepared by the parties provided commercial evidence that the full-scale investment scenario was the most attractive path forward. This included internal modelling comparing the full investment case against alternative, scaled-back scenarios – none of which offered the same financial or strategic upside.

25. However, even with strong evidence, there are inherent limitations in proving a negative – namely, that *no* alternative scenario would be more profitable in future. In such cases, investment commitment remedies can provide additional assurance, helping to "lock in" these benefits by requiring the merged entity to commit to specific investment milestones. This may be particularly useful where the CMA is broadly supportive of the benefits case but remains cautious about its reliability or longevity.

26. That said, investment commitment remedies are less suited to situations where the merger may reduce the parties' incentives to invest. In those cases, the remedy risks working against the grain of the transaction, attempting to correct a change in incentives that the merger itself introduces. In such circumstances, the remedy may lack credibility and sustainability, as the merged entity may have limited commercial motivation to deliver the required outcomes.

27. This distinction is critical. For an investment commitment remedy to be effective and proportionate, it must align with the economic incentives created by the merger, not attempt to override them. From our understanding, this principle may help explain past scepticism from authorities such as the EC. For example, in *Grupo Villar Mir/EnBW/Hidrocantábrico* (Case COMP/M.2434), the Commission imposed an investment remedy designed to counteract the acquirer's expected reduction in incentives to invest. This lack of alignment may have contributed to concerns around the remedy's effectiveness in practice.

28. In summary, we believe investment commitment remedies can be a powerful tool where they work with the grain of the merger's incentive effects, not against them. Their success depends on careful alignment with the parties' commercial motivations, strong supporting evidence, and clear, measurable commitments that can be monitored and enforced over time.

Theme 3: running an efficient process

29. We welcome the recent changes introduced by the CMA to its Phase 2 remedies process, which are designed to foster earlier and more constructive engagement with merging parties. In particular, the CMA's encouragement for parties to initiate remedies discussions prior to the publication of the interim report, the introduction of a standardised remedies form to streamline submissions, and greater transparency around timelines and procedural steps are all positive developments. We also welcome the renewed emphasis the CMA has placed on the importance of direct engagement between merging parties and the Inquiry Group overseeing the investigation. This includes opportunities for teach-ins and substantive meetings to discuss the merger and potential remedies, fostering a more collaborative environment. Together, these measures should support a more efficient and substantive dialogue between the CMA and merging parties.

30. One practical effect of the CMA's revised Phase 2 process is that a significant amount of work is now front-loaded into the early weeks of the investigation. When the substantive assessment of competitive effects and remedies proceed in parallel, this can create resource bottlenecks and capacity pressures for both the CMA and the merging parties.

31. To mitigate these pressures without extending the overall Phase 2 timeline, we recommend that more preparatory work on both remedies and relevant customer benefits/REEs is brought forward into pre-notification and Phase 1. This would allow early identification of potential issues and opportunities, even where a full assessment would still require an in-depth Phase 2 investigation. Steps that could facilitate this include:

    (i) **Greater use of *without prejudice* discussions ahead of a Phase 1 SLC decision.** The Phase 1 process already accommodates *without prejudice* discussions on potential remedies ahead of the SLC decision. These discussions can enable the CMA to provide early, informal feedback, helping the parties to evaluate whether to invest in developing a formal undertakings-in-lieu-of-reference (**UIL**) proposal and/or to begin preparing their evidence base for a potential Phase 2 reference. We recommend that similar opportunities be extended to the discussion of relevant customer benefits/REEs within the same *without prejudice* framework. This would help address concerns that raising these considerations at this early stage may be seen as prematurely conceding the likelihood of an SLC, when in fact the intention is simply to ensure these considerations can be properly explored if the case proceeds.

    (ii) **Early working-level engagement between the CMA's RBFA team and merging parties' economists in both Phase 1 and Phase 2**. Economic evidence plays a critical role in informing the design and assessment of remedies, and closer engagement can help the CMA evaluate the effectiveness of proposed remedies. In particular, we see value in facilitating direct, working-level dialogue between the

CMA's RBFA team and the parties' economists to resolve technical points, align on assumptions, and clarify evidentiary standards. This could build on the model of economist-to-economist meetings already used in Phase 2 to focus and progress the assessment of competitive effects.

(iii) **Updated guidance removing language that discourages merging parties from bringing forward behavioural remedies in Phase 1**. The CMA's remedies guidance actively discourages merging parties from bring forward behavioural remedies proposals in Phase 1 on the basis that they are unlikely to meet the strict criteria to be accepted as UILs.[4] While we recognise that behavioural remedies are less likely to meet the strict "clear-cut" standard required for acceptance as UILs in Phase 1, there may nonetheless be value in initiating early, *without prejudice* discussions of such remedies. Doing so could help reduce pressure and capacity constraints at Phase 2 by enabling earlier scoping, testing, and refinement of more complex remedy proposals. We therefore encourage the CMA to signal in its updated guidance that merging parties are welcome to raise any potential remedies – including behavioural ones – on a *without prejudice* basis during Phase 1.

4 See CMA, Merger Remedies: CMA87 (2018), paras 3.32: "At Phase 1, the CMA is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns. Moreover, the CMA's experience (and that of its predecessor, the OFT) is that devising a workable and effective set of behavioural commitments within the context of a short, Phase 1 timetable is difficult."