Review of Merger Remedies Approach

Fingleton's response to the Competition and Markets Authority's (CMA) Call for Evidence

Fingleton is the leading strategic advisory firm for matters with a UK regulatory or competition dimension. We help firms anticipate and navigate pivotal regulatory challenges, providing clear and constructive advice that enables our clients to secure improved outcomes.

Our team includes a former CMA Remedies Director, a former CMA Mergers Director and a former CMA Executive Director for Mergers and Markets. We have deep experience on both sides of the table, and have advised over 100 senior executive teams on strategic interactions with the CMA, such as merger investigations, market studies and appeals.

The Call for Evidence[1] says that the purpose of the review is 'to ensure that the CMA's merger remedies process reflect the core 4P principles of 'pace, process, predictability and proportionality'. In this response, we use the 4Ps framework to suggest what the CMA should have at the front of its mind as it develops its remedies guidance. We would be happy to discuss these further at the CMA's convenience.

1. Proportionality: Setting an appropriate risk tolerance for complex remedies

The CMA wishes to reflect its principle of proportionality in the merger remedy review. However, its current guidance and practice take an excessively cautious view

[1] "Merger Remedies Review – Call for Evidence document", CMA, 12 March 2025

of the risks of a remedy not being effective or practical, at both phase 1 and phase 2. Our experience of past cases suggests that the 'high degree of certainty' that the CMA seeks is often too high.

For divestitures, this often manifests in two ways. First, some complex proposals are presumed to be too risky. Secondly, the effects of risk mitigations proposed by parties are downplayed or underestimated, even when they are underpinned by sound commercial incentives. These two effects combine and lead to cases where viable remedies are rejected. The excessively low risk tolerance also leads to a reluctance to consider behavioural remedies.

The CMA could signal a more proportionate risk tolerance in the following three areas:

A. The CMA could use the updated guidance to signal a greater acceptance of **some complex remedies** in principle. Examples of complex remedies include carve-out asset divestitures, transfers of customer contracts, and pro-competitive behavioural measures such as access remedies. This would entail the CMA focussing on the riskier elements of the remedy, and placing due weight on elements of remedy design (for example, aligned incentives between the merger parties and a remedy taker) that mitigate effectiveness risks. The CMA's experience of recent complex remedies that it has accepted (such as *Vodafone / CK Hutchison*, *viagogo / Stubhub*, and *Hitachi / Thales*) and its recent remedy reviews provide examples of where it has taken a more proportionate approach.

B. In relation to **Relevant Customer Benefits** (RBC), the CMA could take a less doctrinaire approach. This means assessing merger specificity of benefits against what would be likely to happen in the absence of the merger, rather than the theoretical possibility that the parties could achieve the same benefit via a hypothetical but unlikely non-merger agreement or situation. In addition, the CMA could rely on its expert judgment when comparing customer benefits against detriment, rather than attempting to place a monetary value on each. It is worth noting that in the *Manchester Hospitals* case, the CMA did not feel the need to assess the RCBs and detriment by using a common metric. A more proportionate approach might also entail the CMA placing greater weight on the potential for RCBs to be achieved faster than would be the case without the merger.

C. In **digital markets**, the CMA is able to draw on its experience of non-structural remedies as they are developed and deployed by its Digital Markets Unit and by other competition agencies, especially the European Commission. These solutions, such as IP licenses or access remedies using open APIs, offer a proportionate and effective way of dealing with competition concerns.

In our view, the current guidance is too blunt in assigning risk to different remedy categories. Statements like 'behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies' (CMA87 paragraph 3.5) are unhelpful in categorising all types of behavioural remedies in a similar way. Access to data remedies or interoperability remedies in digital markets may not have the same risk profile as a price cap remedy, for example. A more nuanced

consideration of the differences between different types of behavioural remedies would reflect the CMA's desire to take a proportionate approach to remedies. We would also expect that the CMA's new enforcement powers for remedies would lead to greater compliance from merger parties. This in turn would lead to lower circumvention and monitoring/enforcement risks.

To the extent the CMA is considering how its remedies processes work as between phase 1 and phase 2, it ought to consider how its own choices and operational approach may result in disproportionate remedies in phase 1 relative to phase 2, taking into account (but independent from) the different substantive assessment in each Phase. For example, setting tight pre-notification deadlines alongside the statutory timelines in phase 1 may force parties into a costlier and lengthier phase 2 process where the CMA is incapable of adequately assessing remedies in phase 1 (or where the remedies that the CMA is comfortable with in practice in phase 1 given timing and operational pressures that result from the CMA's own choices are disproportionate to the Substantial Lessening of Competition (SLC) finding).

2. Process: Building on recent changes to phase 2 process and the Mergers Charter

Updating the CMA's remedies guidance is long overdue. In the six years since publication of the last version of the guidance, the CMA's merger caseload has expanded to include more cases where it works on remedies alongside other agencies. It has also been given greater powers to manage the remedies process and enforce compliance with implemented remedies.

The merger process has also changed. The new phase 2 process guidance provides for a longer remedies process, more iterative development and appraisal of remedy options, and greater opportunities for early engagement on remedies. This is a positive step, allowing merger parties to refine complex remedies in the light of feedback from the CMA. A clear signal from the CMA that it has changed its approach will allow merger parties to plan and be fully prepared for this early engagement.

The process changes also allow the CMA to gain a greater understanding of, and become more comfortable with, remedies that it might have previously rejected, providing an opportunity to deliver the more proportionate approach outlined in the previous section.

The recently published Mergers Charter also has areas of read-across for remedies guidance. In particular, the commitment to proportionate design of remedies, while laudable, needs to be fleshed out. The new guidance provides an opportunity for the CMA to set out what this commitment means in practice.

In addition, the proposed streamlining of inquiries and focus on more important issues should lead to the rapid closure of unimportant lines of inquiry relating to lower risk remedy areas.

3. Predictability: Minimising uncertainty for merger parties

As the CMA notes in its Mergers Charter, predictability is important for investor confidence and business decision-making. A lack of certainty and predictability in the

CMA's decisions can have a chilling effect on companies' willingness to undertake pro-competitive deals. It can also lead to situations where companies go through with deals under a genuine misapprehension that the CMA will accept a suitable and proportionate remedy. This issue is particularly acute for large deals across multiple markets where the major part of the transaction is unproblematic.

Uncertainty and unpredictability benefit neither consumers, nor merger parties, nor the CMA. A degree of unpredictability will always result from changes in procedures or approach; this is the price of the improvements that the changes are intended to bring about. One example is the use of the term 'behavioural remedy'. The new guidance gives the CMA an opportunity to make clear which types of behavioural remedies it considers to be 'quasi-structural' and therefore more likely to be accepted, and which types come with intrinsic design and monitoring risks and are less likely to be accepted. Regarding monitoring, parties who are willing to undertake the costs of independent monitoring should not be disadvantaged by being in an industry that does not have a sector regulator.

The CMA can keep this unpredictability as low as possible, by concise and unambiguous drafting of the guidance itself and communication and engagement with stakeholders during the consultation and publication periods. The CMA should also put in place positive feedback loops over the medium and long-term through explanations of its decisions (particularly at phase 1) and a comprehensive evaluation process for the first few cases under the new guidance.

During cases, the CMA may provide more predictability through regular update calls in phase 2, and by greater senior level oversight and engagement with merger parties at hase 1. Greater predictability on multi-national deals can also be achieved by the CMA increasing its co-operation with other competition agencies, particularly in the areas of remedy design and the identification and quantification of customer benefits. This greater co-operation should lead to greater alignment on remedies where competition issues are common across jurisdictions. For cases with limited UK impact where it is considering relying on the actions of other agencies, greater co-operation should also give the CMA assurance that remedies will provide sufficient protection to UK consumers.

The benefits of this increased co-operation to merger parties will be greater certainty of remedy outcomes across jurisdictions, and a more efficient and faster remedies process.

4. Pace: Balancing pace with proportionality and predictability

In the Mergers Charter, the CMA says that it is 'committed to reaching sound decisions as quickly as possible.' However, the desire for pace may come into conflict with the CMA's other objectives for the remedies process, such as consideration of more complex remedies and greater engagement with merger parties.

In particular, the CMA notes the benefits to pace and proportionality of achieving a phase 1 outcome to avoid the time and cost of a phase 2 reference. However, in order to be able to plan and develop possible phase 1 remedies, merger parties need to understand the competition concerns, scale and scope of phase 1 SLCs at an early stage. The short phase 1 timetable, coupled with the desire for shorter pre-notification periods, may make it more difficult for the CMA to carry out sufficient

analysis of more complex remedies. This tension is compounded when the CMA does not weed out speculative or marginal theories of harm at an early stage.

One area where there may be scope for greater pace on remedies is after the final report. Our experience is that companies that accept the CMA's findings wish to move quickly to implement remedies, particularly in cases where integration and realisation of merger benefits cannot be achieved until completion of a divestiture.

We have two suggestions for shortening the implementation period. First, drafting remedies undertakings, on a without prejudice basis, on the basis of the provisional decision on remedies allows for earlier consultation and finalisation. Secondly, the CMA could take a more risk-based approach to purchaser approval and move faster in cases where the divestiture package is robust and potential purchasers have clear incentives to operate the divested business competitively.