THE CMA'S MERGER REMEDIES REVIEW – CALL FOR EVIDENCE

RESPONSE BY FRESHFIELDS LLP

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1. Introduction

1.1 Freshfields (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s call for evidence on the CMA's merger remedies review (the ***Remedies Review***). This response is based on our significant experience in advising clients on CMA merger investigations, at both Phase 1 and Phase 2, as well as our experience of advising clients in cases involving remedies before other major competition regulators.

1.2 This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2. General remarks

2.1 We welcome the CMA's desire to review and consider its approach to merger remedies. A range of factual developments – including but not limited to the UK's exit from the European Union in 2020 and the advent of parallel merger investigations alongside the European Commission (***Commission***), significant changes to the CMA's Phase 2 merger review process introduced in April 2024, and the legislative changes implemented through the Digital Markets, Competition and Consumers Act 2024 (***DMCC Act***) – raise legitimate questions about whether the CMA's approach to remedies remains up to date and effective in today's regulatory environment. Evaluating the CMA's approach in light of its commitment to improving pace, predictability, proportionality and process will also support the CMA to prioritise pro-growth and pro-investment interventions, as guided by the Government in its most recent Strategic Steer.

2.2 Our specific comments in relation to the CMA's questions under each of the three themes are set out in further detail below. However, our key observations in relation to the CMA's existing approach to assessing merger remedies can be summarised as follows:

(a) **The central purpose of merger remedies should be integral to the CMA's practice and standard of legal assessment.** It is important that the CMA keep in mind the principal purpose of remedial action: to address the competitive harm arising from a merger in the most proportionate way possible (e.g., while having regard to the realisation of efficiencies and other benefits). It is not appropriate to introduce any "gloss" on the applicable statutory framework, particularly where this could result in the unnecessary elimination of potentially workable remedies.

(b) **The assessment of remedies should be fact-specific and reflect evolving commercial practice.** In recent years, the CMA has had to adapt to the challenges of assessing the substantive impact of mergers in developing – and often fast-moving – markets (e.g., in the digital and other high-tech sectors). The solution to

such concerns may not always be remedies that were historically targeted to address less novel competition concerns. The CMA should therefore be open to changes in the solutions proposed to address such competition concerns (e.g., because a divestiture may not be a necessary or proportionate solution in such circumstances). In this regard, the CMA should also avoid adopting an unduly formalistic approach to its assessment of remedies (e.g., by adopting a "cookie cutter" approach under which certain types of remedy are considered the only remedies that are acceptable to deal with certain types of competition problem; or applying an automatic presumption as to when upfront-buyer conditions may be necessary in a divestiture scenario). A more nuanced approach (supported by effective engagement), with tailored remedies, is the best way to achieve the CMA's stated objective of ensuring that every deal that is capable of being cleared should be.

(c) **The overall process (on remedies – but also substantive issues) should ensure it properly facilitates effective remedies outcomes.** In particular, the CMA (reflecting recent changes made to the Phase 2 process) should be more open with merging parties from an earlier stage about the nature and extent of its competition concerns, and should ensure that there is sufficient engagement with senior staff (and panel members) on both the substantive issues and the development of a remedy. This would increase confidence to engage in "without prejudice" remedies discussions, as well as generally facilitating more time for merger parties to consider, design and propose potential remedies, and more time for the CMA to assess whether the remedies could address its concerns.

(d) **The approach to efficiencies should be reconsidered and clarified, to enable merging parties to assess and engage meaningfully on meeting the requisite standard.** In practice, the standard of assessment is unclear and the CMA has only rarely considered that competition concerns arising from a merger can be outweighed by potential efficiencies or customer benefits arising from the transaction. The CMA should provide clear guidance, with examples, on the types of efficiencies which would meet their standard of assessment (e.g., on quantification and weighting as against any SLC findings). The CMA should develop a sufficiently calibrated and workable test, bearing in mind the practical limitations on sources of evidence on these specific issues.

(e) **The CMA's remedies process should be enhanced by a greater openness to the use of monitoring trustees.** The CMA should be willing to use monitoring trustees to manage any burdens related to remedy proposals. For example, the CMA could consider instructing a monitoring trustee to provide greater bandwidth or industry expertise than available within the case team, or to oversee

engagement with stakeholders on more complex carve-out remedies.

3. Remedy Theme 1: The CMA's approach to remedies

Q A.1: Should the CMA's current guidance approach of requiring phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' be revisited, within the confines of the applicable legislative framework and timing constraints inherent in the phase 1 UILs process? If so, what standard should the CMA apply?

Q A.2: Is there more the CMA can do within its current legal framework to create opportunities for more complex remedies in phase 1?

Approach to Phase 1 remedies

3.1 In principle, the CMA has considerable flexibility to define the appropriate standard for Phase 1 remedies. The approach set out in the current guidance is not mandated by the Enterprise Act (***EA2002***) and the CMA should generally be prudent about applying an additional "gloss" on the standards set out in legislation.

3.2 In some circumstances, it is apparent that the requirements, set out in the current guidance, that remedies should be "clear cut" (in relation to the substantive competition assessment and in practical terms) and "capable of ready implementation" can – in practice – raise unnecessary barriers to good remedies outcomes, which could be addressed by changes to the CMA's practice.

3.3 **The provision of sufficient clarity on SLC findings.** In some cases, the articulation of an SLC finding in a Phase 1 decision has been imprecise and left significant doubt about what "target" the merging parties should be looking to hit when offering a Phase 1 remedy. For example, in differentiated markets, it has not always been clear what part of the market the SLC affected (e.g., in relation to particular customer types or services types). This might be reflected in how an SLC finding is articulated in the operative parts of a Phase 1 decision, but also in how that SLC is evidenced (e.g., if evidence relevant to particular market segments has been "read across" and considered to apply to the broader market). More clarity, where possible, in how SLC findings are articulated would increase the prospect for Phase 1 remedies (and if such clarity is lacking in the CMA's Phase 1 decision when issued, it would be helpful if the CMA were open to providing any required clarifications, following the SLC decision at Phase 1, to enable a remedies offer to be made).

3.4 From a process perspective, the earliest possible indication of the CMA's substantive thinking in relation to any competition concern would, of course, be helpful in facilitating engagement in remedies. In particular, in addition to offering early feedback on concerns that the CMA is considering (at all stages of the process), it would be particularly helpful to get any update on the CMA's thinking following an issues meeting. This would be most useful where an issues letter has set out a range of theory of harm (some of which

might be more plausible than others), as merging parties can otherwise consider remedies across multiple product areas.

3.5 **Facilitating genuine "without prejudice" remedies discussions.** In general, creating a regime in which merging parties are comfortable to engage in "without prejudice" remedies discussions (without the risk of "colouring" the substantive competition assessment) is key to facilitating early-stage engagement (which will, in turn, increase the likelihood of remedies outcomes being workable in the event that an SLC finding is eventually made at the end of a Phase 1 investigation). In our experience, this is more likely where the merging parties have confidence that they will get sufficient opportunities to "make their case" to the CMA and that any concerns ultimately established will be proportionate and well-founded (which raises broader questions than those considered in the current consultation exercise).

3.6 In addition, the CMA should consider what "formal" mechanisms might be adopted (such as separate teams or safeguards/undertakings) to provide additional confidence that discussions are genuinely without prejudice. The CMA may also find it useful to make clear (e.g., in a non-attributable way in its periodic reporting) how frequently cases in which remedies have been discussed have resulted in unconditional clearance, to help increase "user" confidence that this kind of engagement does not in practice prejudice the outcome on the substance.

3.7 **The de facto "presumption" of an upfront buyer (*UFB*) condition.** At present, the guidance serves to create a de facto "presumption" that a UFB will be required ("*At Phase 1, the CMA will generally require an upfront buyer unless it considers that there are reasonable grounds for not doing so* […]").[1]

3.8 In practice, this means that merging parties have to be able to enter into a signed merger agreement with a third-party (which might include marketing an asset, engaging in initial negotiations with (multiple) interested parties, facilitating due diligence with (multiple) interested parties, and concluding a final sale and purchase agreement with the chosen purchaser etc.) within 90 days of an SLC finding. It may be difficult to start this work on a "without prejudice" basis – e.g., given the potential disruption to staff, customers, and suppliers (which can be considerable), many businesses are reluctant to market a divestment business before a definitive (and public) SLC finding.

3.9 Given the unduly conservative nature of this approach (which often gives too much weight to risks that are manageable in practice), we encourage less use of the UFB condition, such that the CMA's starting assumption is that a UFB is not required, unless there is significant purchaser and/or asset risk (e.g., material concerns around saleability). This would heighten the chances of successful Phase 1 remedies in circumstances where there remains limited risk that a binding sale would not be entered into – even if it took slightly longer than the 90-day UIL period. The CMA would, of course, retain the residual powers that it already holds today in non-UFB cases

[1] CMA87 - Merger Remedies Guidance (***CMA87***), paragraph 5.29.

(including to vary the undertakings where appropriate). The CMA's new fining powers provide an additional tool to incentivise compliance, even where a UFB condition has not been required (so the ability to refer a merger to Phase 2 if the initial sale falls through is lost).

3.10 **Contractual conditionality and the UFB condition.** Where UFB conditions are a necessary in order to obtain CMA approval, the CMA's guidance states that the sales agreement should "*generally* [be] *conditional from the buyer's perspective only on acceptance of the UILs by the CMA*".[2] In practice, we have found that the CMA can be willing to take a flexible approach to this condition – e.g., where a sales agreement might be conditional on certain regulatory approvals that cannot be obtained by the end of the UILs period (but the CMA believes that there is no material risk that those approvals will not ultimately be obtained). To facilitate the practicality of UFB condition cases, the revised guidance should make clear that the CMA may not require "ordinary course" approvals (e.g., those required under the National Security and Investment Act 2021 or by the Financial Conduct Authority) to be obtained by the time the CMA accepts the UILs (and, by contrast, specify any circumstances in which the CMA will require approvals to be obtained pre-signing).

Q B.1: Should the CMA's current approach to assessing the effectiveness and proportionality of remedies be revisited within the confines of the legislative framework? If so, what factors should the CMA consider?

Q B.2: Has the CMA's approach to effectiveness precluded potentially effective remedies being considered as part of its proportionality assessment?

The CMA's standard of legal assessment

3.11 As noted above, the CMA's guidance should generally not impose any additional "gloss" on top of the legislative standard. The CMA's legal duties under the EA2002 are to assess whether a remedial solution "*remedies, mitigates or prevents*" the competition concern identified or any adverse effect resulting from it, "*having regard to the need to achieve as comprehensive a solution as is reasonable and practicable*".

3.12 Given the potential inconsistency between the position set out in the CMA's consultation document, and the positions that the CMA (and the Courts) have taken in previous cases, it would be important for the CMA to properly articulate the circumstances in which it may be willing to accept a remedy that mitigates (rather than remedies or prevents) a competition concern.

3.13 There may well be circumstances where it is appropriate for the CMA to consider remedies that seek to mitigate competition concerns, taking into account the nature and scale of the SLC and the potential costs of a more invasive remedy (e.g., where an SLC arises in a small market and/or seems

[2] CMA2 - Mergers: Guidance on the CMA's jurisdiction and procedure (***CMA2***), paragraph 9.98.

likely to be transitory, but a more invasive remedy might eliminate many of the broader pro-competitive impacts of a deal in other markets).

3.14 In any event (i.e., leaving aside whether the CMA seeks to accept remedies that mitigate a competition concern), the CMA should reconsider its approach to remedies which reduce rather than eliminate a substantive overlap (e.g., where a divestiture does not remove an overlap between the merging parties entirely but reduces their shares below the threshold level of concern). This kind of remedy has been accepted by other authorities (e.g., by the Commission in *Aon / Willis*).[3] This can be a particularly effective approach where there is an identified remedy taker who is currently a less effective competitor but would be "built up" by the acquisition of additional market share (and other capabilities transferred with the divestment business).

3.15 This outcome appears to be acceptable to the CMA in "fix it first" cases – i.e., where the merging parties structure a deal so that they divest assets up-front to prevent an SLC arising in the first place (with the potential disbenefit for the CMA that it lacks the ability to approve the terms of transfer and potential purchaser in such circumstances).

Effectiveness and proportionality should be assessed "in the round"

3.16 The CMA applies a predominantly "two-step" assessment of remedies: first, it will undertake an assessment of a remedy's effectiveness; and second, only where there are two or more effective remedies, an assessment of each remedy's proportionality.[4] In choosing between two effective remedies the CMA will assess proportionality if they are equally effective – a less proportionate remedy would be favoured if it is more effective – but "*will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects*".[5]

3.17 The risk of this "two-step" approach is that it could "filter out" remedies that the CMA does not consider to be "effective" (which may be a bar that is higher than that provided for by the statute) – in particular because it results in the CMA failing to pay sufficient regard to the reasonableness and practicality of proposed solutions within the broader context of the case. We therefore suggest that the CMA's guidance should find a way of considering effectiveness and proportionality "in the round" (in the same way as the CMA considers substantive competition concerns), rather than through the artificial construct of the existing "two-step" process (given that the EA2002 does not envisage a gating mechanism where proportionality is secondary to effectiveness).

3.18 In addition, the CMA's existing approach to the assessment of proportionality effectively risks over-enforcement by focussing on an unduly narrow definition of remedy "costs". As noted elsewhere in this response,

[3] Case M.9829 – Aon/Willis Towers Watson, Commission decision of 9 July 2021.

[4] CMA87, paragraphs 3.4 - 3.6.

[5] CMA87, paragraph 3.4.

there is scope for the CMA to place more weight on the benefits foregone where remedies extinguish Relevant Consumer Benefits (***RCBs***) (which the CMA's guidance already recognises can be considered as a relevant cost). In addition, it may be appropriate for the CMA to place more weight on the costs imposed on merging parties (which the existing guidance largely discounts, on the basis that these are effectively "self-assumed" by merging parties that choose to enter into a transaction). In particular, in keeping with the position set out in the existing guidance that "*the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects*",[6] the CMA should consider whether all of the costs of a divestment remedy (including the transaction-related costs on the merging parties and potential purchaser) could outweigh an SLC in some circumstances (particularly in a Phase 2 investigation where the *de minimis* exception is not available).

Q C.1: Is the current distinction that the CMA draws in its Merger Remedies Guidance between behavioural and structural remedies helpful and meaningful? If not, how should the CMA classify different types of remedies?

Q C.2: In what circumstances are behavioural remedies likely to be most appropriate?

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)?

Q C.4: To what extent could the CMA's new enforcement powers under the DMCC Act 2024 to fine merger parties for breaches of their remedy obligations under remedy undertakings and orders influence the types of remedies the CMA accepts at phase 1 or imposes at phase 2?

Q C.5: Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

Q C.6: What lessons can be drawn from evidence in other jurisdictions, and behavioural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?

3.19 The CMA's remedies assessment should be rooted in a case-specific analysis – i.e., determining, on the facts of the case, the appropriate remedial solution to the identified SLC. In some circumstances, there may not always be a clear distinction between "types" of remedies (e.g., many "behavioural" remedies have similar effects to structural remedies and many structural remedies have behavioural elements).

3.20 To that end, we believe that artificially drawing distinctions between different types of remedies should not be an important part of the CMA's analysis, particularly where this could result in inappropriate "short cuts" being taken in the assessment of remedies.

[6] CMA87, paragraph 3.11.

3.21 By contrast, the key requirement of the CMA's guidance is to provide sufficient detail on the CMA's intended approach to the analysis of particular types of circumstance to enable appropriate remedies planning and engagement with the CMA (and to be willing to constructively engage to provide additional guidance in novel circumstances).

Behavioural remedies

3.22 In our experience, behavioural remedies can be suitable in a range of circumstances. We believe it is important not to apply an unduly static approach to the assessment of behavioural remedies (e.g., by focussing on difficulties identified in the CMA's *ex post* assessments) given that many of these remedies were designed a very long time ago, and developments in technology and commercial practice can significantly change the assessment of risks around the design and execution of such remedies over time.

3.23 The CMA's guidance should set out situations in which such remedies might be practically and effectively applied, whilst maintaining an open mind to other case specific situations where behavioural remedies would be appropriate (in particular, the CMA should not allow the guidance to create a presumption that behavioural remedies are *only* suitable for regulated industries or industries where there is a sectoral regulator.)

3.24 We suggest that the revised guidance could usefully consider:

(a) **Types of competition problems in which behavioural remedies might be particularly suitable:** for example, behavioural remedies may be more appropriate when remedying a vertical or conglomerate theory of harm, or when confronted with a horizontal issue relating to dynamic or potential competition (e.g., where concerns around how early-stage competition might develop could be "freed up" by a non-divestiture remedy).

(b) **The sectors in which behavioural remedies might be suitable:** for example, there is an obvious argument that behavioural solutions are likely to be particularly suitable in: (i) regulated industries (which operate within clear benchmarks and often have specialist regulators available to provide input and support); and (ii) mature industries in which the parameters of competition are well-known and established, and market participants often have experience of entering into commercial arrangements with each other. That said, we believe it is important that the CMA recognises that behavioural remedies can also be used – and may be a more appropriate solution – in developing markets, where "principles-based" undertakings/orders can be used to accommodate the evolution of the market (and the CMA would retain residual powers to vary remedies to the extent needed, and new fining powers to support scrupulous compliance).

(c) **Commercial context:** for example, behavioural remedies are more likely to be acceptable where different businesses within a single

group already operate independently to a large extent (e.g., so a behavioural remedy could be limited to "underpinning" the incentives to continue to operate in that way). Where a behavioural remedy reflects arrangements entered into in the ordinary course within an industry, or where market participants are confident in their ability to make a remedy work, then this should be taken as strong evidence of the effectiveness of a remedy.

3.25 In assessing behavioural remedies, the CMA should (as in its substantive assessment) consider a range of evidence "in the round", taking into account what is available in practice and the specific circumstances of the industry at issue.

3.26 In our view, specific issues that the CMA may wish to consider within its revised approach include:

(a) **The role of third-party evidence.** In assessing evidence from market participants, the CMA must strike a balance between giving appropriate weight to the expert views of market participants (particularly those of the remedy-taker(s)) on the feasibility of the remedy, while being alive to the scope for such third parties trying to "game" the process and use the remedies process for their own commercial benefit. The CMA should ensure it tests third-party representations and evidence with the same level of analytical rigour and scepticism as it applies to those of the merging parties (and the remedy taker). In addition, it would be useful for the guidance to open up the possibility of joint hearings on remedies (replicating the position for joint hearings on substantive issues),[7] as there may be circumstances in which the best way of working through different views on the technical aspects of a remedy (e.g., an interoperability solution) will be to have the merging parties and the third-parties interacting in "real time", rather than the CMA acting as a "post box" to relay positions between both sides.

(b) **Third-party technical experts.** Consultants with considerable industry expertise have the potential to make an important contribution to remedies design. In practice, it can be difficult to "harness" the expertise of these expert resources. On the one hand, the CMA may lack the ability/resources to engage expert input sufficiently quickly but, on the other, the CMA has sometimes been sceptical about the incentives of consultants engaged by the merging parties. The CMA should consider ways in which it can utilise this expertise appropriately – for example, by explaining the parameters the CMA may want to put around any work in which this third party is involved so that it can be considered sufficiently robust for the purposes of developing or assessing the remedy.

3.27 Our experience of remedies in other jurisdictions demonstrates that there is great variety in behavioural remedies. The Commission in particular has an

[7] See CMA2, paragraph 11.37.

extensive "toolbox" of behavioural commitments, many of which are still in force and, in our experience, are working well without any difficulties with implementation in practice.

Q D.1: In what circumstances are carve-out divestiture remedies likely to be most appropriate?

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?

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

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?

Q D.5: What lessons can be drawn from evidence in other jurisdictions, and from complex structural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?

3.28 Carve-out divestitures are an important tool to further the CMA's stated ambition to promote proportionate and pacey remedial solutions, as they can be an effective and precise means of addressing an SLC. In practice, whether a "carve-out" remedy is required is often a function of how a business has chosen to organise itself (and, in many cases, businesses operating in the same market are organised differently). Accordingly, a carve-out divestiture could be appropriate in any situation, given that selling the narrowest package of assets required to address an SLC (wherever possible) is an important part of a proportionate approach to remedies.

3.29 In keeping with the observations made above, one particularly important issue where competition concerns might be addressed by a range of assets within an existing business is for the SLC to be specified sufficiently precisely (to ensure that merging parties know precisely what package of assets could address the SLC). The considerations set out above (in relation to the need to specify the SLC and provide additional feedback where appropriate) are therefore particularly important in relation to carve-out remedies.

Risk mitigation

3.30 As a starting point, the CMA should not approach carve-out divestiture proposals from a presumption of adverse risk; whether a carve-out divestiture remedy is appropriate should be assessed on a case-by-case

basis. There are many factors which would mitigate risks that the CMA has previously identified in relation to carve-out divestitures,[8] including:

(a) **A capable divestment purchaser's views:** purchasers of carve-out remedies are frequently able to successfully and profitably operationalise a lighter package of assets than the CMA might otherwise consider necessary to address the SLC. Significant weight should generally be afforded to the views of prospective divestment purchasers and their rationale for the transaction (although the CMA should, of course, also be alive to the scope for such prospective buyers to try to leverage the divestment process for their commercial gain).

(b) **Prevailing industry or market practices which lend themselves to facilitating carve-out structures:** the CMA should consider whether transactions (e.g., asset packages) similar to those contemplated in carve-out remedies have taken place in the ordinary course in the relevant industry. If they have, then this would be particularly probative evidence of the workability of a carve-out remedy within the industry in question (although the absence of precedent transactions should not be regarded as a bar to a carve-out remedy being put in place).

(c) **Support from experts or industry professionals:** the CMA should take into account the views of third-party industry professionals (e.g., M&A advisers) on the scope of a carve-out package and the existing capabilities and resources of prospective buyers. As noted above, it would be valuable for the CMA to provide practical guidance on how it might be able to put more weight on the work of third-party advisers engaged by the merging parties to support the development of remedies.

(d) **Willingness to instruct a monitoring trustee:** the CMA should be willing to make use of a monitoring trustee to manage any burdens that could be brought about by the engagement required (with the merging parties and/or third parties) on the practicalities raised by a carve-out divestiture. To this end, the CMA should consider instructing monitoring trustees at an early stage in the remedy process (even "informally" – i.e., where the CMA would not have the same formal powers to formally appoint and direct a monitoring trustee but could achieve similar objectives through contractual arrangements entered into by the merging parties).[9]

[8] Most notably in CMA186 – Merger remedy evaluations, 24 October 2023 and Aldwych Partners and NOCON, Merger Remedies Evaluation – A report for the Competition and Markets Authority, July 2023.

[9] Under EA2002, the appointment of a monitoring trustee is restricted to situations where interim measures are already in place or as part of imposing interim measures. In considering any future legislative reform we suggest that providing the CMA with the ability to appoint a monitoring trustee prior to the imposition of interim measures is considered.

Due diligence risks

3.31 Concerns about information asymmetry between the merging parties and the divestment purchaser or a paucity of effective divestment purchaser due diligence can be addressed through market-standard contractual mechanisms. For example, a divestment seller can provide warranties that it has transferred all necessary assets to the divestment business for the purchaser to operate a standalone business. A seller can then "top up" the divestment package with further assets that the purchaser deems necessary.

3.32 The CMA should also consider the use of mechanisms to ensure that a divestment package contains sufficient assets, with the undertaking/order providing scope for the underlying asset package being "topped up" (within specified parameters) as needed (see paragraph 3.34 and footnote 10 below). In practice, such a mechanism could be largely overseen by a monitoring trustee, so any additional burden on the CMA should be limited.

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?

Q E.2: Are there any circumstances in which the CMA could take on a greater role in the monitoring and enforcement of remedies? What would be the costs and benefits of this?

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?

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?

3.33 The CMA should consider utilising monitoring trustees more frequently to monitor and enforce remedies, particularly where there is limited bandwidth or industry expertise within the CMA. As set out in paragraph 3.30(d) above, the CMA should proactively consider the use of monitoring trustees to provide additional support, particularly on the practicalities of remedies, and consider instructing monitoring trustees at an early stage in the remedy process.

3.34 For example, in a carve-out scenario, monitoring trustees can play a key role (working with the merging parties and potential remedy takers) to ensure that divestment packages are sufficiently broad to enable the divestment purchaser to compete effectively and restore the pre-merger conditions of competition in the market.[10]

3.35 To the extent that there are statutory limitations on the CMA's power to appoint monitoring trustees, the CMA should consider working with

[10] This approach was used by the Department of Justice in *Assa Abloy / Spectrum Brands (HHI)*, where it appointed a monitoring trustee to ensure that, among other things, Assa Abloy complied with its obligation to use best efforts to assist the divestment purchaser to obtain all necessary licenses, registrations and permits to operate the divestment business.

monitoring trustees "informally" (i.e., where the monitoring trustee engaged by the merging parties carries out similar functions, even where not formally appointed by the CMA).

4. Remedy Theme 2: Preserving pro-competitive merger efficiencies and merger benefits

Q F.1: What evidence should the CMA look for to support the materiality and likelihood of claimed rivalry enhancing efficiencies?

Q F.2: Does the CMA's current approach to remedies effectively capture potential rivalry-enhancing efficiencies? If not, how can the current approach be improved?

Q F.3: What are the circumstances in which it would be possible to design effective remedies that can lock-in genuine Rivalry Enhancing Efficiencies?

Q F.4: What more can the CMA do to ensure that its approach to merger remedies encourages pro-competitive investment?

4.1 The CMA should reconsider its approach to efficiencies – both in terms of the standard of assessment, and the application of this standard to the evidence. In particular, it is striking that CMA has only rarely considered that competition concerns arising from a merger can be outweighed by potential efficiencies or customer benefits arising from the transaction (particularly when synergies that will result in more attractive products/services for consumers often form an important part of the rationale for a transaction).

4.2 Regarding rivalry enhancing efficiencies (***REEs***), merging parties are reliant on the CMA's interpretation of its duties under Sections 22 and 35 or 33 and 36 EA2002 and related CMA guidance. Given the latitude of the CMA's standard of assessment, there is a particular onus on the CMA to provide clear guidance on how merging parties can substantiate REEs, and refrain from imposing a standard which is practically extremely difficult to meet.

4.3 In particular, the Merger Assessment Guidelines do not provide specific examples of REEs/RCBs, at least for mergers with horizontal effects. The absence of specific guidance and/or recent examples in the CMA's case law can make it particularly difficult for merger parties to determine what would be considered as compelling evidence by the CMA (which in turn restricts their ability to invest time and resources to developing evidence in support of REEs/RCBs at a sufficiently early stage of the case for that evidence to be given material weight during merger investigations).

4.4 In formulating this specific guidance, the CMA should articulate an achievable standard for REEs and provide clear and actionable guidance on how remedies should be treated (e.g., on the quantification of REEs, weighting of REEs as compared to the SLC identified, and manner in which REEs are "locked in" etc.). In particular, we encourage the CMA to consider:

(a) **The relevance of factors beyond lower prices:** as acknowledged by the CMA in November 2024,[11] we would encourage the CMA to look beyond lower prices and focus on other benefits including innovation, choice, quality, security of supply, productivity, investment, and growth.

(b) **The need for a sufficiently calibrated and workable test:** this approach should adopt a longer-term horizon and broader perspective for assessing efficiencies (including, e.g., through issuing guidance on how to consider efficiencies specific to particular sectors or industries (for example consistent with the usual investment cycles) and also acknowledge that most appropriate way to "lock in" REEs (e.g., through inputs-based or outputs-based measurement, or a combination of both) may depend on the circumstances.

(c) **The practical reality of the sources of evidence that are available to the CMA:** while internal documents and management statements are valid sources of evidence, companies in the ordinary course will typically not consider REEs in the same way as the CMA's framework provides for. This means that further sources of evidence, such as expert reports, will inevitably be required to demonstrate REEs to the CMA's standard (e.g., by "bridging the gap" between contemporaneous evidence and the CMA's stylised framework for assessment). The CMA's approach should reflect and allow for these practical realities.

(d) **A constructive, timely approach to engaging with expert reports:** given the need for expert reports, the CMA should be open and constructive in its engagement with consultants. For example, for economic reports, the CMA should recognise that economic models are built on assumptions and can never be completely perfect. The CMA should therefore avoid a "nitpicking" approach to critiques of such reports, and be open to engaging on whether, on the basis of robust methodologies and considered in the round with other sources of evidence, sufficient REEs are being generated. The CMA should ensure that any engagement is sufficient, constructive and timely.

4.5 A fulsome assessment of REEs requires most crucially that the CMA engages with the merging parties in good faith on all sources of evidence. In our experience, evidence relevant to the assessment of efficiency claims could include the following:

(a) internal documents relating to the merging parties' operations, including ordinary course business models and documents, and statements from management of the merging parties to the owners and financial markets about the expected efficiencies. These documents are often governed by legal duties, such as directors' duties (where misleading statements could give rise to significant

[11] "Driving growth: how the CMA is rising to the challenge", a speech by Sarah Cardell, delivered at the Chatham House Competition Policy 2024 conference, 21 November 2024.

penalties such as shareholder litigation), and should be given corresponding weight;

(b) historical data or examples of efficiencies being realised (e.g. from previous transactions);

(c) pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which competition is likely to be enhanced;

(d) survey evidence demonstrating customer valuation of non-price factors;

(e) quantitative analysis to illustrate the commercial logic and incentives to deliver the efficiencies; and

(f) quantitative analysis (e.g. merger simulations) that consider the overall impact on consumer welfare and take into account both upward pricing pressure and efficiencies.

Q G.1: Does the CMA's current approach to remedies in phase 1 effectively capture RCBs? If not, how can the current approach be improved?

Q G.2: Does the CMA's current approach to remedies in phase 2 effectively capture RCBs? If not, how can the current approach be improved?

Q G.3: Should the CMA's current approach to the types of evidence for substantiating RCBs be revisited, within the confines of the legislative framework? If so, what types of evidence should the CMA accept in substantiating RCB claims?

Q G.4: How can the CMA best quantify and balance RCBs on the one hand with the SLC's adverse effects on the other?

Q G.5: Are there any barriers to merger parties engaging on RCBs with the CMA throughout the different stages of a case (either at phase 1 or phase 2)?

Relevant Customer Benefits

4.6 Significant limitations in making constructive use of RCBs within the Phase 1 are fixed by statute. In particular, the current statutory framework prevents the CMA from both: (a) using its discretion not to refer in relation to certain affected markets (for example, finding that the RCBs outweigh an SLC in a national market or in one product market); and (b) accepting UILs to address an SLC in another affected market (for example, accepting a local divestment to remedy an SLC in a local market). Recognising that the current exercise is intended to explore what is possible within the existing legislative regime, a statutory amendment that would enable the CMA to use RCBs and UILs in parallel at Phase 1 would help more cases to be resolved (proportionately) at Phase 1.

4.7 As with REEs, any assessment of RCBs requires a forward-looking assessment (of both any potential competitive harm as well as prospective

benefits). In the case of RCBs, the CMA must assess whether the relevant customer benefits would outweigh the likely SLC(s) and adverse effects identified. The ability to self-assess in relation to any potential competitive harm is facilitated by extensive guidance on how the CMA will consider competition concerns (from the CMA's guidance and a significant volume of available precedent). To help provide similar support for self-assessment for RCBs, the CMA should provide more detailed guidance – in particular – on:

(a) the **types of evidence** that can be used to demonstrate that RCBs are achievable – the same considerations that apply in relation to types of evidence that should be acceptable in relation to REEs should apply to RCBs as well;

(b) the approach to the **quantification of RCBs** – i.e., how in practice different types of benefits (focussing on the types of benefits that are most likely to arise in practice) can be "measured" in a way that will be sufficiently probative for the CMA;

(c) the approach to the **weighing of RCBs** as compared with the SLC(s) identified (again focussing primarily on the trade-offs that are most likely to arise in practice). For example, additional guidance would be helpful in relation to how the CMA might weigh up potential harms/benefits that are not directly comparable (e.g., a quality improvement vs. a potential price impact). Similar issues arise around the magnitude and certainty of harms/benefits.

4.8 Merging parties are and should be encouraged to engage from early stages if seeking to demonstrate RCBs, and the CMA should be required to provide timely feedback on such evidence. This will allow parties with sufficient time to address any CMA concerns regarding the quality or type of evidence and to gather any additional evidence needed.

5. Remedy Theme 3: Running an efficient process

Q H.1: What process barriers are there currently to reaching a phase 1 remedies outcome?

Q H.2: How can the CMA amend its phase 1 process to allow more complex remedies to be assessed within a phase 1 timeframe?

Q H.3: If the nature and/or scope of potential competition concerns are unclear, what steps can the CMA case team and merger parties take to ensure that they are best placed to engage effectively on remedies at the earliest possible stage in phase 1?

Issues letter

5.1 As set out in paragraph 3.3 above, one barrier to reaching more successful Phase 1 remedies outcomes is the limitation for meaningful engagement with the CMA at earlier stages the merger review process (i.e., before the CMA's Phase 1 SLC decision). The issues letter is the first opportunity for merging parties to understand the CMA's substantive concerns to a

meaningful degree (and, even then, is explicitly presented as a "worst case" scenario so it is sometimes difficult to assess how much weight should be placed on the positions that it sets out). This means that merging parties often do not have sufficient time to consider and design remedies to address the identified concerns in the remaining Phase 1 period.

5.2 Accordingly, in order to provide a basis for more nuanced engagement before the Phase 1 SLC decision, the CMA could consider providing a more accurate and targeted feedback on its competition concerns at an earlier stage in the case, for example by:

(a) providing more detailed indications of its substantive concerns at the earliest possible stage in Phase 1 (or in pre-notification), including ahead of the "state of play" meeting; and

(b) more streamlined and pointed issues letters, clearly setting out the CMA's principal concerns in a more balanced way. While this would change the purpose of the issues letter (and could, in theory, lead to more supplementary issues letters being issued), this may be worthwhile to support more effective remedies engagement where concerns ultimately are sustained.

Without prejudice discussions

5.3 Merging parties may be reluctant to engage in early remedies discussions because they are sceptical that such discussions are genuinely without prejudice to the parallel substantive assessment. To give parties greater comfort, the CMA should consider:

(a) ensuring early remedies discussions are held with the CMA's remedies team without the presence of all or most of the case team involved in the substantive assessment; and

(b) providing more detail in its guidance on the processes the CMA would typically put in place to ensure that early remedy discussions are not prejudicial to an SLC finding.

Q I.1: What barriers are there currently to reaching a phase 2 remedies outcome?

Q I.2: Does the current phase 2 process adequately facilitate early remedy engagement? If not, how can it be improved?

Phase 2 remedies process

5.4 The same thematic considerations apply across both Phase 1 and Phase 2 proceedings – i.e., conveying confidence that the merging parties will get a proper hearing on the substantive issues and that discussions are genuinely "without prejudice" will help prompt early engagement on remedies.

5.5 Within a Phase 2 context (even under the recently-revamped process), the same issues can arise in relation to the quality and specificity of the feedback provided on competition concerns (e.g., if a Phase 1 decision does not outline with appropriate clarity the potential competition concerns, it may

be difficult for a Phase 2 group to provide sufficiently precise feedback to the merging parties on an update call after the initial substantive meeting).

5.6 We also believe that, notwithstanding improvements to the CMA's Phase 2 process, it would be beneficial to further enhance informal interactions between the merging parties and the CMA (with more frequent constructive touchpoints). We note, for example that the Commission process is generally characterised by a higher level of engagement, with the merging parties and the Commission often iterating the remedies proposal on a frequent (e.g., weekly) basis through calls or short RFIs, in order to constructively and collaboratively develop a viable and robust remedy.

Q J.1: How can the CMA ensure its remedies process at phase 1 and phase 2 sufficiently takes account of parallel actions by other competition agencies?

Q J.2: How can the CMA ensure it utilises the expertise of other UK government departments or sector regulators to increase the chance of a successful remedy outcome?

Q J.3: On the question of whether the CMA or others should take remedial action to address an SLC, should the CMA make more use of making recommendations to others to take action to remedy competition concerns arising from a merger and if so, what are the circumstances where it may be appropriate to do so?

Working with other regulators

5.7 In keeping with the position set out in its own jurisdictional and procedural guidance (and consistent with the government's strategic steer), the CMA should actively consider when remedies in other jurisdictions will be adequate to mitigate the SLC. It would be helpful for the CMA to provide more clarity on the approach that it will adopt in varying circumstances, in particular to specific the circumstances in which the CMA might consider it to be appropriate to open a formal investigation in the UK and/or put in place a UK-specific remedy.

5.8 In practice, it will be important for the CMA to manage this process carefully. In particular, it would be wholly unsatisfactory for the CMA to open formal proceedings in the UK at an advanced stage of proceedings in other jurisdictions (where this might extend the overall period required to obtain regulatory approvals, thereby delaying the closing of the deal).

5.9 While not necessary for a successful remedies package, the expertise of other UK government departments, sector regulators or other appropriate/relevant industry experts should be leveraged as far as possible, as well as the existing legal frameworks in which those authorities or regulators operate. For example, under the DMCC Act, the Digital Markets Unit (***DMU***) can utilise its powers to develop a more complete understanding of designated firms and their relevant markets, and therefore a deeper comprehension of the strategic context of the transaction under review. Where appropriate, this understanding should feed into the CMA's

consideration of effective remedies (and DMU powers should also be taken into account in considering how a remedy in that sector might be monitored and what residual risks arise if a remedy does not operate as envisaged).

5.10 Government departments and sector regulators often have ready access to market-wide data which may not be available to individual competitors, such that they can bring unique insights and perspectives to the CMA. They will be attuned to recent developments and key issues in the relevant sector and can act as a sounding board for the CMA in considering the need for and effect of remedies packages.

5.11 Existing legal frameworks can be used to reinforce or supplement the enforcement or monitoring of remedies – e.g. the *Vodafone / Three* Network Commitment has been added as an Ofcom licence condition, such that the merged entity is required to meet its targets or risk the consequences of a licence breach.

Question on any other processual changes

Q K.1: Are there any other ways, not covered by the specific questions above, in which the CMA could improve its remedy processes, at either phase 1 or phase 2?

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?

Freshfields

21 May 2025