

UK Finance

Response to CMA Merger Remedies Review – Call for Evidence

1. Introduction

- 1.1 UK Finance is pleased to respond to the Competition and Markets Authority's ("CMA") call for evidence on the Merger Remedies Review. This Consultation is important to our Corporate Finance Committee members ("members") who advise clients active in mergers and acquisitions ("M&A"). This response was prepared with the advisory support of Paul, Weiss, Rifkind, Wharton & Garrison LLP.
- 1.2 Our members are supportive of the CMA's focus on enhancing pace, predictability, proportionality and process (the "4Ps") and welcome the opportunity to engage with the CMA on its approach to merger remedies as part of this.
- 1.3 In this submission, we provide our members' preliminary views on each of the Remedy Themes. We look forward to further engagement with the CMA during the course of its review. If you have any questions or would like to discuss any of the views expressed in this submission, please contact avanthi.weerasinghe@ukfinance.org.uk

2. CMA's approach to remedies

The CMA's approach to Phase 1 remedies¹

- 2.1 Our members believe that there should be scope for parties to engage with the CMA on remedies (on a without prejudice basis and in a structured way) from an early stage in the CMA's review. Currently, many parties do not have any meaningful engagement with the CMA on remedies until Phase 1 is at an advanced stage,² which, coupled with the short timeframe for consideration of undertakings in lieu,³ does not provide the CMA with sufficient time to consider complex remedies at Phase 1 or for merger parties to receive and react to CMA feedback: remedies in Phase I are too often a "one shot game". Providing a structured process (e.g., appointing a decision maker earlier in the process to engage with the parties on remedies) and greater scope for engagement with the CMA on remedies from an early stage (including in pre-notification) would enable parties to offer (and the CMA to accept) more complex remedies at Phase 1, delivering "*clear benefits to both pace and proportionality from achieving a phase 1 remedy and avoiding the time and cost associated with a phase 2 reference.*"⁴
- 2.2 Procedural reform would have a substantive impact: facilitating consideration of more complex remedies at Phase 1 would allow for revised interpretation of the requirement for Phase 1 remedies to be "clear-cut" and "capable of ready implementation," which in turn would allow the CMA to become less risk averse in relation to remedies at Phase

¹ This is also relevant from a Theme 3 "process barriers...to reaching a phase 1 remedies outcome" perspective.

² This is the case absent fast-tracking to consideration of undertakings in lieu, which is unlikely to be strategically desirable in many cases.

³ We believe that the timeframe for offering and accepting undertakings in lieu can be too short to reach a satisfactory outcome, but appreciate that amending this would require statutory reform, which may be outside the scope of the CMA's review.

⁴ CMA Merger Remedies Review – Call for Evidence document, paragraph 24.

1 and enable more creative and potentially more proportionate solutions (particularly where there are no obviously available structural remedies). Members believe that there should be scope for a more flexible approach within the current legislation (supported by any necessary procedural reforms to guidance).

The CMA's approach to behavioural remedies

- 2.3 Members believe that behavioural remedies can be capable of resolving an SLC in a variety of different circumstances and may, in certain cases, be a more appropriate and proportionate means of resolving an SLC than a structural remedy (e.g., where the overlapping or vertically linked business which raises SLC concerns may not have sufficient assets or resources to operate as an independent entity or where the divestment business cannot be separated). Members are of the view that the CMA should be open to engaging with parties on behavioural remedies (at Phase 1 and Phase 2), and that behavioural remedies should not be viewed as “*unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies*”⁵ – this does not reflect reality (or practice by other regulators such as the EC). Accordingly, the CMA should consider amendments to paragraph 3.28 and 3.32 of its Merger Remedies guidance (the “**Guidance**”),⁶ to remove or temper the preference towards structural remedies to satisfy the “clear cut” criteria.

Effectiveness and proportionality

- 2.4 Consistent with the above, members believe that the Guidance should be revised to recognise that behavioural remedies are capable of fulfilling the “effectiveness” and “proportionality” criteria for addressing a SLC. Currently, the guidance focuses on re-establishing the structure of the market and states that behavioural remedies are inherently unlikely to achieve this aim.⁷ Members believe that de-linking the concepts of restoring rivalry and re-establishing the structure of the market would redress the imbalance between structural and behavioural remedies in this context.

Assessing, monitoring and enforcing remedies

- 2.5 Our members are supportive of paragraph 3.48 of the Guidance, which notes that appointment of expert monitors may enable behavioural remedies to operate satisfactorily where parties operate in a regulated environment, and encourage the CMA to factor this into its consideration of behavioural remedies offered by parties operating in a regulated sector. The Financial Conduct Authority in particular is an experienced regulator that regularly exercises its concurrent competition powers (and the Prudential Regulation Authority also has a secondary competition objective). They are therefore well placed to lend support in monitoring behavioural remedies in the financial sector; we consider that the Digital Markets Unit should fall into the same bracket for digital market concerns in relation to designated SMS businesses.

⁵ Guidance, para. 3.5(a).

⁶ CMA87, Merger Remedies, 13 December 2018.

⁷ *Ibid.*

3. Preserving pro-competitive merger efficiencies and merger benefits

3.1 Members note the following as regards rivalry enhancing efficiencies and relevant customer benefits (“RCBs”):

- (a) Members welcome the CMA’s willingness to engage with (and accept) behavioural remedies which “locked in” the parties’ efficiency commitments on *Vodafone/Three* and are supportive of the CMA taking this approach in future cases (where appropriate). To this end, we believe that the Guidance should outline clearly how parties can show that remedies (whether structural or behavioural) could (i) “lock in” rivalry enhancing efficiencies (e.g., through a combination of enabling and controlling measures as in *Vodafone / Three*); and alternatively where the CMA considers these could (ii) jeopardise rivalry enhancing efficiencies.
- (b) Members welcome the CMA’s willingness to consider the views of sectoral regulators when evaluating RCBs⁸ and believe that consulting with sectoral regulators will enhance the CMA’s ability to evaluate RCBs in the context of transactions involving a regulated sector.
- (c) Members consider that the Guidance should also provide greater detail on how RCBs will be evaluated in the CMA’s remedy decision making process. As drafted, the Guidance makes clear that the CMA may modify a remedy to ensure retention of an RCB or prefer a particular remedy on this basis, but the mechanics for this (and how they are likely to be applied in practice) are not clear. We believe that this would benefit from clarification (taking into account that appropriate remedies may plausibly be structural or behavioural in nature). We consider that an RCB under the Enterprise Act is sufficiently flexible a concept to take account of benefits arising outside of the relevant overlap or vertically linked or conglomerate markets and that this is a benefit of the UK regime.

4. Running an efficient process

- 4.1 Members welcome engagement by the CMA with overseas regulators on parallel reviews and believe that the CMA should continue to engage with overseas regulators on remedies where appropriate. It is generally preferable for parties to have a single set of global remedies and alignment can streamline the process from parties’ and regulators’ perspective.
- 4.2 Finally, as above, we note that appointment of expert monitors may increase the prospect of behavioural remedies operating satisfactorily. Sector-specific regulators can be a particularly valuable resource in this context, and we encourage the CMA to make use of this expertise (where appropriate) going forward.

⁸ Call for Evidence, paragraph 61.

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Contacts:

Julie Shacklady, Director, Primary Markets and Corporate Finance
julie.shacklady@ukfinance.org.uk

Avanthi Weerasinghe, Head of Market Practice and Regulatory Policy
avanthi.weerasinghe@ukfinance.org.uk

Gabriel Ihama, Analyst, Capital Markets and Wholesale Policy
gabriel.ihama@ukfinance.org.uk

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Contacts:

Nicole Kar, Partner
nkar@paulweiss.com

Matthew Hearn, Partner
mhearn@paulweiss.com

Rebecca West, Associate
rwest@paulweiss.com