Comments and Suggested Edits to *Merger Remedies Guide Draft for Consultation*

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Introduction

Enclosed are suggested edits with commentary to the Competition and Markets Authority (CMA) *Merger Remedies Guide Draft for Consultation* 16 October 2025 (*Remedies Guide*). This introduction provides some context to the edits and comments, which are self-explanatory. My focus was on the sections regarding structural remedies, but there are some edits and comments to behavioral remedies and review procedures as well.

I have mainly focused on the risks and resource burdens that accompany remedy negotiations (in mergers and elsewhere). As the CMA knows, crafting merger remedies is as predictive an exercise as merger analysis itself. The same uncertainties regarding likely future competitive effects of any merger apply to the risks and benefits of allowing a merger with remedies. Generally, any merger enforcer will have only one opportunity to address likely competitive harm, so great care needs to be taken to reduce the risk that a remedy will fail.

Accordingly, the CMA should be careful to avoid taking on absolute obligations such as "ensuring that" a remedy will be no more burdensome than necessary. And the merger parties should bear most if not all of the burden to show that their proposals both minimize the risk of remedy failure and minimize the burden (on them), if that is their argument. The benefit of the doubt should go to the CMA.

The draft *Remedies Guide* itself best articulates the touchstone for the CMA's efforts:

> 3.4 At both phase 1 and phase 2, the Act requires that the CMA, when considering remedies, shall 'in particular, have regard to the need to *achieve as comprehensive a solution as is reasonable and practicable* to the SLC and any adverse effects resulting from it'. [emphasis added. Footnotes are omitted throughout these comments.]

[1] I am a former assistant director in the U.S. Federal Trade Commission's bureau of competition. I served for over twenty-five years as head of the bureau's compliance division, which oversees merger remedy drafting, implementation, and enforcement, among other duties. While I was assistant director, the bureau issued its 1999 divestiture study, and the remedies study in 2017 (jointly with the FTC's bureau of economics), both of which the CMA has cited. I have also contributed to Global Competition Review's *Merger Remedies Guide* (2nd-5th Editions) and have worked on U.S. government projects with the International Competition Network relating to merger remedies among other foreign consultations. I have been on various panels hosted by the American Bar Association, the American Antitrust Institute, the Corporate Law Institute, and others. The views expressed are my own.

The CMA should be able to craft and enforce effective remedies and still follow the principles of proportionality and burden minimization by requiring robust showings from merger parties and rejecting unsupported conclusions about buyer capabilities and plans.

When considering remedy review (reporting and enforcement) and modification, the CMA should adhere to the principle that remedies, especially negotiated remedies are "final" and should not be subject to *required* reconsideration unless the party makes a strong initial case for doing so. I develop this point below in the comments to Section 9.

Suggested Edits and Comments

Additions and edits to the draft's text are by reference to paragraph numbers and are shown in **bolded blue**.

3.5 The following principles apply to the assessment of remedies at phase 1 and phase 2, although their application will take account of the relevant differences in the decisions to be taken at each phase:

…

> *(b)* The CMA will then assess whether the effective remedy or remedies it has identified are proportionate. The CMA will select the least costly and intrusive remedy, and will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects**, understanding that such remedy selection will depend on the specific facts, and that absolute or quantitative certainty will generally be unachievable**.
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> **Comment:** As the CMA recognized in its "Merger Remedies Evaluations," CMA 186 (24 October 2023) at ¶ 3.4, "The learning points from the research are essentially qualitative in nature as the limited number of cases available for review and the variety and complexity of individual cases militates against statistically robust quantitative analysis." Similarly, the CMA should require merger parties to provide robust evidence if they assert that one remedy is demonstrably less costly or intrusive. On balance, the CMA's judgment should carry significant if not unreviewable weight.

3.18 The requirements of a remedy should only be those necessary to resolve the SLC and its adverse effects. The CMA will engage with the merger parties and third parties to **seek to** ensure that a remedy is no more onerous than it needs to be.

> **Comment:** With reference to ¶ 3.4, the CMA's goal is to "to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it." Accordingly, CMA should not assume the burden of *ensuring* a no-more-than-necessarily onerous remedy, especially considering the

general indeterminacy of future costs. (And note the phrase "seek to ensure" in current draft ¶ 4.9(b). That phrase is equally appropriate here.)

Also: CMA should consider including an explicit burden on the merger parties to support their claims with "relevant evidence," as is required in ¶¶ 3.35 and 3.36 (RCBs).

3.19 In situations where the CMA has identified more than one effective remedy, the CMA will select the least costly and intrusive remedy **when possible**.

Comment: Same point as above. The burden should be on the merger parties to justify their assertions about cost and intrusiveness.

3.23 In exceptional circumstances, even the least onerous but effective remedy might be expected to incur relevant costs that are disproportionate to the scale of the SLC and its adverse effects (*e.g.* if the relevant costs ***incurred by third parties*** as a result of the remedy and/or the RCBs lost as a result of a remedy are likely to outweigh the SLC and its adverse effects). In those exceptional circumstances, the CMA will not pursue the remedy in question and may consider remedies which will only be partially effective in resolving the SLC.

Comment: Emphasis added to underscore that costs on non-merger parties (*e.g.* customers, suppliers) are a greater consideration than costs to be borne by the merger parties themselves.

3.33 For example, in the CMA's investigation into the anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust (2017), . . . CMA therefore concluded that it would be disproportionate to prohibit the merger, and that it should be cleared**. As noted in ¶ 3.25, such cases will be rare.**

Comment: Suggest this addition to underscore how unusual such a situation will be.

6.9 In assessing the effectiveness of a proposed divestiture remedy, the CMA will have particular regard to the following categories of risk, which will affect the extent to which it resolves the SLC and its adverse effects, its practicality and overall risk profile. These are: . . .

Comment: The CMA should consider adding a paragraph that recognizes the inter-related nature of the enumerated risks. That is, asset and purchaser risk can be greatly reduced by requiring an upfront buyer, because the CMA can assess both the buyer and the asset mix *before* the CMA accepts the remedy. Similarly, requiring

divestiture of an ongoing business greatly reduces composition risk. (The least risk is presented by requiring divestiture of an ongoing business to an upfront buyer, where the CMA can assess the buyer's ability, its need for any additional assets, and the robustness of its business plan all prior to accepting the remedy.) *See e.g.* Global Competition Review's *Merger Remedies Guide*, which throughout discusses the interrelatedness of these risks.

6.11 The incentives of merger parties may serve to increase the composition, purchaser and asset risks of divestiture. . . . They may also allow the competitiveness of the divestiture remedy to decline during the divestiture process (asset risks).

Comment: Consider adding, "These incentives can be greatly reduced by requiring divestiture to an upfront buyer."

6.14 The scope of the divestiture package should be appropriately specified and configured . . . . In defining the scope of a divestiture remedy, the CMA will normally seek to identify the smallest viable, standalone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area or areas of competitive overlap. This may comprise a subsidiary or a division or the whole of the business acquired.

Comment: The CMA should consider expressly placing the burden on the merger parties to show that the "smallest viable, standalone business, *will* compete successfully. (Presenting an acceptable upfront buyer should be part of that showing.)

6.16 [Regarding local markets] The CMA will generally require the divestiture of the entire overlap giving rise to an SLC. . . . . However, merger parties will need to provide robust evidence to demonstrate that divestiture remedies which do not remove the entire increment are nevertheless effective and will enable the purchaser to compete effectively having regard, for example, to the materiality of any economies of scale **density and scope** from operating multiple local sites. **Asset packages containing a mix of assets from the two merger parties will be disfavored without a robust showing by the merger parties that the mix will be effective.**

Comment: Consider emphasizing this point and holding the merger parties to a high burden. Note "Merger Remedies Evaluations," CMA 186 at ¶¶ 4.26, 4.38(a) and 4.39 identifies possible lost efficiencies involving "scale, density or scope" and merger party incentives to minimize the asset package. Note also the U.S. FTC's prior general preference for "clean sweep" divestitures in local markets (*e.g.* grocery retailers), meaning that *all* of one party's assets (*e.g.* store locations) within a local

market must be divested (along with related distribution assets), even if some locations don't appear to compete closely with the other party's locations in that market.

Also note: The CMA should add here that it will disfavor "mix and match" remedy packages (where some assets of one merger party are combined with some assets of the other merger party.) These packages generally increase the risk of failure, sometimes because the parties have included less competitive assets and held back better ones, but sometimes because geographic coverage within the local market is not as strong as the two merger parties' own mix was before the merger.

6.23 Carve-out remedies . . .

(b) Where merger parties have more influence over the content of the divestiture package (*e.g.* where the CMA specifies a framework or minimum package and allows the merger parties to negotiate the details), this influence may provide merger parties with the ability to reduce the competitive capability of the divestment business. **In addition, possible purchasers may choose to ask for only parts of a package, to avoid being rejected in favor of another bidder.** For this reason, the CMA will typically seek to minimise the discretion for negotiations between merger parties and prospective purchasers over the content of divestiture packages and / or take a cautious approach when defining the extent of the minimum package.

> **Comment:** Past U.S. experience has shown that some would-be buyers have "bid against themselves," in order to be chosen by the merger firms. It can be difficult for the agency to identify that behavior.

(d) The transfer of customers to a new supplier will often depend on customer consent. The risk that a transfer will not be successful may vary according to the importance placed on the supplier's products or services by the customer. In some cases, the risk can be mitigated by designing the remedy as a 'reverse carve-out'. **The CMA may also require the merger parties to secure consents from suppliers or customers for transfer of important supply or distribution contracts.**

> **Comment:** In general, the CMA should require the merger parties to obtain advance approval to transfer important contracts. The purchaser should not need to negotiate these contracts on its own. A monitor may be needed to assure that the merger parties do not agree to disadvantageous terms in such transfer approvals. Failure to obtain transfer approvals should lead the CMA to reject the merger parties' remedy proposal. One caveat is that the merger parties may have an incentive to "over-compensate" the particular

customer or supplier to obtain consent. The proposed purchaser should have an opportunity to assess the circumstances before taking the remedy package. A monitor may also help prevent game-playing by the parties.

6.27 In carve-out remedy cases, the CMA will generally expect the divesting party to provide a warranty in the transaction agreements . . .

Comment: The CMA may want to refer expressly here to the benefit of having a monitor in these situations, to assure the purchaser has complete information and to assist determining which additional assets should be divested.

6.36 The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority, or satisfy the CMA that these requirements will be obtained within a reasonable timeframe. **In certain cases the merger parties may be required to assist the transfer of relevant licences and approvals.**

Comment: Noted in comment to ¶ 6.23(d). In some cases the merger parties, as current licensees or holders of regulatory approvals, may need to provide information and consents for the transfer of regulatory approvals. A general requirement to assist in all necessary ways may capture that obligation. This may also apply as to suppliers who hold rights of approval before the transfer of any licenses or contracts.

Purchaser risk – suitable purchasers

General comment: Divestiture to an acceptable purchaser is a critical aspect of divestiture analysis. It has been the U.S. experience that requiring an upfront buyer reduces the risk that an acceptable purchaser will not be found. Accordingly, the CMA should note that its general practice will be to prefer upfront buyers. The provisions beginning at ¶ 6.62 may therefore be better placed at the beginning of this discussion. If the merger parties advocate for a post-merger divestiture (in six months, usually), they should be required to identify several ready, willing, and able purchasers for the CMA to review. Note the discussion in ¶ 6.37 et seq. The CMA should reject a post-merger divestiture if it is not confident that a purchaser is actually available.

Monitoring trustees and/or independent experts

6.71 Monitoring trustees and independent experts may be able to support the CMA in its assessment of complex remedies by providing an independent, arm's length assessment of

the composition risk of a proposed remedy. **The CMA will retain the ultimate authority whether to accept or reject a remedy or proposed purchaser.**

> **Comment:** The CMA should be careful not to be deemed to delegate to a monitoring trustee or other expert the ultimate authority to accept or reject a proposed remedy or purchaser or any of the remedy's terms.

Behavioral Remedies

> **General Comment:** No specific suggested edits. The CMA recognizes the risks posed by behavioral remedies, especially in horizontal mergers. An over-arching note is that such remedies should be written with as much clarity as possible, as the CMA acknowledges, both because the parties must be on clear notice what is required and prohibited, and because enforcement for any breach will be difficult if the remedy's terms are not clear. *See e.g.* the CMA's discussion in ¶ 7.26, which may usefully be included as a preamble to the entire Behavioral Remedies section.
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> *Firewall remedies in vertical mergers*
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> > **General Comment:** Firewall remedies are also a useful *additional* provision when divestitures, especially carve-outs, will not happen upfront. They prevent information about the to-be-divested assets or business being passed along to the merger parties. The CMA may want to note this generally in the discussion of Structure Remedies.

Appointment and responsibilities for assessing remedy proposals (Trustees, Independent Experts, etc.)

8.6 If a monitoring trustee or an independent expert is appointed in advance of any UILs, Final Undertakings or a Final Order, the general considerations in relation to its appointment outlined below will apply:

> *(a)* A monitoring trustee or an independent expert should always be independent of the merger parties, have appropriate qualifications and capacity to carry out its functions, and should not be subject to conflicts of interest. **A monitoring trustee or independent expert should be free to engage in confidential discussions with the CMA (*i.e.* not including the merger parties).**
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> > **Comment:** This has at (rare) times been a source of contention in FTC practice. Parties understandably bristle at the idea that an expert they have engaged (at their expense) may discuss certain issues with the agency's staff outside the parties' presence. Experience has shown, however, that the expert will speak more freely with the staff under these conditions and that

the staff can effectively alert the parties to any issues raised by the expert. In practice, no parties have refused these conditions.

9. Monitoring and review of merger remedies

General Comments About Section 9

I have not made extensive suggested edits to Section 9 but urge the CMA to embrace two overarching points and, where appropriate, work them into the *Remedies Guide's* specific language.

First, regarding reporting by the merger parties and instances of possible breaches, the CMA should make clear that merger parties' good faith or bad faith efforts to comply or avoid compliance, including failure to report quickly breaches of obligations, will factor heavily in the CMA's determination of appropriate penalties and other enforcement actions. *See generally* some comments below and the CMA's reference to Administrative Penalties: Statement of Policy at ¶ 2.2. In U.S. experience, the good or bad faith of the party has often been the deciding factor in the enforcer's decision whether to take action against a breach and has been a factor given great weight by the court deciding the penalty amount. (The gain from the breach is also a factor and is usually reflected as well in the party's good or bad faith.)[2]

Second, the CMA should clarify throughout Section 9 that it is not *required* to consider modifications of UILs, Final Reports or Final Orders if the merger party has not made an initial showing, with relevant evidence, of the need for such modification. The *Remedies Guide* itself notes that such reviews can be fact-intensive. The CMA should decline to engage in such resource-demanding exercises unless the merger party makes its initial showing.[3]

The concern about burden arises as much when considering remedy modification as when negotiating remedies themselves, and the CMA should emphasize that the merger parties generally bear that burden. The CMA's resources are limited, as they are for all enforcement agencies, so it is appropriate for the CMA to protect itself from unwarranted demands on those resources.

[2] A full discussion of the factors used by U.S. courts in assessing penalties is beyond the scope of these comments.

[3] A full discussion of the U.S. procedures for considering order modifications is also beyond the scope of these comments, but the U.S. courts give great weight to the finality of orders, including negotiated remedies. Parties under order must show that conditions have changed before the agency will be required to weigh that showing against other factors.

Specific comments to Section 9

9.20 The CMA encourages all parties to report to the CMA all breaches of UILs, Final Undertakings and Final Orders as soon as these are discovered, even where a full account of the details is not yet available **and even when a required report is not yet due**. . . .

> **Comment:** This is a small point, but the FTC did have one instance where a party explained its knowing failure to report a breach with words to the effect, "our report was not due for another six months."

9.34 [Changed Circumstances, generally]

> **Comment: Here would be a good place to state explicitly that the merger parties have the burden of showing that conditions have changed and that those changes support modifying the existing UIL, Report or Order.**

9.35 In cases where ~~the changes are complex or uncertain,~~ a detailed investigation ~~**will**~~ **would** be required in order to evaluate whether or not there has been a change of circumstances (and, if so, what, if any, changes to UILs, Final Undertakings or a Final Order may be appropriate), **the merger parties must provide an initial showing, with supporting evidence, of those changes and the need for a modification. Otherwise** ~~**In these circumstances**~~, the CMA will **not** undertake a substantive review of the individual UILs, Final Undertakings or Final Order.

> **Comment:** This is an important issue, although the suggested edits are inartful. The entire ¶ 9.35 might better be rewritten to make the burden point clearer. The language from ¶ 9.41 is particularly appropriate. The general thought is that unsupported claims will not put the CMA to the burden of having to explore those claims itself. "Supporting evidence" includes affidavits from those with specific relevant information.
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> **Citation:** For example, the U.S. FTC recently re-articulated the long-used standard for showing that an order should be reopened and modified:
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> > A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.
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> > * * *
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> > The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. All information and material

> that the requester wishes the Commission to consider shall be contained in the request at the time of filing.

In re Enbridge, Inc., et al. FTC Docket 4604, 8 April 2025 [footnotes omitted], available at https://www.ftc.gov/system/files/ftc_gov/pdf/c4604enbridgeorder.pdf. The CMA should consider stating in a general way, applicable to all modification requests, what the requester must show and how it must support its claims.