

# Response to the Competition and Markets Authority's consultation – draft revised merger remedies guidance (CMA87)

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## 1. **Introduction**

- 1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation on its draft merger remedies guidelines (CMA87), as published on 16 October 2025 ("**CMA87 Consultation**"). We support the CMA's commitment to ensuring that its merger processes embody the principles of pace, predictability, proportionality and process (the "**4Ps**") and its provision of draft amended CMA87 merger guidance ("**Draft Revised Guidance**" or "**Guidance**").
- 1.2 Embedding the 4Ps into the CMA's merger processes will play a vital role in fostering a regulatory environment that not only safeguards competition, but also promotes economic efficiencies, encourages investment and supports growth.
- 1.3 Our response to the CMA87 Consultation draws on our extensive experience in advising merger parties and third parties on both UK and multi-jurisdictional mergers including during pre-notification, and the CMA Phase 1 and Phase 2 merger investigations.
- 1.4 This response follows a previous response we provided to the CMA's call for evidence in relation to its merger remedies approach dated 12 March 2025.
- 1.5 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. We confirm this response does not contain any confidential information and we are happy for it to be published on the CMA's website to the extent necessary.

## 2. **Summary**

- 2.1 We welcome the clear indication in the CMA's Draft Revised Guidance that the CMA is considering a more flexible approach to behavioural remedies in appropriate merger cases and that it is open to earlier engagement and greater transparency for merger parties, in line with the 4Ps framework. In order for this to be achievable, it would be helpful, where possible, for the Guidance to provide further clarity to assist merger parties to better understand how the Guidance will be implemented in practice.

## 3. **Approach to effectiveness and proportionality**

- 3.1 We welcome the CMA's guidance on acceptable remedies that would meet the "Effectiveness Criteria" at paragraph 3.8 of the Draft Revised Guidance. To further support clarity and predictability, it would be helpful for the CMA to set out in its decisions to accept (or not accept) a remedy, how the CMA has applied (or not applied) each criterion. This additional detail would align with the CMA's commitment to **predictability** and assist in building a body of decisional practice that will enable companies and advisers to identify remedies that the CMA is likely to consider to be effective (further enhancing the ability of companies and the CMA to move at pace). Accordingly, we suggest that paragraph 3.10 of the Draft Revised Guidance includes a sentence such as: "*The CMA as far as is possible, will explain in each case, how the proposed merger remedy satisfies, or fails to satisfy, each element of the Effectiveness Criteria*".

## 4. **Approach to structural and behavioural remedies**

- 4.1 As outlined above, we welcome the increasing flexibility of the CMA to remedies in the Draft Revised Guidance. We set out below some comments in respect of the proposals regarding both structural and behavioural remedies.

### **Structural Remedies**

- 4.2 We note the CMA's comments at paragraphs 6.4 and 6.5 of the Draft Revised Guidance, that a full prohibition is an effective remedy. In the context of the overall tenor of the Guidance, and in line with the CMA's approach it would be helpful to clarify that a full prohibition would be adopted when there is no other reasonable option available to the CMA, a "*measure of last resort*" implemented only when other options have been tested and failed to address the SLC.

- 4.3 Paragraphs 6.6 to 6.50 of the Draft Revised Guidance set out the approach of the CMA to assessing the effectiveness of divestiture remedies and the various risks that the CMA will consider. In this respect, we have the following comment:

*Purchaser risk:* in paragraphs 6.29-6.36, the Draft Revised Guidance sets out the various purchaser suitability criteria. With regard to "capability", at paragraph 6.33 the CMA notes that it will generally require that the divestment business includes all capabilities required to operate the business. However, the Draft Revised Guidance goes on to say that in exceptional situations the purchaser would also need to have certain capabilities to operate the business successfully. In such circumstances, where the assets require considerable technical expertise and support (e.g. if they comprise highly specialised IP), the purchaser must not only possess the relevant expertise but also ensure that the relevant staff and support functions have sufficient capacity to give the relevant assets the support that they need. We recognise that the Draft Revised Guidance makes clear that this will be relevant in only exceptional situations. However, given the focus of the Draft Revised Guidance on the composition of a remedy and for it to be complete for a purchaser to be able to compete effectively in the market, if the CMA were to nevertheless apply this criteria it would likely significantly raise the bar for a potential remedy to be accepted and a purchaser to be approved. It would also materially narrow the pool of potential purchasers. We therefore agree with the CMA that it will be important for this additional requirement to be used only in rare circumstances.

#### **Behavioural Remedies**

- 4.4 We welcome the measures described at paragraph 7.38 that can be implemented to mitigate the risks of behavioural remedies.
- 4.5 However, at paragraph 7.38 (e) the CMA notes as a mitigating factor "*The industry is sufficiently mature and stable such that there is a low risk that the market or competitive conditions change in ways which mean that the remedy becomes ineffective or starts to distort market outcomes. However, the CMA notes that in highly mature and stable industries, behavioural remedies may need to be long-term in nature. This, in turn, increases the risks associated with monitoring, market distortion, and specification*". In order to avoid any confusion arising from this statement, it would be helpful if the CMA could indicate what timeframe(s) or ranges of timeframes may be acceptable for behavioural remedies generally in mature markets as well as nascent markets which are considered not to result in market distortions.

#### **5. Approach to remedies with "carve-outs"**

- 5.1 We welcome the additional clarity on, and openness to, "carve-out" remedies in the Draft Revised Guidance. It would be helpful if the CMA could specify in more detail the types of warranties the CMA would require in a carve-out situation to make the CMA comfortable with the proposed remedy.

#### **6. Emphasis on pro-competitive efficiencies and RCBs**

- 6.1 We welcome the CMA's encouragement to merger parties to engage with RCBs earlier in the merger process. The greater willingness to hear arguments that RCBs might outweigh any potential SLC, is welcome.
- 6.2 We also welcome that the CMA has provided examples at paragraph 3.34 of the Draft Revised Guidance which are helpful in explaining where the evidentiary bar sits for RCB arguments. It would be helpful for the CMA to provide further working examples.
- 6.3 We also note that at paragraphs 3.35 and 3.36 the CMA requires "*verifiable evidence*" at the "*earliest possible opportunity*". In order for merger parties to satisfy both the evidential requirement and early engagement, it would be helpful if the CMA could provide guidance on the extent and nature of evidence that would meet the test of "verifiable" and when it considers to be the earliest possible opportunity to engage with the CMA.

**7. Approach to the use of Trustees and Independent experts**

- 7.1 We welcome that the Draft Revised Guidance encourages Parties to appoint Monitoring Trustees and Independent Experts. Our view is that this is most relevant to behavioural remedies as this would provide a mechanism to also have a detailed evaluation of behavioural remedies proposed by merger parties, and provide comfort to the CMA in relation to their viability.

**8. Remedies in multi-jurisdictional mergers**

- 8.1 We welcome the CMA's indication that it intends to cooperate closely with other international regulators, as noted in paragraph 32 of Appendix A to the Draft Revised Guidance. This states that the CMA *may* cooperate with other authorities to ensure "*remedies in different jurisdictions are consistent, or at least mutually compatible*". We support such international cooperation to avoid burdensome requirements where the UK impact is limited and note this aligns with comments made by Doug Gurr on 23 October 2025 that "*.. markets are global, and interventions in one jurisdiction affect another. The UK must do things in a way that works for the UK, and where approaches differ, we aim for dialogue and coherence, not confrontation or duplication*".<sup>1</sup> To the extent possible, further guidance on how the CMA intends to work cooperatively to deliver such outcomes would be helpful.

**Eversheds Sutherland (International) LLP**

**13 November 2025**

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<sup>1</sup> <https://www.gov.uk/government/speeches/competition-for-growth-a-perspective-from-the-chair-of-the-cma>.