Ashurst

Proposed changes to the CMA's mergers remedies – Response of Ashurst LLP

November 2025

Introduction

1. We welcome the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on the proposed amendments to its mergers remedies guidance (CMA 87) (**Draft Revised Guidance**) (16 October 2025). This response contains our own views, based on our experience advising and representing clients on the application of the CMA's merger control regime under the Enterprise Act 2002, and is not made on behalf of any of our clients.

2. We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our response.

Draft Revised Guidance

Question 1: Overall, are the changes introduced by the Draft Revised Guidance sufficiently clear and useful?

3. The changes introduced by the Draft Revised Guidance provide a helpful outline of the CMA's plans to incorporate the '4Ps' framework within its work on merger control. However, there are several aspects of the guidance that would benefit from additional clarity (as explained in our responses to questions 2 – 4 below).

Question 2: What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

<u>Approach to Effectiveness and Proportionality</u>

4. The Draft Revised Guidance confirms that, in the context of mergers involving local markets considered at phase 1, the CMA may accept divestiture remedies that do not remove the entire increment caused by the merger in the market or markets in which the potential SLC has been identified based on a filter or decision rule. We welcome this change.

5. However, the CMA should consider expanding this approach beyond local market cases. There is no reason why the divestiture of assets that reduce the merged entity's position below the level at which there is a realistic prospect of an SLC, could not fully resolve competition concerns in mergers where the geographic market is national (or wider) and even in mergers involving local markets where a filter or decision rule has not been applied.

Approach to behavioural and structural remedies

6. We welcome the proposed amendments to the Draft Revised Guidance to broaden the application of behavioural remedies by moving away from the default position that behavioural remedies are only available where there is a time-limited SLC, substantial RCBs or where structural remedies are not feasible.

7. However, we note that the Draft Revised Guidance is particularly focused on the applicability of behavioural remedies in vertical and conglomerate mergers and it appears that the CMA remains cautious to apply behavioural remedies to horizontal mergers. Indeed, the Draft Revised Guidance refers to academic evidence that behavioural remedies *"may be more appropriate in certain cases involving vertical and/or conglomerate, rather than horizontal, theories of harm"* (paragraph 7.20) but there is no further explanation or guidance as to the circumstances in which the CMA may be prepared to accept behavioural remedies in horizontal mergers (which contrasts with the detailed guidance relating to behavioural remedies in vertical mergers).

8. Overall, the application of behavioural remedies remains heavily caveated and the burden on the parties to meet the CMA's threshold to consider behavioural remedies remains very high. This appears to contrast with a speech by Sarah Cardell, published on 18 September 2025, and the continued signposting of the CMA to its 4P's framework, that the CMA is "*applying a pro-growth, UK-focused mindset*"[1] and aims to accept mergers where it is conceivably possible that they can be cleared (including through the acceptance of behavioural remedies).

9. In this regard, we would welcome clarification on the weight the CMA will typically give to mitigating factors when considering potential behavioural remedies. For example, we note that in *Vodafone/Three*[2], the vast majority of the mitigating factors listed at paragraph 7.38 of the Draft Revised Guidance were applicable. It would be helpful for the Draft Revised Guidance to explain the circumstances in which the CMA would be willing to accept remedies which satisfy some (but not all) of the mitigating factors.

[1] https://www.gov.uk/government/speeches/delivering-impact-in-times-of-change

[2] Vodafone / CK Hutchison JV merger inquiry - GOV.UK

Approach to remedies at Phase 1

*Undertakings-in-lieu (**UILs**)*

10. We welcome the CMA's updated guidance on its assessment of UILs offered at phase 1, including the CMA's willingness to engage with parties on remedies early in the process on a without prejudice basis. However, we note that the Revised Draft Guidance states that "*early constructive engagement on potential remedies can maximise the chance that a more complex remedy proposal will meet this standard, as it gives the CMA time to fully assess the risks and consider appropriate safeguards*"[3]. We also note that paragraph 4.9(a) of the Draft Revised Guidance adopts the phrase "sufficiently early" in relation to remedy proposals involving something other than the divestiture of a standalone business.

11. We believe merging parties would benefit from clearer guidance as to the meaning of "*early constructive engagement*" and "*sufficiently early*", and in particular the point at which the CMA is likely to consider the merging parties are too late to meet the "*clear-cut*" test for the purpose of a complex remedy. We understand that in Getty / Shutterstock[4] the parties "*offered a complex package of remedies at a late stage in the Phase 1 process*" and that the CMA subsequently decided that these did not fully address its concerns. It remains unclear in practice the point at which it will be too late for effective engagement on complex remedies to take place. For example, is the state of play meeting too late to engage with the CMA on complex remedy proposals? We note that the Appendix to the Revised Draft Guidance provides commentary on when parties may engage with the CMA on potential remedies. However, consistent with the CMA's commitment to Pace, Process and Predictability, we believe that it would be beneficial for the Revised Draft Guidance to provide further clarity on this issue.

Monitoring Trustees

12. The Revised Draft Guidance states that the CMA's assessment of the merger parties' remedy proposal "*may benefit from the early appointment of a monitoring trustee and/or industry expert*", particularly in cases where the remedy proposal is particularly complex, highly technical in nature, or requires the input of an industry sector expert.

13. We welcome the opportunity to appoint a monitoring trustee to assist with the CMA's remedies assessment process. However, we are conscious that concerns in relation to a potential conflict of interest may be raised in circumstances where merging parties "*extend the role of a monitoring trustee to perform this role*" (paragraph 3.65 of the Draft Revised Guidance), which we understand to mean

[3] Draft Revised Guidance, Appendix A, paragraph 8

[4] Getty Images / Shutterstock merger inquiry - GOV.UK

that the monitoring trustee appointed to monitor the parties' compliance with remedy implementation obligations may also perform a role assisting with the CMA's assessment of remedies . We would welcome the CMA's confirmation that it would, in principle, be satisfied with merging parties choosing and appointing a monitoring trustee to assist with the assessment of remedies on the basis that the same trustee will continue through to remedy monitoring.

Merger Procedure

14. We note that the Draft Revised Guidance includes an Appendix A, which we understand is planned to be an addendum to the CMA2 guidelines (which were recently updated). We would welcome confirmation as to whether this addendum will be published at the same time as the updated CMA87, or whether it is expected to follow a separate timeline for implementation. We also assume this appendix will be published in conjunction with CMA2, and not CMA 87, but should be grateful for clarification on this point.

Question 3: Are the changes to the Draft Revised Guidance consistent with the CMA's '4Ps framework' and likely to promote pace, predictability, proportionality and engagement in relation to merger remedies? Are there any additional changes that may further contribute to these priorities?

15. We do not have any comments on this question beyond what has been set out in our responses to the other questions to this consultation.

Question 4: Do you have any other suggestions for additional or revised content of the Draft Revised Guidance?

Approach to 'mix-and-match' remedies

16. The Draft Revised Guidance no longer refers to the CMA's approach in relation to 'mix-and-match' remedies. We note that the removal of this section of the guidance is not explained in the consultation document and would welcome clarification on the CMA's current approach, which we assume is that 'mix-and-match' divestitures are not less preferrable than divestitures emanating entirely from one of the merging parties[5] (in which case, this point should be explicitly stated in the Revised Draft Guidance). This approach would be in line with the CMA's 4P's framework, the Mergers Charter and recent CMA decisions (see for example the Schlumberger / ChampionX and Topps Tiles / CTD Tiles merger inquiries), as there may be instances where a mix-and-match remedy would be the most proportionate option available to remove the SLC.

Other

[5] Merger Remedies (CMA87), 13 December 2018, paragraph 5.16.

17. We note that in many previous consultations on proposed amendments to its guidelines, the CMA has published a redline to illustrate the changes that have been made. However, we note that a redline of the Draft Revised Guidance was not published with the consultation document.

18. We would suggest that, in connection with future consultations, accompanying redlines could be provided as a matter of standard practice. Although respondents may have the software tools to create in-house digital comparisons, these comparison methods are not always reliable and may not be available to all respondents. This is particularly important in cases where there are changes to guidance documents that are not fully explained in the consultation document.

Ashurst LLP

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