A&O SHEARMAN RESPONSE TO CMA MERGER REMEDIES GUIDANCE CONSULTATION

1. INTRODUCTION AND SUMMARY

1.1 We are grateful for the opportunity to respond to the CMA's consultation dated 16 October 2025 (the **Consultation**) on its revised merger remedies guidance (CMA87) (the **Guidance**).

1.2 In general, we consider that the revisions to the Guidance are helpful and well-considered. If fully reflected in the CMA's day-to-day practice, they should make a significant contribution to the implementation of the 4Ps framework in the context of mergers.

1.3 We particularly welcome the greater openness towards behavioural remedies at both phase 1 and phase 2 signalled in the Guidance, which should help ensure interventions are proportionate while enhancing pace through phase 1 clearances in appropriate cases. That said, we believe the CMA could have gone further in the Guidance to signal its willingness to accept behavioural remedies. As noted in more detail below, it could expressly state that there is no presumption against the acceptance of behavioural remedies at phase 1 and make clearer that behavioural remedies are not reserved for vertical cases (or horizontal cases only where needed to secure rivalry-enhancing efficiencies). The Guidance could also, e.g., give further examples to aid parties' assessment of the types of behavioural remedy that may be accepted, and in which circumstances.

1.4 Beyond this, there are also areas where we believe further amendments to the Guidance would improve its clarity or coverage on certain points. We set these out below by reference to the relevant chapters and paragraphs of the Guidance.

1.5 We would be happy to expand upon or discuss any of the points raised in this response.

2. CHAPTER 3 (OBJECTIVES AND PRINCIPLES)

2.1 Overall, we welcome the revised explanation of the objectives and principles behind the CMA's approach to remedies. We consider that this is significantly clearer than under the current guidance and is in line with the more flexible approach described in the Consultation. The further detail on the CMA's approach to assessing proportionality is also helpful.

2.2 We particularly welcome the clear statement at paragraph 3.5(c) that the CMA will consider at both phase 1 and phase 2 remedies that mitigate the SLC where a fully effective remedy would be disproportionate. This goes some way to address the concern that the approach under the current guidance has imposed an unduly restrictive gloss on the language of the Enterprise Act 2002.

2.3 We also welcome the recognition in footnote 13 that a remedy may be effective even if it does not directly restore competition to the level that would have prevailed absent the merger. However, it would be helpful for the CMA to include some (explicitly non-exhaustive) examples of where it might accept this to be the case.

2.4 At paragraph 3.8(d), in discussing the assessment of a remedy's effectiveness, the Guidance notes that *"Remedies that act quickly in resolving competitive concerns are preferable to remedies that are expected to have an effect only in the long-term or where the timing of the effect is uncertain."* In light of the CMA's decision in *Vodafone/Three*, we think it would aid clarity for the CMA to qualify this by noting that a remedy that will take a significant period of time to restore competition may nonetheless be effective when coupled with short-term outcome-controlling measures (such as targeted pricing commitments) to avoid customer detriment in the interim period.

2.5 At paragraph 3.26, in discussing the proportionality of a remedy, the Guidance notes that the CMA will not have regard to factors such as *"the percentage of the merger parties' overall revenue that is generated in market(s) where the CMA has found an SLC, or the size of the market(s) where the CMA has found an SLC relative to the size of the market(s) affected by the transaction as a whole"*. We suggest the CMA qualifies this by recognising that in circumstances where the SLC market is small relative to those affected by the transaction as a whole, it may be the case that RCBs arising in other markets will be substantial relative to the effects of the SLC, and that this will be taken into account where relevant.

3. CHAPTER 4 (ASSESSMENT OF REMEDIES OFFERED AT PHASE 1)

3.1 The provision of specific guidance on the CMA's approach to remedies at phase 1 is helpful, and the Guidance itself is generally clear.

3.2 We particularly welcome the confirmation at paragraphs 4.7-4.9 that the CMA will in appropriate circumstances consider 'mitigating' remedies and behavioural remedies at phase 1. However, some helpful policy statements contained in the Consultation are not currently reflected in this section of the Guidance. It would aid clarity, and give merger parties reassurance regarding the proportionality of the CMA's approach, to include the following points:

(a) paragraph 4.8 should state expressly that there is no presumption against behavioural remedies being accepted at phase 1, consistent with paragraph 3.57(a) of the Consultation; and

(b) paragraph 4.9 should state expressly that the earlier parties start engaging with the CMA on remedies, the more likely it is a remedy will meet the 'clear-cut' standard. The current text implies this but falls short of *"explicitly stat[ing]"* this, as contemplated by paragraph 3.57(b) of the Consultation.

3.3 More generally, while we understand that early engagement will be preferable, it should not become a necessary condition for, or act as an undue limitation on, the acceptance of remedies at phase 1. How early merger parties will be able to engage with the CMA on remedies will depend on when they have sufficient information on the CMA's potential concerns. In some cases, parties may be able to anticipate these even at the pre-notification stage (opening the door to the 'without prejudice' discussions the Guidance envisages); in others, they will be less obvious, e.g., emerging from feedback during the market test. Given the significant public interest in avoiding the large costs of a phase 2 reference where there may be an effective remedy at phase 1, the CMA should not allow the absence of early engagement to *de facto* preclude a remedy short of a standalone divestiture.

3.4 We also note the CMA's point that third parties who would be affected by a proposed remedy should have time to comment. However, given the tight phase 1 review period, it will necessarily be the case that third parties will often not have long to comment. This should not preclude effective remedies from being considered or accepted. In particular, third parties have only to comment on proposals put forward by the merger parties, rather than prepare the proposals. While a reasonable period should be allowed, it should not necessarily be a concern that they have less time to contribute than the merger parties.

4. CHAPTER 5 (OVERVIEW OF REMEDY TYPES)

4.1 The overview of remedy types provided in this chapter seems appropriately framed, as an aid to analysis rather than a rigid classification that determines the likelihood of acceptance.

4.2 That said, we suggest revisiting footnote 45. At present, it suggests that acceptance of the remedy in *Vodafone/Three* was premised on it being in some way 'structural' (*"This remedy could therefore be considered to have a structural effect"*). Highlighting this cuts across the revised framing of the new Guidance. We suggest rephrasing as "*This behavioural remedy could be considered to be effective in stimulating the process of competition"*.

5. CHAPTER 6 (STRUCTURAL REMEDIES)

5.1 As an overall comment, while the additional detail provided on the CMA's approach to assessing structural remedies is welcome, it would aid clarity for discussion of procedural matters to be separated out into a standalone section, following the description of the substantive criteria.

5.2 As part of this, we also suggest expanding paragraphs 6.37-6.39 *("Purchaser Approval Process")*, which are notably brief, to include additional explanation of how the CMA will run the approval process in practice.

5.3 By way of more detailed comments on particular sections of the Guidance:

(a) The discussion of composition risk and the scope of the divestiture package at paragraph 6.13ff is silent on whether a 'mix and match' remedy combining assets from both merger parties may be accepted. We note, however, that the Guidance no longer expresses a preference for avoiding such remedies (cf. paragraph 5.16 of the current guidance). It would be helpful to make the position explicit, especially given the interest in this topic engendered by the *Cargotec/Konecranes* merger. In line with the revised Guidance's focus on assessing each remedy on its merits, we suggest this should be done by stating that a mix and match remedy may be accepted, provided any incremental composition risks are adequately addressed.

(b) In relation to paragraph 6.16, we welcome the clarity provided on how the CMA will approach divestitures of less than the entire overlap in cases involving local markets, in line with the policy position stated at paragraph 3.58 of the Consultation. However, it would be helpful if the CMA could provide examples of the kind of *"robust evidence"* it would require to be satisfied that such remedies are effective.

(c) Paragraph 6.19 discusses the number of packages into which a divestiture may be split, noting that this has typically been limited to two to three packages (although a footnote refers to *Heineken/Punch Taverns*, in which four packages was considered an acceptable number). We assume the intention is not to set down a bright-line rule (whether at three or four), but it would be helpful for the Guidance to make this clear. Regarding the specific concern raised about the impact on public resources of assessing multiple packages, this can be mitigated through the appointment of a monitoring trustee or independent expert to assist in the assessment of the remedy. We suggest that the Guidance acknowledges this here and that an appropriate reference is also included in the discussion of the role of independent third-party firms in assessing divestiture remedies at paragraph 8.7 of the Guidance.

(d) In relation to the discussion of 'carve-out' remedies at paragraphs 6.21-6.27 ("*Divestiture of an existing business or 'carve-out' package of assets"*), we suggest that the Guidance cross-refers to the later section on *"Mitigating the risks of complex structural remedies"* (paragraph 6.57ff), as this section sets out ways to mitigate the composition risks highlighted by the CMA.

(e) In relation to footnote 75, the CMA has not given reasons for its apparent change of position on 'virtual divestitures' (e.g., divestment of production capacity). The current guidance (paragraph 5.15) contemplates this as a remedy that the CMA may accept where there is good reason to do so and the risks can be contained. In contrast, the Guidance now seems to take a more restrictive position, stating that the CMA will not typically consider such arrangements as a *"primary remedy"*. This cuts across the generally more flexible approach of the Guidance and risks excluding a remedy that could be effective and more proportionate than a conventional divestiture. We suggest that the CMA revisits this.

(f) Paragraph 6.46 states that hold-separate and asset maintenance obligations under remedy undertakings/orders *"may"* be limited to obligations in relation to the divestment business, on a *"case -by-case basis"*. However, we suggest that this should be the starting point for the CMA, so as only to impose the minimum necessary obligations to preserve the divestment business, with any expansion beyond this instead considered on a case-by-case basis. We recommend that the CMA replaces *"may"* with *"will usually"*, or similar language.

(g) For similar reasons, we suggest that paragraph 6.47 should not begin by referring to the appointment of a hold-separate manager for *"each merger party's business"* but instead to the appointment of a hold-separate manager for the divestment business.

(h) The discussion of IP divestitures at paragraphs 6.51-6.56 would benefit from use of consistent terminology (or further explanation). At present, the Guidance uses mixed terminology (divesting, licensing, granting access) without fully explaining the distinctions (if any). In addition, paragraph 6.55 would benefit from additional detail on where an IP divestiture remedy may be suitable.

(i) Paragraphs 6.57ff are headed *"Mitigating the risk of complex structural remedies"*. While the discussion may be most relevant to complex structural remedies, it also appears to extend beyond these. For example, as the CMA states at paragraph 6.63, upfront buyers are generally required at phase 1 (i.e., not only where the divestment is a complex one). The CMA may wish to revise the heading or structure of this section to avoid confusion.

(j) Paragraphs 6.60 and 6.61 discuss the role of early engagement with the CMA on more complex remedies. Our comments in section 3 above apply here. We also note that in the example given in footnote 95 (*Safran/Collins*), engagement with customers and other stakeholders appears to have commenced shortly after publication of the UILs for consultation. It would be helpful for the CMA to clarify whether this is what the CMA expects in most cases (even complex ones).

(k) Paragraph 6.61 also contemplates merger parties enabling the CMA to discuss confidential aspects of a proposed remedy with third parties. Merger parties may be wary of this, and it would be helpful for the Guidance to address what guarantees of confidentiality there would be.

(l) In paragraph 6.67, the Guidance sets out examples of composition, purchaser and asset risks that may not be satisfactorily mitigated by the appointment of an up-front buyer – for example, that merger parties may be incentivised to pick a weak purchaser, or the existence of an information asymmetry. As these are presumably points the CMA will wish to satisfy itself about in assessing the suitability of any purchaser (up-front or not), it might be clearer for the Guidance just to state that, for the avoidance of doubt, the CMA will still assess an up-front buyer against the purchaser suitability criteria.

(m) In discussing the appointment of divestiture trustees at paragraph 6.69, the Guidance omits the words *"in unusual cases"* before *"at the outset of the divestiture process"* (compare

paragraph 5.44 of the current guidance). Given the highly intrusive nature of such a measure, only in exceptional cases will it be appropriate to appoint a divestiture trustee at the outset of the process. This wording should therefore be reinstated.

(n) Paragraphs 6.70-6.76 explain that a monitoring trustee can play a number of roles – supporting the CMA in its remedy assessment, assessing purchaser suitability and monitoring implementation of the divestiture. It would be helpful for the Guidance to clarify whether the CMA would have any concerns about the same monitoring trustee being involved in each of these stages (or, conversely, would typically welcome or even expect this).

6. CHAPTER 7 (BEHAVIOURAL REMEDIES)

6.1 We generally welcome the CMA's proposed new approach to behavioural remedies as described in the Consultation and think that, on the whole, Chapter 7 of the Guidance clearly reflects its position. However, we have some specific comments on certain parts of the chapter.

(a) The CMA has removed the section from the current guidance on *"restraining horizontal market power"* (paragraphs 7.27-7.51 of the current guidance). It is unclear why. The Consultation (paragraph 3.27) notes that there is academic evidence that behavioural remedies may be more effective in cases involving vertical/conglomerate theories of harm, rather than horizontal theories of harm. However, this general proposition does not seem to justify excluding behavioural remedies to restrain horizontal market power in the specific circumstances contemplated by the current guidance. Indeed, the examples given seem quite consistent with the Guidance's focus on remedies that work to stimulate the process of competition, in that they are all designed to facilitate entry and expansion by other players by preventing exclusionary practices. We suggest the current guidance on this point should be replicated in the Guidance.

(b) Paragraphs 7.19ff discuss the use of behavioural remedies in *"restraining the impact of vertical mergers"*. However, similar considerations support the use of behavioural remedies in respect of conglomerate mergers. Paragraph 7.20 cites academic evidence confirming this, but the Guidance does not otherwise discuss the point. The Guidance should be revised to make clear that behavioural remedies may similarly be appropriate in conglomerate (as well as vertical) cases.

(c) The CMA has also removed the section from the current guidance on the design of price caps (paragraphs 7.36-7.39). In our view, it would be useful to include more information on the types of/bases for price caps, especially as these are one of the more common types of behavioural remedy that the CMA has accepted in practice. The CMA could amend the current guidance on price caps to reflect more recent cases, such as *Vodafone/Three* (for example, noting that price caps may in appropriate cases be restricted to a narrow subset of products purchased by vulnerable customers).

(d) In paragraph 7.38(d), it would be helpful if the CMA could give non-exhaustive examples of the types of behavioural remedy that *"aligns with existing commercial practices and norms in the relevant industry"*. The Consultation refers to *"eg licensing or access remedies"* at paragraph 3.23(d), but it would assist merger parties to provide more explanation, case references, and/or brief example scenarios.

7. CHAPTER 8 (TRUSTEES, INDEPENDENT EXPERTS AND ADJUDICATORS)

7.1 We welcome the more comprehensive guidance on the role and responsibilities of monitoring trustees, independent experts and adjudicators. It is helpful that the Guidance (e.g., paragraphs 8.3 and 8.4) recognises how such appointments can allow the CMA to reach a decision more quickly or determine that a more complex remedy will nonetheless be effective. This is very much in line with the 4Ps goals of pace and proportionality.

7.2 We refer to our comments on paragraphs 6.69 and 6.70-73 above, which could also be reflected in this Chapter. (We note that paragraph 8.12(b) at least acknowledges that appointment of a divestiture trustee at the outset is not *"typical"*; however, we suggest *"exceptional"* remains more appropriate.)

8. CHAPTER 9 (MONITORING AND REVIEW)

8.1 We welcome the CMA's decision to consolidate the guidance on monitoring, breach and review (which is currently split across three documents: CMA11, CMA87 and CMA136) into a single place in the Guidance. However, we note that some important guidance material has not been carried across:

(a) Chapter 4 of CMA136, which sets out the CMA's approach to enforcement in respect of breaches of merger remedies, including when it will consider informal action, as well as other types of formal enforcement, including directions, has not been replicated in the Guidance. While we appreciate that the CMA will be keen to deter and enforce merger remedy breaches through use of its new and stronger fining powers, we do not believe that fines will be appropriate or proportionate in every case of breach. We therefore invite the CMA to reinstate some of its current practice and procedure into the Guidance, as well as adding more information on the process it will follow (including the safeguards for rights of defence) in cases where it is minded to pursue civil penalties.

(b) While paragraph 9.28 of the Guidance discusses factors that the CMA will consider when determining if a breach should be included on the register of material breaches, paragraph 3.17 of CMA136 provided examples of how these factors may apply in practice. We believe that these are helpful and should be carried across to the Guidance.

(c) Paragraph 3.4 of CMA11 has been omitted from the "*Process for reviews of UILs, Final Undertakings and Final Orders*" section of the Guidance. This states that it *"is open to parties to approach the CMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request"*. In our view, it is in the interests of both the parties and the CMA for there to be the possibility of engagement before the submission of a request to ensure that the submission can be scoped appropriately. We suggest that the CMA reinstates paragraph 3.4 of CMA11.

(d) Paragraph 3.13 of CMA11 has been omitted from paragraph 9.51 of the Guidance. This expressly confirms that the parties will be told of the decision to launch the review before (or at the very least at the same time as) the CMA publishes such decision. Although the Guidance mentions that it will *"keep up to date the information provided to the merger parties and published about the review and its progress"*, we suggest this is made clearer in line with 3.13 of CMA11.

9. APPENDIX A (ADDENDUM TO CMA2)

9.1 We think Appendix A is a helpful addition and provides useful information on the remedies process.

9.2 However, we suggest that further cross-references are included to specific sections or paragraphs of the Guidance to aid and signpost users. For example, paragraph 11 of Appendix A, which discusses the possible appointment of a monitoring trustee and/or industry expert, should cross-refer to Chapter 8 of the Guidance.

9.3 Regarding paragraph 4(c) on early engagement, we refer to our comments at points 3.3 and 3.4 above.

10. SUBSTANTIVE ASSESSMENT OF EFFICIENCIES

10.1 We note the CMA's intention to carry out further work on its approach to the substantive assessment of efficiencies and welcome the opportunity to contribute our views on this matter in due course. We also note the statement in the Consultation that the CMA does not propose to change its approach to RCBs – we encourage the CMA to reflect further upon this as part of its additional work and, again, would be happy to share our thoughts.

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