SLAUGHTER AND MAY

13 November 2025

Slaughter and May Response to CMA Consultation on Draft Merger Remedies Guidance

1. Executive Summary

1.1 We welcome the opportunity to respond to the Competition and Markets Authority's (CMA) consultation on proposed updates to the CMA's merger remedies guidance (the **Draft Revised Guidance**).

1.2 We support the CMA's initiative to revise its guidance, and consider that the Draft Revised Guidance is largely successful in embedding the '4Ps' within the merger remedies framework. However, there are some instances where the CMA could make certain additional changes in the final guidance (the **Final Guidance**) to further contribute to these priorities, and/or where additional clarification would be helpful (per Q.6.3- 6.5 of the consultation (the **Consultation**)). In our response below, we provide specific comments on the key updates proposed in the Draft Revised Guidance and Consultation, and make suggestions as to where the CMA could further embed the '4Ps' in the Final Guidance.

2. Proposed changes to CMA's approach to remedies

Proposed key changes

(A) Approach to analysing the effectiveness and proportionality of remedies

(B) Approach to behavioural and structural remedies

(C) Approach to complex divestiture remedies

(D) Approach to remedies at phase 1

(E) Approach to the use of trustees and independent experts to assess remedies

Effectiveness and proportionality

2.1 Although we still consider that assessing the effectiveness and proportionality of potential remedies in parallel (rather than sequentially) would allow for a more holistic assessment of the benefits and risks of a potential remedy,[1] the revisions to the proportionality assessment are broadly positive. In particular, it is encouraging that the Draft Revised Guidance removes the references to choosing between two "equally effective" remedies in the proportionality assessment, in recognition that the CMA has the option to choose a less – but still sufficiently – effective remedy where it is the more proportionate choice. It is also positive that the Draft Revised Guidance explicitly recognises that the loss of RCBs is a relevant cost that must be taken into account in the proportionality assessment,[2] and that as such effective behavioural remedies may be less costly than effective structural remedies where these would likely be

[1] As per our response to the Merger Remedies Review.

[2] Draft Revised Guidance, para 3.15(c).

preserved only by the former.[3] It would be helpful if the Final Guidance included some additional examples of circumstances where behavioural remedies may be less costly than structural remedies, to ensure that this is not in practice limited to circumstances where RCBs would otherwise be lost, such as where the proposed remedy is a licence which mirrors market practice (and so would not result in market distortions or involve significant monitoring costs). Moreover, the new presumption in the Draft Revised Guidance that "considerably"[4] less significance should be attributed to costs incurred by the merger parties as opposed to anyone else is contrary to the strategic steer that the CMA must support the government in its primary mission for economic growth, and seems at odds with the Mergers Charter and with recent CMA statements about the importance of creating an environment that encourages business investment.[5] We urge the CMA to return to the previous formulation (without the addition of "considerably") in the Final Guidance.

2.2 The Effectiveness Criteria should also explicitly recognise that in certain circumstances a behavioural remedy might actually be the most effective in resolving the SLC and its adverse effects. This is hinted at in the statement that "*enabling [behavioural] remedies which 'work with the grain of competition', seek to address the causes of an SLC, and in certain cases, may directly stimulate competition in a long-lasting way*"[6] but the sentence appears to be half-finished; the Final Guidance should clarify the meaning here.

2.3 Finally, we are encouraged by the acknowledgement in the Draft Revised Guidance that mitigations may be relevant on the rare occasions where there is no remedy which is both effective and proportionate.[7] However in line with the '4Ps' framework, we urge the CMA to provide some further examples of when this might occur, in addition to cases where the loss of RCBs outweigh the SLC. For example, it would be helpful to refer to the following circumstances:

(A) Cases where the only alternative remedy is prohibition which would be disproportionate in the circumstances. The Draft Revised Guidance seems to refer to this obliquely by referring to circumstances where "*all feasible remedies will only be partially effective*", but it would be helpful to clarify that this would include such a situation.

(B) Cases where the merger's impact is predominantly ex-UK, and so a prohibition remedy would necessarily have a significant impact outside the UK. This would also be in line with the CMA's recent approach to global mergers.

(C) Cases where the identified SLC is in relation to a small part of the merging parties' activities (e.g. <10%).

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[3] Draft Revised Guidance, para 3.20.

[4] Draft Revised Guidance, para 3.16.

[5] See for example Doug Gurr's speech at the ICC conference, 23 October 2025.

[6] Draft Revised Guidance, para 7.14.

[7] Draft Revised Guidance, para 3.23: "*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*".

(D) Cases where partial divestment would be sufficient to mitigate the concern.

Behavioural and structural remedies

2.4 We agree with the statement in the Draft Revised Guidance that "*some remedies, however, fall within a spectrum of the two classifications, with varying degrees of both structural and behavioural characteristics*".[8] We are also encouraged that the Draft Revised Guidance removes the presumption against behavioural remedies at phase 1, so aligning the guidance with recent practice, although given that the "clear-cut" standard remains unchanged, it remains to be seen whether this will have a material impact. We are however concerned that the new guidance that earlier engagement on remedies increases the parties' chances of meeting the clear-cut standard, essentially serves to prejudice those parties who choose instead to follow the traditional sequential process of discussing remedies only after it is clear that these will be required. Whilst opening up this additional route of early engagement is positive for those parties who wish to twin-track these discussions, the Final Guidance should be explicit that securing a remedy at phase 1 will still be possible for parties who do not wish to engage with the CMA early, but instead to follow the sequential route. In any case, for any early discussions to be productive it is essential that case teams provide the parties with meaningful feedback in advance of those discussions as to which areas are – and are not – likely to be of concern. The recent processual changes in relation to early teach-ins and update calls have been positive, but for complex phase 1 remedies to be feasible the CMA must still go further – in line with the '4Ps' framework. See further below on early engagement.

2.5 We also support the move away from the position that behavioural remedies are generally only appropriate in a very narrow set of circumstances, and we agree with the factors identified as reducing their perceived risks. In line with the '4Ps', the Final Guidance should broaden para. 7.37(b) to include additional third parties "*with appropriate expertise, powers and resources*" to increase effective monitoring and enforcement – such as an industry Ombudsman – to avoid creating the impression that behavioural remedies will only be acceptable in regulated industries.

Complex divestitures (including carve-outs)

2.6 The Draft Revised Guidance overstates the risks associated with carve-out divestitures. In particular, the CMA should have more faith in the M&A process and give due credit to a business' ability to assess for itself whether a due diligence process is sufficiently robust. The Draft Revised Guidance's insistence that "*significant information asymmetries between the seller and purchaser/the CMA around what is needed for the divestment business to compete effectively*" limits the usefulness of a buyer's due diligence, suggests both undue scepticism towards businesses as well as misplaced protectionism, which is fundamentally contrary to the Mergers Charter and the quest for growth.[9] As part of having more faith in the M&A process, the Final Guidance should move away from the default position requiring an upfront buyer, which in our experience can be extremely frustrating for businesses. Whilst having an upfront

[8] Draft Revised Guidance, para 5.3.

[9] Draft Revised Guidance, para 6.20.

buyer can mitigate the risk associated with carve outs as the Draft Revised Guidance recognises, the risk in itself is much overstated and this should not be the default position.[10]

Remedies at phase 1

2.7 We support the revised approach to local markets cases where the CMA applies a "decision rule", which provides welcome clarity very much in line with the '4Ps'. For our comments on the other proposals under this section, please see paras 2.1 to 2.5 above.

The use of trustees and independent experts

2.8 It is critical for the CMA to engage earlier, and in a more substantive way, with industry / technical experts and it is therefore positive that the Draft Revised Guidance explicitly recognises the role that monitoring trustees and independent experts can play in supporting the CMA in assessing complex remedies (at the expense of the parties) – as is indeed already standard practice.[11] The Final Guidance should however broaden the scope of who these experts might be, explicitly including (for example) sectoral regulators and smaller regulators such as Ombudsmen who the CMA could consult early on, without the parties having to retain an expensive monitoring trustee (or indeed in addition to that). It should also recognise that in most cases merging parties operating in complex or technical industries will have, in-house, the expertise that the CMA seeks – and that this is best accessed via direct conversations (e.g. teach-ins) rather than iterative RFIs.

3. Proposed changes to ensure the preservation of pro-competitive merger efficiencies and merger benefits

Proposed key changes

(A) REEs

(B) RCBs

REEs

3.1 We welcome the inclusion of "*remedies to secure merger-specific rivalry-enhancing efficiencies*" as a category of enabling behavioural remedies in the Draft Revised Guidance,[12] to be used in circumstances where the CMA sees the potential for efficiencies but has some concerns as to their timeliness and/or likelihood. It is also positive that the Draft Revised Guidance does not limit these to investment remedies (but rather gives this as an example).[13]

[10] Draft Revised Guidance, para 6.25.

[11] Draft Revised Guidance, para 6.67.

[12] Draft Revised Guidance, para 7.4(b).

[13] Draft Revised Guidance, para 7.17.

The Final Guidance might further explain that such remedies should include measurable milestones which are within the parties' power to achieve (rather than being outcomes-focused).

3.2 The Consultation notes that much of the feedback on REEs received in response to the call for evidence related to how the CMA assesses efficiencies within its competitive framework, rather than being specifically tied to remedies, and that the CMA will be exploring its approach to this wider topic further in due course. We urge the CMA to take into account the feedback received as part of this consultation in its upcoming work on this wider topic.

RCBs

3.3 We support the additional prominence afforded to RCBs in the Draft Revised Guidance, and in particular the explicit discretion afforded to case teams to accept a partially effective (i.e. mitigating) remedy where any effective remedy would result in lost RCBs which are likely to outweigh the SLC.[14] The clarification that the CMA will make this assessment in the round, rather than seeking to quantify precisely the extent of any SLC and any claimed RCB, is helpful, but the Final Guidance should offer some additional guidance as to how the CMA might carry out this assessment pragmatically and holistically.[15] For example, bearing in mind the '4Ps' framework and the CMA's commitment to growth, the CMA should give more weight to RCBs in a case where it has identified an SLC in a narrow market whilst recognising RCBs across a much larger – or multiple – markets, affecting significantly more UK customers.

3.4 We also welcome the clarification that parties should submit evidence on RCBs at the earliest opportunity (including in pre-notification), and the explicit recognition that the submission of such evidence does not imply that the parties accept the existence of an SLC (i.e. that any such discussions would be "without prejudice").[16] It would be helpful if the Final Guidance recognised that any early engagement on RCBs is likely to be linked to parallel discussions on REEs, given the substantial overlap that in practice arises between the facts giving rise to REEs and RCBs despite different legal frameworks. Indeed in general we consider that there remains scope for the CMA to refine its approach to RCBs further, and we welcome the indication that the CMA intends to consider this again in the context of its upcoming work on the substantive assessment of efficiencies.

4. Proposed changes relating to the merger remedies process at phase 1

4.1 The Consultation points to the CMA's new approach under the revised CMA 2 as addressing many of the concerns raised by stakeholders as to the challenges to engaging early on remedies without sight of the case team's key concerns. Our experience on recent cases over the past few months has indeed been positive in this regard, but the suggestion in the Consultation that the amendments to CMA 2 have entirely fixed this issue is misplaced. In particular, there is still some way to go in terms of empowering and encouraging case teams to provide meaningful, concrete feedback sufficiently early so as to ensure there is enough time

[14] Draft Revised Guidance, para 3.31.

[15] Draft Revised Guidance, para 3.22.

[16] Draft Revised Guidance, para 3.36 and Consultation para 4.22 – which explicitly notes: "*At phase 1 and phase 2, we propose to encourage earlier engagement on RCBs […] by signalling our openness to early without-prejudice discussions during phase 1 (including in pre-notification) or at the early stages of phase 2*".

for the parties to develop and discuss potential remedies within the phase 1 timeline. The Final Guidance should explicitly empower case teams to use the teach-ins and early update calls to provide clearer direction to the parties (and not simply an often lengthy list of potential issues).

4.2 In terms of the additional proposals to amend CMA 2 set out in the Appendix, we support the inclusion of an option for parties to "*choose to involve the phase 1 decision maker [in remedies discussions] at an early stage, including during pre-notification*".[17] We also support the introduction of a separate meeting to discuss remedies to be scheduled "*not more than two working days after the deadline for the merger parties' response to the issues letter*" (noting that the option to discuss remedies at the end of the Issues Meeting instead will remain).[18] Repositioning the meeting as a "touchpoint" at which the CMA decision maker can provide feedback post-Issues Meeting, and the parties can if they wish discuss remedies, would significantly increase its usefulness and uptake, as would allowing for some more flexibility as to the timing of this meeting, noting that businesses will have poured significant time and resources into preparing for the Issues Meeting and responding to the issues letter (alongside their day job) and may appreciate a day or two more to prepare before launching into the next substantive meeting.

4.3 We are disappointed that the revised CMA 2 retains the previous position that "*merger parties should not expect to engage in iterative discussions or negotiations with the CMA*" during the short UIL period (although note that this is now absent from the Draft Revised Guidance). We recognise the difficulties imposed by the short UIL period, but continue to consider that this guidance (which case teams follow closely) represents a key barrier to reaching a phase 1 remedies outcome, and is not consistent with the CMA's '4Ps' commitments. The CMA should clarify in the final Appendix to CMA 2 that consistent with the Final Guidance, this position no longer applies.

4.4 The Appendix should also go further to ensure sufficient flexibility in the phase 1 remedies timeline *after* the 'acceptance in principle' decision. The revised CMA 2 currently states that where merger parties intend to offer an upfront buyer in their UILs but have not identified the buyer at the time of the offer, they will be afforded a "relatively short period" after the 'acceptance in principle' decision, "*not typically […] longer than a few days*" to identify the buyer.[19] In practice, engaging with potential buyers ahead of the phase 1 decision is not a realistic option for many businesses, yet under the current guidance those businesses are seemingly expected to carry out the whole process of marketing a divestment and finding a buyer in a little over two weeks – which does not seem 'proportionate' and will often be simply unfeasible. Our recent experience suggests the CMA has discretion to be flexible here, given that the statutory timeline following the 'acceptance in principle' decision should be sufficient even where the merger parties begin marketing a divestment only after the phase 1 decision. The final Appendix should update CMA 2 to reflect this flexibility.

[17] Draft Revised Guidance, Appendix A, para 9.

[18] Draft Revised Guidance, Appendix A para 19.

[19] Revised CMA 2 (28 October 2025), para 9.103 and FN 285.