Linklaters

Merger Remedies Guidance Consultation – Linklaters Response

1 Introduction

(1) Linklaters welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation on its draft merger remedies guidance (the "**Remedies Guidance**").[1]

(2) We are supportive of the CMA's proposals to embed the CMA's 4Ps framework in its approach to remedies.[2] We welcome the additional flexibility that the Remedies Guidance affords the CMA, which we believe will support the CMA in reaching proportionate decisions at pace. In particular, we are supportive of the CMA's changes to its effectiveness assessment and the recognition that behavioural remedies and complex structural divestments can be appropriate remedies in a variety of circumstances.

(3) There are a number of incremental changes that the CMA could adopt to further reinforce the 4Ps framework in its remedies practice. We provide more detail on these suggestions below, including: (i) ensuring that the CMA's changes to its effectiveness assessment are fully operationalised and that the CMA takes forward partially effective remedies through to its proportionality assessment; (ii) revisiting whether the requirement for "clear cut" remedies at Phase 1 remains the appropriate standard; and (iii) removing the presumption that upfront buyer remedies are required at Phase 1.

(4) This response addresses each of the three key themes outlined in the CMA's consultation document (the "**Consultation Document**"). We look forward to continued engagement with the CMA on these topics.

2 Proposed changes to the CMA's approach to merger remedies

(5) This section considers each of the CMA's five proposed changes in relation to Theme 1 of the Consultation Document.

2.1 The CMA's proposed approach to effectiveness and proportionality

(6) We welcome the CMA's revision of its approach to effectiveness and proportionality, in particular:

(i) **Flexible effectiveness assessment:** we appreciate the CMA's statement that its assessment framework for effectiveness is intended to be flexible, with scope within the Remedies Guidance to consider a wider range of possible remedies (including behavioural remedies) as effective;

(ii) **Detail on proportionality assessment:** additional explanation of each stage of the CMA's proportionality assessment enhances predictability on how that assessment will be run;

(iii) **Removal of 'equally effective' standard:** we support the removal of references to the CMA choosing between two 'equally effective' remedies[3] at the proportionality

[1] The current guidance is referred to as the "**2018 Guidance**".

[2] We would encourage the CMA to continue the process of embedding the 4Ps framework across its guidelines and guidance.

[3] 2018 Guidance, para 3.6.

step. The CMA's ability to consider multiple effective remedies will aid its overall proportionality objectives if applied in practice.[4]

(7) While these changes are positive, as noted in our response to the CMA's Call For Evidence, we do not believe a two-step effectiveness and proportionality assessment is demanded by the starting point set out in section 73(3) of the Enterprise Act 2002 ("**EA02**"), i.e. 'the need to achieve as comprehensive a solution as is reasonable and practicable'. Like other stakeholders, we remain of the view that bifurcating effectiveness and proportionality assessments places excessive weight on finding a 'comprehensive' solution at the outset, to the detriment of being 'reasonable and practical' (i.e. proportionate). Delaying consideration of credible remedies which the CMA does not view as 'comprehensive' but would nevertheless be largely effective and proportionate until after a sequential two-step assessment[5] risks inefficiencies and is at odds with the CMA's pace and process intentions.

(8) We reiterate our view that a holistic assessment incorporating proportionality considerations from the outset would be preferable for these reasons, and we would encourage the CMA to reconsider its strict sequential approach – which risks undermining the helpful changes outlined in paragraph (6)~~(5)~~.

(9) If the CMA elects not to move to a holistic assessment, then we would encourage it to develop a working practice which effectively operationalises the CMA's new approach of considering multiple (not necessarily 'equally') effective remedies referenced in paragraph (5)(iii) above. In keeping with this stated intention, the CMA should routinely progress largely (or even partially) effective remedies to its proportionality assessment, rather than discarding them at the effectiveness stage. In particular, we note that when the CMA is considering a more remote or temporally distant SLC, that it should take a more flexible approach in determining whether a remedy is sufficiently effective. This approach would ensure that the CMA considers a full range of remedy proposals at each stage of its assessment, rather than immediately focusing on remedies with high effectiveness scores that may prove disproportionate or costly to implement. This approach would retain much of the CMA's existing framework while delivering many of the benefits of the holistic approach we suggest above, notwithstanding the different approaches to remedies at Phases 1 and 2 as discussed further in section 2.4 below.

2.2 The CMA's proposed approach to behavioural and structural remedies

(10) We welcome the CMA's proposed changes in respect of behavioural remedies:

(i) **Broadening availability:** recognition that behavioural remedies can be effective in some cases is positive directionally,[6] and we support a move away from the position in previous guidance that behavioural remedies should only be considered in a limited set of three scenarios.[7] We prefer the proposed focus on a multi-factor approach to risk mitigation of behavioural remedies depending on the specific facts,[8] rather than to reliance on high thresholds which prevent their use (e.g., the SLC being a "relatively short duration"). We would also encourage the CMA to consider the success of behavioural remedies in market investigations (which have historically

[4] Remedies Guidance, para 3.11.

[5] Remedies Guidance, para 3.5(c).

[6] Remedies Guidance, para 7.2.

[7] 2018 Guidance, para 7.2.

[8] Remedies Guidance, para 7.38.

been adopted more frequently) and ensure that any lessons from these processes are applied in a merger control context;

(ii) **Role of industry experts:** recognition of the role that industry regulators and industry participants can play in monitoring and enforcement, as well as consideration of specific industry characteristics, is beneficial; and

(iii) **Vertical mergers:** we welcome explicit recognition of the appropriateness of behavioural remedies for vertical and/or conglomerate mergers.[9]

(11) We would welcome explicit recognition that the CMA's references to industry regulators includes the Digital Markets Unit ("**DMU**"), and that the CMA will seek to draw on the DMU's specialist expertise as an evidence source and for monitoring and enforcement, in the context of digital mergers. That said, this should not tip the balance in favour of SLCs or broader remedies and the same statutory tests should continue to apply in these areas of the economy.

(12) Given the CMA's intention to retain distinct categories and subcategories of remedies, we reiterate our view that the focus in every case should be on assessing effectiveness and proportionality across a universe of available remedies, based on the specific circumstances and merits of each case.

2.3 The CMA's proposed approach to complex divestiture remedies

(13) The CMA's proposed approach to complex divestiture remedies is helpful in several areas, specifically:

(i) **Effectiveness of carve-outs:** we welcome the recognition that carve-outs can be capable of addressing an SLC at source and will generally have a long-term effect[10]. We would urge the CMA to take an open stance when considering carve-outs, notwithstanding any preference for standalone divestiture. As noted previously, our experience is that the risks of carve-outs (which the CMA now identifies directly)[11] can in many cases be readily mitigated through effective remedy design, consultation and robust purchaser approval processes (where purchasers are incentivised to carry out their own thorough diligence);

(ii) **Contractual commitments:** we appreciate the CMA's adjusted approach to contractual commitments and conditionality for remedy sale agreements (i.e., removing the position that conditionality could generally only be the acceptance of UILs by the CMA[12])[13]. This will provide welcome flexibility and should encourage a broader set of suitable buyers;

(iii) **Partial upfront buyer:** we welcome the flexibility that enabling a partial upfront buyer solution for divestiture of multiple discrete assets or businesses can bring.[14]

[9] Remedies Guidance, para 7.20.

[10] Remedies Guidance, para 6.21.

[11] Remedies Guidance, para 6.23.

[12] 2018 Guidance, para 4.30.

[13] Remedies Guidance, para 6.62.

[14] Remedies Guidance, para 6.66.

(iv) **Detail on evidence sources:** we welcome the additional clarity on the CMA's intended approach to carve-out remedy assessment, including the types of evidence that may be required, which is helpful for predictability.

(14) We otherwise reiterate the value of engaging with other competition agencies (where waivers are in place) working on the same investigation or (if relevant) the sectoral regulator, given that the challenges associated with assessing complex structural remedies are similar, regardless of jurisdiction.

2.4 The CMA's proposed approach to remedies at Phase 1

(15) We welcome the CMA's proposals to make the following changes:

(i) **Behavioural remedies:** we support the CMA's decision to remove the presumption against behavioural remedies at Phase 1.[15] As noted in Section 2.2, this change provides the CMA (and merger parties) with welcome additional flexibility to consider non-structural remedy packages, and increases the likelihood of the CMA finding an effective and proportionate remedy package at the end of Phase 1.

(ii) **Restoration of pre-merger market structure:** we welcome the CMA's decision to clarify that in Phase 1 mergers involving local markets where the CMA has applied a filter or decision rules, it may accept divestitures that do not remove the entire increment caused by the merger.[16] This clarifies the CMA's stance and means that merger parties in front of the CMA at Phase 1 are not subject to a higher standard than those who elect to divest a sufficient overlap prior to the investigation to prevent competition concerns arising and avoid UIL requirements.

(16) However, there are two areas where we believe the CMA could go further in ensuring that Phase 1 remedies are proportionate and capable of being adopted at pace: (i) the CMA's decision to retain the requirement that UILs will only be accepted where it is "clear cut" that they resolve the competition concern caused by the merger[17]; and (ii) the retention of the requirement that the CMA will generally require an upfront buyer at Phase 1.[18]

(17) The "clear cut" standard exceeds the statutory test in section 73 of the Enterprise Act 2002 ("**EA02**"), which requires the CMA to achieve "*as comprehensive a solution as reasonable and practicable".* This higher standard risks preventing the CMA from considering and ultimately accepting good remedy outcomes in favour of perfect solutions. While the CMA has clarified that behavioural remedies can meet the clear-cut standard and that early engagement improves prospects, we remain concerned that this standard will cause the CMA to reject reasonable and practicable remedies. We encourage the CMA to align the "clear cut" standard more closely with the EA02 test.

(18) Whilst we understand the benefit and certainty that an upfront buyer requirement provides to the CMA[19], it also imposes a significant procedural hurdle on merger parties, which can frustrate the adoption of effective remedy packages. In particular, it is often difficult for merger parties to market and agree divestiture packages within 90-day timeframe following an SLC finding. Additionally, many of the risks associated with not having an upfront buyer can be addressed through the CMA's existing powers, including the ability to refer a

[15] 2018 Guidance, para 3.3.2 and Remedies Guidance, para 4.8-4.9.

[16] Remedies Guidance, para. 6.16.

[17] Remedies Guidance, para. 4.3.

[18] Remedies Guidance, para. 6.63.

[19] Remedies Guidance, para. 6.64.

transaction to Phase 2 if the initial sale is unsuccessful. We recommend that the CMA moves away from a presumption requiring an upfront buyer at Phase 1 and instead clarifies that such a requirement is more likely at Phase 1 than at Phase 2.

2.5 The CMA's use of trustees and independent experts to assess remedies

(19) We agree that there is value in the CMA speaking to monitoring trustees and/or industry experts about merger parties' remedies proposals prior to reaching a final decision on a remedies package. We agree with the proposals to clarify this point in the Remedies Guidance, though would caution that given the time and expense inevitably involved in such broader consultation, the CMA should ensure consideration is given to what is proportionate in each case rather than adopting an effective default.

3 Pro-competitive merger efficiencies and merger benefits

(20) We understand that the CMA is limited in its approach to relevant customer benefits ("**RCBs**") by the regime set out in the EA02 and that more material substantive changes are not possible without statutory amendments. In particular, we note that the Explanatory Notes in the EA02 explain that RCBs are unlikely to arise very often which limits the scope for the CMA to materially change its substantive approach to RCBs.

(21) However, we welcome the CMA's amendments to the section on RCBs, including:

(i) **Earlier consideration of RCBs:** the CMA proposes to engage earlier on RCBs during Phase 1 and Phase 2, and we expect that this will provide the merger parties with additional time to refine their RCB claims.

(ii) **Examples of RCBs:** the Remedies Guidance provides examples of past cases where RCBs have influenced remedy discussion and we expect this additional clarity is welcome.

(22) We note that a number of stakeholders (including Linklaters in its prior consultation response) provided comments on the CMA's process for considering rivalry enhancing efficiencies, particularly in light of the CMA's decision in *Vodafone / Three.* We understand that the CMA intends to provide further guidance on its approach to the substantive assessment of efficiencies in due course, and we look forward to engaging further with the CMA on this topic.

4 CMA's Remedies Process

(23) We welcome the CMA's proposed improvements to generate procedural efficiencies, particularly at Phase 1, and support incorporating amendments into CMA 2 as a consolidated source of process guidance:

(iii) **Early Phase 1 engagement:** we agree that early and constructive engagement on remedies will maximise the chances of success for all stakeholders, and appreciate the CMA's clarification that it will be open to remedies discussions at multiple points, including during pre-notification and at earlier stages of the formal Phase 1.Whilst early engagement from CMA is welcome, it is imperative that it is combined with fulsome and substantive feedback on the CMA's view on potential theories of harm and remedies. The value of regular engagement is undermined if it doesn't provide the parties with insight into the CMA's provisional thinking; and

(iv) **Involvement of senior decisionmaker:** providing merging parties with the option to involve the Phase 1 decisionmaker at an earlier stage, including pre-notification, is particularly positive and if applied effectively, could help bridge any 'gaps' in understanding regarding emerging thinking on theories of harm and potential remedies.

(24) In addition to the option regarding Phase 1 decisionmaker involvement, given the intended 'without prejudice' nature of remedies discussions, there would be added value in merger parties being able to request changes to proposed CMA attendees more broadly. For example, there may be circumstances where it is preferable to hold remedies discussions without all or most of the CMA case team, or only with a sub-set of the remedies team (akin to a commercial 'clean team' style arrangement).

(25) With regards to Phase 2, we welcome the CMA's efforts to encourage early remedy engagement in more recent cases and the amendments made to the Phase 2 process to facilitate this approach into the future (noting that there have been relatively few mergers on which to observe this 'new regime'). We recognise that the CMA's consultation on the Remedies Guidance was published prior to the Department for Business and Trade's announcement regarding the abolition of the panel system which will alter Phase 2 processes more broadly. We look forward to participating in further consultations on these additional changes in due course.