

## UK Finance

### Response to CMA Merger Remedies Consultation

#### 1. Introduction

- 1.1 UK Finance is pleased to respond to the Competition and Markets Authority's ("CMA") consultation on proposed changes to its merger remedies guidance (CMA87) (Guidance). This Guidance is important to our Corporate Finance Committee members ("**members**") who advise clients active in mergers and acquisitions ("**M&A**"). This response was prepared with the advisory support of Paul, Weiss, Rifkind, Wharton & Garrison LLP.
- 1.2 Our members are supportive of the CMA's focus on enhancing pace, predictability, proportionality and process (the "4Ps") and welcome the opportunity to engage with the CMA on its approach to merger remedies in this context.
- 1.3 This submission builds on the preliminary [views](#) we provided on the remedy themes in the CMA's call for evidence in May this year, and provides some further submissions on the proposals now envisaged in the draft Guidance. If you have any questions or would like to discuss any of the views expressed in this submission, please contact [avanthi.weerasinghe@ukfinance.org.uk](mailto:avanthi.weerasinghe@ukfinance.org.uk).

#### 2. CMA's approach to Phase 1 remedies

- 2.1 In its draft Guidance consultation document (the "**Consultation Document**"), the CMA acknowledges that "*there will be clear benefits to both pace and proportionality from achieving a phase 1 remedy outcome and avoiding the time and cost of a phase 2 reference.*"<sup>1</sup> This is an important starting point, because it sets the objective of resolving competition concerns with remedies, where required, at an early stage. Our members are supportive of this approach.
- 2.2 Early engagement on remedies is important in complex remedy cases, as it enables the CMA to properly and thoughtfully assess whether the solution proposed addresses concerns identified in the context of the particular case and to respect the principle of proportionality. Early "without prejudice" remedies processes will allow merger parties and the CMA to explore whether remedies may be required, and what the available options might be – while allowing for the conclusion (at Phase 1) that none are required.
- 2.3 Greater engagement with the case team including during pre-notification will assist with this, because it will allow merger parties to have earlier insight into the case team's developing thinking, while giving the case team a greater opportunity to ask for information relevant to remedies upfront (rather than under significant time pressure at the end of a Phase I process). Update calls with the case team, already taking place to a greater extent in Phase 1, will allow a better understanding earlier of the issues that may need to be addressed.

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<sup>1</sup> Consultation Document, paragraph 3.52.

- 2.4 That said, the prevailing concern from merging parties regarding remedies engagement is the risk of prejudicing the CMA's review, by giving the perception of conceding that there is a competition issue requiring remedies. It is therefore essential that the CMA takes steps to ensure remedies discussions are genuinely without prejudice – both as concerns the decision maker and the case team.
- 2.5 In this regard, our members welcome amendments to the draft Guidance which state that remedies discussions are “*without prejudice to the CMA's substantive assessment of the competition issues*,”<sup>2</sup> as well as references to this engagement being possible during pre-notification.<sup>3</sup>
- 2.6 Protecting the without prejudice nature of these discussions – particularly early on in the process – is of paramount importance. Perception and practice are equally important in this regard, to encourage merger parties to come forward for early engagement without fear of unintended consequences. Our members look forward to the CMA proactively encouraging early remedies discussions, while reassuring merger parties as to their without prejudice nature and, where appropriate, “handing back” remedies proposals where the Phase I investigation reveals these are not required. This is critical to building trust in the reforms.

### 3. The CMA's approach to behavioural remedies

- 3.1 Our members welcome a shift in presumptions against behavioural remedies at Phase 1,<sup>4</sup> the removal of the reference to behavioural remedies being more practicable where the merger parties are active in a regulated industry,<sup>5</sup> and the possibility (if requested by the merger parties) for engagement with the Decision Maker on remedies including in pre-notification.<sup>6</sup> These amendments permit greater flexibility within the Phase I process.
- 3.2 As we said in our response to the Call for Evidence, our members believe that behavioural remedies can be capable of resolving SLCs in a variety of different circumstances and may, in certain cases, be a more appropriate and proportionate means of resolving competition concerns than a structural remedy.
- 3.3 Whilst our members welcome the progress the draft Guidance makes in relation to behavioural remedies, our members believe that there is scope to go further.
- 3.4 **The “clear-cut” standard is difficult to meet in Phase 1 with “non standard” structural remedies.** The CMA should consider further amendments to the draft Guidance (including at paragraphs 4.4 – 4.8), to lower the threshold for satisfying the “clear cut” criteria.

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<sup>2</sup> Guidance, Appendix A, paragraph 7(b); see also Appendix A, paragraphs 4 and paragraph 24; paragraphs 4.9 and 6.60.

<sup>3</sup> Guidance, paragraph 4.9(a).

<sup>4</sup> Consultation Document, paragraph 3.57(a).

<sup>5</sup> Consultation Document, paragraph 3.31(b); Draft Guidance, paragraph 7.9(d).

<sup>6</sup> Consultation Document, Appendix A, paragraph 9.

- 3.5 The CMA notes that its high phase 1 remedies standard is necessary, as any competition concerns have not been subject to a detailed investigation.<sup>7</sup> But a Phase 1 CMA review is detailed by international standards, particularly in cases involving a Case Review Meeting and issues meeting (which a remedy case will do). While our members acknowledge the restrictions imposed by statutory time limits (which are essential to achieving pace and predictability), the CMA's pre-notification engagement is typically detailed and intensive and most importantly is in the CMA's hands as to duration, and our members consider can be significantly rigorous such that less rigidity on the Phase 1 remedies standard can be accepted.
- 3.6 It is also important to have guidance on how merger parties can include mitigants within remedies proposals to reduce the risk the CMA considers associated with behavioural remedies. The "broad categories" of risks discussed in paragraph 7.9 of the draft Guidance include the risks that may arise, but for the most part include insufficient guidance on how these risks may be mitigated. Practical examples of suitable risk mitigation measures would enhance the ability for merger parties to devise and propose suitable remedies, allowing more productive and efficient remedies discussions – for instance, relying on standards set by third party organisations where relevant to avoid specification risks, and using monitoring and enforcement (including sectoral regulators) to avoid circumvention risks.
- 4. Preserving pro-competitive merger efficiencies and merger benefits**
- 4.1 Our members welcome the CMA's intention to explore the substantive assessment of efficiencies and look forward to updated guidance in this regard to support merger parties' ability to come forward with efficiencies arguments. The CMA's restrictive approach to efficiencies in the few fully argued cases (e.g., Sainsbury's/Asda where a significant proportion of the efficiencies identified and quantified by the merger parties were rejected by the CMA), deter parties from presenting efficiencies arguments. A more flexible approach to efficiencies from the CMA will result in more representations on efficiencies from merger parties, and a better understanding on all sides of how and when they will be relevant to CMA reviews.
- 4.2 In addition, the call for evidence referred to the CMA's ability to consider sectoral regulators' views in assessing RCBs, but the draft Guidance does not include any express reference to this. In our members' view, the CMA should consult with sectoral regulators and other experts, where relevant, to enhance its evaluation of RCBs.



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Whether it is through innovating for the future, driving economic growth, helping struggling customers amid increases in the cost of living, fighting economic crime or working to finance the net zero transition – the industry is having an overwhelmingly positive effect on the lives of people across the UK and improving the society we live in. Further information is available at: [www.ukfinance.org.uk](http://www.ukfinance.org.uk)

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