Response to CMA call for evidence on merger remedies

1 Mills & Reeve LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) call for evidence of its approach to merger remedies (the **Call for Evidence**).

2 Mills & Reeve is a national UK law firm with 170 partners and over 750 lawyers operating from seven offices in Birmingham, Cambridge, Leeds, London, Manchester, Norwich, and Oxford.

3 Mills & Reeve's competition practice is made up of experts specialising in this field, with the lead partner having over 25 years of experience advising domestic and international clients across a wide range of UK and EU competition law matters, including extensive experience of UK merger control. We act for a range of clients who have varying experience of CMA merger investigation processes. Our comments below are based on the experience of our competition team in advising on all aspects of the CMA merger process, including at phase 2, both at Mills & Reeve and in their previous firms.

4 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. We would be happy to discuss our responses more generally, at the CMA's convenience. In the interests of providing an efficient and useful response, we have not responded to every question in the Call for Evidence, but only those questions where we consider we have useful insights to share.

5 We confirm that this response does not contain any confidential information, and we are happy for it to be published on the CMA website.

Approach to phase 1 remedies

QA.1 ***Should the CMA's current guidance approach of requiring phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' be revisited, within the confines of the applicable legislative framework and timing constraints inherent in the phase 1 UILs process? If so, what standard should the CMA apply?***

QA.2: ***Is there more the CMA can do within its current legal framework to create opportunities for more complex remedies in phase 1?***

6 We consider that the CMA's current guidance approach of requiring phase 1 remedies to be "clear-cut" and "capable of ready implementation" could be retained as the standard in principle; but that the CMA's approach to considering whether an undertaking in lieu of a reference (UIL) meets these standards should be revisited.

7 In particular, the statement in the CMA Merger Remedies Guidance (**CMA 87**) that "*at Phase 1 the CMA is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns*" (CMA 87, para 3.32) is unhelpful and should be amended or deleted.

8 We consider that the CMA should acknowledge explicitly that behavioural remedies are capable of meeting these standards in appropriate cases. For example, see Mueller / Dairy Crest (Case ME/6524/15), where Mueller agreed to make capacity available to a third party at its Severnside dairy by way of a toll processing agreement that would enable the third party to offer fresh milk supplies to national multiples. See also the OFT's investigations into the anticipated acquisition by Tetra Laval Group of part of Carlisle Process Systems (2006), where the OFT accepted UILs focused on an irrevocable, perpetual and exclusive licence of certain IP rights; and the completed acquisition by Unilever of Alberto Culver Company (2011), where the OFT accepted UILs from Unilever to divest the bar soap business of Alberto Culver, including the divestment of the Simple brand, which was effected by a perpetual and royalty-free licence covering UK, Ireland and the Channel Islands.

9 We acknowledge that behavioural remedies may be somewhat more complex than structural remedies. However, we consider that even a relatively complex behavioural UIL could still be capable of being both clear cut and capable of ready implementation if given proper consideration.

10 The current statutory timeframe allows just 5 working days from receipt of the Phase 1 decision for the parties to offer UILs and a further 5 working days for the CMA to consider any UILs offered and decide whether the UILs offered (or a modified version of them) might be acceptable as a suitable remedy. This is a very compressed period. Within the confines of this legislative framework, we would advocate for some changes to the phase 1 process to enable parties to be more comfortable with discussing remedies earlier, on a without prejudice basis, so that they have the time to prepare the UIL offer, and the CMA has the time to consider it within the current statutory timeframes.

11 We consider that the CMA could create more opportunities for consideration of more complex remedies by reflecting some of the recent procedural changes in the phase 2 process in the phase 1 process.

12 In particular, we would advocate for earlier identification of the CMA's emerging or current thinking on substantive issues in the phase 1 process. At present the parties become aware of this thinking too late in the process, leaving little time to formulate a UIL which addresses the harm identified.

13 This increased openness would enable the merger parties to consider the structure and form of potential UILs earlier in the process. We consider that it is essential that CMA 87 and CMA 2 (Mergers: Guidance on the CMA's jurisdiction and procedure) ("**CMA2**") should contain a clear statement that early discussions around possible UILs are strictly without prejudice to the substantive consideration of whether an SLC arises.

14 The parties should be provided with a mechanism for discussing remedies which is distinct and separate from their advocacy on the substantive elements of a merger. This would allow the parties to put forward possibly more complex UILs and allow the CMA time to consider them within the timing constraints of the overall phase 1 process.

15 Typically, any discussions between the case team and the parties regarding possible remedies will not be disclosed to the CMA decision maker before they have made a decision on competition issues, in order to avoid influencing or prejudicing the decision. Footnote 151 CMA2 says that, exceptionally, where remedies are likely to be complex in design or implementation, or when the merger parties request, the decision maker may be involved in decisions concerning UILs prior to taking the decision on whether a substantial lessening of competition (SLC) arises. The footnote goes on to consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC decision.

16 One possibility to allow more substantive and timely consideration of UILs would be to offer this process in all cases, not just in exceptional circumstances or when parties ask for it; and to publish guidance about how the CMA will go about safeguarding the decision-making process. This would go some way to addressing the concerns about discussions prejudicing the SLC decision.

17 Another possibility may be to have a separate remedies 'lead' who runs the remedies discussions and who would have no involvement in the SLC decision, but could work with the SLC decision maker after the decision is taken, to enable the decision maker to decide if the UIL is effective.

QB.1 Should the CMA's current approach to assessing the effectiveness and proportionality of remedies be revisited within the confines of the legislative framework? If so, what factors should the CMA consider?

QB.2: Has the CMA's approach to effectiveness precluded potentially effective remedies being considered as part of its proportionality assessment?

18 The approach taken by the CMA pursuant to its current guidance (CMA 87) sets the bar for accepting behavioural remedies at a very high level. The primary legislation would appear to offer the CMA the opportunity to accept behavioural remedies in more cases, promoting two of the four Ps principles (pace and proportionality). The CMA must **have regard** to the need to achieve as comprehensive a solution as is **reasonable and practicable**, for the purpose of remedying, preventing or **mitigating** the SLC and any adverse effects resulting from it (emphases added). It therefore permits the CMA, in principle, to accept behavioural undertakings offering reasonably comprehensive and practicable solutions that aim to mitigate the SLC and any resulting adverse effects.

19 The CMA has already shown what can be achieved through behavioural remedies in the context of phase 2 cases, most notably the recent Vodafone / Three merger. The CMA was able to shift its focus towards finding a solution that preserved the wider economic benefits of the merger, while ensuring that the companies involved behave in ways that maintain competition and protect consumers. In our view the combination of a less "onerous" interpretation of its own legal duties under the primary legislation and appropriate changes to the phase 1 process and timetable to allow improved evaluation and scrutiny of behavioural UILs (see comments above) offers scope for the CMA to extend the more nuanced "balancing" type approach adopted in Vodafone / Three to suitable phase 1 cases.

QC.1: Is the current distinction that the CMA draws in its Merger Remedies Guidance between behavioural and structural remedies helpful and meaningful? If no, how should the CMA classify different types of remedies?

20 We consider that the current distinction drawn between "behavioural" and "structural" remedies in CMA 87 is helpful and generally well understood. Further formal classification or codification of "types" or "forms" of remedies could be unhelpful as it could lead to further undue focus on the "form" of remedy at the expense of consideration of whether the remedy allows the CMA to discharge its statutory duties.

21 We acknowledge that there are reasons advanced by the CMA in its current Guidance for "preferring" structural remedies over behavioural remedies (CMA 87 at para 3.4.6). However, if a behavioural remedy is presented which enables the CMA to discharge its obligations under the primary legislation, in principle there seems no good reason why the CMA should be pre-disposed to a structural remedy. Rather the CMA should be agnostic on the question and evaluate each possible remedy on its own merits. We note in this context that the CMA has no obligation to follow the lead of the European Commission in its Notice on Acceptable Remedies (European

Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004).

22 Having said that, we can understand that some behavioural remedies will require a material degree of monitoring and (in some cases enforcement), and that it would be reasonable for the CMA to take into account in considering the merits of a behavioural UIL any resource implications that would arise. We note that it would be open to the parties in this context to offer to engage a monitoring trustee on terms which provides full transparency to the CMA. In regulated sectors (including for firms designated as having SMS under the DMCCA), this oversight and monitoring role could be undertaken by the relevant regulator.

QC.2 In what circumstances are behavioural remedies likely to be most appropriate?

23 As noted above, we consider that the CMA should take an agnostic approach to the form of remedy and consider remedies, including any behavioural UILs, proffered by the parties on their merits, according to the circumstances of each case. We recognise that effective monitoring may be key to the acceptability of a behavioural remedy and in the regulated sectors, the regulator could assume that responsibility, meaning that a behavioural remedy may be more obviously appropriate. However, this should not preclude behavioural remedies in other industries where monitoring could be performed by a monitoring trustee.

QC.3 How should the CMA assess the likely effectiveness of behavioural remedies? What types of evidence should the CMA obtain to assess this (and from whom)?

24 In principle, each potential behavioural UIL should "produce" a key set of consultees whose views in relation to the effectiveness of the proposed remedy should be sought. For example, in the Mueller / Dairy Crest case, the remedy was designed to enable national multiples to continue to access supplies of fresh milk from a credible competitor to the two remaining large processors. The CMA explained the importance of gathering the views of this group of customers: "*National multiples are the defined group of customers which may be harmed as a result of the Merger in this case. In addition, the national multiples will be the businesses who would invite bids from the [toll processor] meaning that their views are highly relevant to the CMA's assessment as to whether the Undertakings restore the competitive constraint of the downsized Dairy Crest that would be lost as a result of the Merge*r." The critical issue for the CMA will be to access the views of industry and relevant businesses who understand how competition on the relevant market works (see our response to QE 3 below).

25 This would also support the CMA's aim under its "4 Ps" principles to have better and more open engagement from industry and business embedded in its processes.

QC.4 To what extent could the CMA's new enforcement powers under the DMCC Act 2024 to fine merger parties for breaches of their remedy obligation under remedy undertakings and orders influence the types of remedies the CMA accepts at phase 1 or imposes at phase 2?

26 We consider that the CMA's enforcement powers under the DMCC Act 2024 should make the CMA more confident in accepting behavioural remedies requiring ongoing monitoring for compliance, as it would be reasonable to assume that the powers to impose potentially significant fines may help to deter non-compliance.

QC.5 Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

27 We understand the CMA's general position is that the short phase 1 timetable means that it is more appropriate for UILs to prevent or remedy the SLC, and therefore divestiture remedies are more likely to be appropriate, whereas the longer timeframe at phase 2 means that behavioural remedies could be given more consideration. However, we consider that this concern could be addressed by the suggestions set out above providing for more and earlier engagement on any substantive issues and remedies within the phase 1 process.

28 In addition, we note that at phase 1 the CMA has a discretion to accept a UIL if it considers that this would be appropriate to remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it. By contrast, at phase 2 the CMA has a statutory duty to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC (sections 35 and 36 Enterprise Act 2002). However, we do not consider that this should mean that the CMA should take a fundamentally different approach to behavioural remedies at phase 1 and 2. Rather, as set out above, we consider that the CMA should be agnostic as to form and consider behavioural UILs at phase 1 and remedies at phase 2 on their merits, according to the circumstances of each case.

QC.6 What lessons can be drawn from evidence in other jurisdictions, and behavioural remedies which do not relate to mergers, but which could be seen to be comparable (for example, markets or sector regulation?

29 We consider it may be difficult to draw meaningful lessons from comparison with behavioural remedies which do not relate to mergers, because of the different form and context in which such non-merger remedies are imposed. For example, the majority of behavioural remedies in market investigations have been imposed on all the market participants by statutory instrument (examples

include land restrictions, grocery supply chain restrictions, and transparency remedies in markets such as home credit, retail banking and funerals). These remedies serve the purpose of remedying an identified competition issue present across a whole market, which may be a result of structural or other features of the market, rather than an SLC which arises as a result of a merger between specific market participants. The use of a statutory instrument means that they are imposed by legislation which does not involve the negotiation or agreement of affected parties in the same way as merger remedy; compliance mechanisms are also built in. For merger parties, if satisfactory remedies cannot be agreed, they may choose to abandon the transaction, which is not the case in a market investigation. In our view, the fact that market investigation remedies serve a different purpose and are achieved through different mechanisms means that few lessons could be drawn for merger remedies.

QD.1 In what circumstances are carve-out divestiture remedies likely to be most appropriate?

30 As noted above, we consider the CMA should be agnostic as to form of remedy and consider each on its merits in the circumstances of the case.

QD.2 Are there specific circumstances (e.g. certain industries) where the risks associated with carve-out divestitures are generally more or less likely to manifest themselves?

31 It may be that industries subject to rapid technological change or innovation may be less suited to carve-out divestitures. This is because there may be less certainty about what would be needed to run the carved-out divested business in the long term, and to ensure the business was robust enough to withstand changing market conditions. However, as noted above, we consider that generally the CMA should be agnostic as to the form of remedy and consider each on its merits in the context of the sector in question.

QD.3 Are there any additional ways in which the risks relating to carve-out divestitures can be mitigated?

32 The CMA has already highlighted in CMA 87 the need to consider composition risk and purchase risk as elements for consideration in a carve-out divestiture, and we agree that these are important considerations.

QD.4 Purchasers may face challenges in conducting robust due diligence on divestment packages in carve-out divestiture remedies. This may limit the usefulness of such due diligence to the CMA as a safeguard against composition risks. Are there any steps that could be taken to mitigate these risks?

33 We consider that this concern may be overstated. The CMA can make its own enquiries of the parties if it has concerns about the robustness of the due diligence carried out by the purchaser. In any case, we consider that if a purchaser genuinely felt they could not carry out robust due diligence, they would either seek to reflect this in the purchase price or abandon the transaction.

QD.5 What lessons can be drawn from evidence in other jurisdictions, and from complex structural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?

34 No comment.

QE.1 Are there circumstances in which the CMA could make greater use of Monitoring Trustees when monitoring and enforcing remedies? What would be the costs and benefits of this?

35 As noted above, we understand that effective monitoring may be key to the acceptability of a behavioural remedy. In these circumstances, we consider that the CMA could make greater use of Monitoring Trustees, in particular in relation to markets which are not subject to sector regulation. There are a large number of professional services firms with expertise in monitoring trustee roles and these could be an effective resource.

QE.2 Are there any circumstances in which the CMA could take on a greater role in the monitoring and enforcement of remedies? What would be the costs and benefits of this?

36 We do not consider that the CMA's limited resources should be directed to extensive monitoring and enforcement of remedies. This role could be undertaken by independent Monitoring Trustees or sector regulators (where relevant).

QE.3 How can the CMA ensure it has access to the right expertise to assess complex remedies given the breadth of industries we cover?

37 We do not consider that the CMA should approach this concern in any different way to the way in which it ensures it has access to the right expertise to assess complex mergers. The CMA has extensive powers to compel formally the production of information it needs for its assessment, and access to a wide range of academic and industry experts, which should be sufficient for it to assess the merger itself and any remedy.

QE.4 Are there ways in which the CMA can practically monitor complex and behavioural remedies without materially increasing its own resourcing costs or giving rise to conflict-of-interest issues?

38 No comment.

39 In response to questions ***QH.1 to QI.2***, we refer to comments in our answers above regarding the process for considering and accepting UILs and remedies.

Mills & Reeve

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