Response to the CMA's Call for Evidence: Merger Remedies Review

Introduction

1. Covington & Burling LLP (**Covington**) welcomes the opportunity to respond to the Competition & Markets Authority's call for evidence dated 12 March 2025 regarding the CMA's approach to merger remedies.

2. Covington's views are based on our experience advising clients in relation to merger control in the UK and the EU as well as in various EU Member States, and on feedback received from our clients that have participated in phase 1 and phase 2 CMA investigations and which involved remedies.

3. The call for evidence is asking for feedback to improve the way UK merger control operates, including improving the so-called 4Ps (pace, predictability, proportionality and process). In summary, our response makes the following suggestions: (i) for the CMA to increase the flexibility in its approach to remedies, in particular behavioural remedies, and to revisit its current remedies guidance accordingly; (ii) for the CMA to take a more open minded approach towards assessing rivalry enhancing efficiencies ("**REEs**") and relevant customer benefits ("**RCBs**"); (iii) for the CMA to allow for earlier and more meaningful engagement with senior staff on substantive issues and remedies; and (iv) for the CMA to enhance the internal checks and balances in its merger review process.

4. Merger control is the shop window of the CMA. Most businesses experience the CMA through its merger control function rather than through its enforcement function. In 2024, the CMA considered just over 1,000 mergers of which it formally investigated 38.[1] Merger control risk assessment forms a key part of any corporate M&A strategy, and the predictability and pace of merger control (or lack thereof) in a key jurisdiction such as the UK is a critical factor when assessing the feasibility of a corporate transaction. Therefore, the CMA's merger control function is particularly important when it comes to attracting investment to the UK.

5. It is helpful to recognise that, in the recent past, the user experience of UK merger control has been somewhat mixed. At times, UK merger control has been seen as being overreaching (both in terms of jurisdiction and substance), slow moving, and lacking transparency. There was also, at times, a lack of senior staff involvement, which meant that junior staff may have been left in charge of taking important day-to-day decisions with considerable ramifications for the companies involved.

6. UK merger control decisions are subject to judicial review, which is light touch when compared with the full merits appeal in UK antitrust enforcement and the European standard of 'manifest error of assessment'. As a result, the CAT has mostly refrained from quashing merger control decisions on substantive grounds, and the lack of in-depth scrutiny allowed for a high degree of latitude on the part of the CMA, including in relation to remedies.

7. How does this fit with the UK Government's growth agenda? Overreaching merger control is likely to stifle competitively neutral or pro-competitive deals. Lack of flexibility with respect to remedies may prevent efficient outcomes, particularly in vertical mergers. A negative impact is particularly likely in the case of smaller deals where the costs and delays resulting

[1] https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes/annual-merger-investigation-outcomes

from UK merger control can often be disproportionate. Unnecessary barriers to selling a business will make the UK unattractive for start-ups (who eventually will look for an exit).

8. Therefore, Covington welcomes the CMA's stated aim to put merger control at the heart of its new approach (the '4Ps') with a view to creating a more business friendly environment. We see this as a genuine attempt to make the UK more attractive to investors while promoting competition and protecting consumers and are very supportive of the CMA leadership's efforts to make the new approach a reality. We hope that our response will assist the CMA to improve its approach to merger control remedies and stand ready to assist further in the spirit of constructive engagement.

Theme 1: CMA's approach to remedies

Approach to phase 1 remedies

A.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?

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

Effectiveness and Proportionality

B.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?

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

9. The current remedies guidance may have contributed to the lack of flexibility around phase 1 remedies, particularly the requirements that phase 1 remedies need to be '*clear-cut*' and be ready to be implemented '*within the constraints of the phase 1 timetable*'.

10. The current standard of requiring phase 1 remedies to be 'clear-cut' does not appear to be based on the actual wording of the Enterprise Act 2002 (the **Enterprise Act**). In the interest of greater flexibility at phase 1, it may be helpful for the CMA's assessment of proposed remedies to rely more closely on the actual wording of the Enterprise Act and fundamental principles of public law (in particular the principle of proportionality).

11. The Enterprise Act confers *administrative discretion* upon the CMA to accept undertakings at phase 1: the CMA *may* accept undertakings in lieu of a reference for the purposes of remedying, mitigating of preventing the substantial lessening of competition or any adverse effect with has resulted or may result from it.[2] In addition, the Enterprise Act confers a wide *margin of appreciation* upon the CMA when considering whether to accept undertakings at phase 1: the CMA may *"accept from [..] the parties [..] as it considers appropriate undertakings to take such action as it considers appropriate"*. By its very nature, the word

[2] See s. 73 (2) of the Enterprise Act.

appropriate empowers the CMA to make a judgment call when contemplating remedies at phase 1. Thus, the Enterprise Act provides the CMA with a fairly high degree of latitude when considering undertakings at phase 1, subject to the qualification that, *"the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable" to the substantial lessening of competition and any adverse effects resulting from it".*

12. As a result, the current guidance may have fettered the CMA's discretion under s. 73 of the Enterprise Act unnecessarily and in doing so reduced the existing flexibility under the legislation for more complex remedies in phase 1. We therefore suggest that the CMA revisit the current remedies guidance.

13. In our view, there is more the CMA can do within its current legal framework to create opportunities for more complex remedies in phase 1. We have explained above that the Enterprise Act confers a fairly high degree of latitude on the CMA to accept appropriate phase 1 remedies, including more complex behavioural remedies.

14. First, in the past, at times, the CMA has arguably been too inflexible in its approach towards remedies at both phase 1 and phase 2. The CMA has repeatedly expressed a strong preference for structural remedies and scepticism regarding the effectiveness of behavioural remedies. For example, the current remedies guidance states that "*behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies and may result in distortions when compared with a competitive market outcome*".[3] The CMA has prohibited a number of mergers in the past where behavioural remedies were proposed but were deemed insufficient. We hear from clients that they are not seriously considering proposing behavioural remedies at phase 1 because they have real doubts that the CMA would contemplate behavioural remedies at phase 1.

15. The CMA's past practice is reflective of this approach: the CMA has accepted behavioural remedies in only a small number of cases, and those tended to be in regulated industries, or be very fact specific. This is in contrast to other competition authorities such as the European Commission and the Autorité de la Concurrence, who have shown a more flexible approach to accepting complex behavioural remedies in appropriate cases. In our view, the CMA should also take a more flexible approach.

16. Second, in cases where the theories of harm in question are more speculative remedy risks are also lower, and therefore the CMA should exhibit more flexibility with regard to the types of remedies considered. This is an approach which other agencies, such as the European Commission, have adopted in the past.

17. Third, a further step the CMA could take within its current legal framework is to address a frequent concern that we hear from merging parties, namely that potential remedies are discussed too late in the process (see further our response under theme 3 below). One factor affecting the timing of remedy discussions is that the merging parties are concerned that early discussion could increase the likelihood of remedies ultimately being requested by the authorities. This leads to parties being reluctant to discuss any form of remedy until they have a clear idea of the CMA's concerns. In our view, merging parties would be more open to engaging in early remedies discussions with the CMA, if the CMA demonstrated a culture of 'giving back' remedies if they are later deemed not to be required. This would help to create trust with merging parties and encourage them to discuss remedies more openly from the outset.

[3] CMA 87 Merger Remedies, paragraph 3.5(a)

18. Finally, remedies must be proportionate. In assessing the appropriateness of remedies, the CMA should pursue remedies that are proportionate to address the specific harm identified and are not overly broad. Moreover, remedies must not seek to enhance competition beyond what can be reasonably expected in the counterfactual. The CMA should alter its approach to assess the effectiveness and proportionality of potential remedies in parallel, rather than assessing these factors sequentially. Conceptually, as a matter of public law, effectiveness and proportionality are inextricably linked.

Behavioural remedies

C1: Is the current distinction that the CMA draws in its Merger Remedies Guidance between behavioural and structural remedies helpful and meaningful? If not, how should the CMA classify different types of remedies?

C2: In what circumstances are behavioural remedies likely to be most appropriate

C3: 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)?

C4: To what extent could the CMA's new enforcement powers under the DMCC Act 2024 to fine merger parties for breaches of their remedy obligations under remedy undertakings and orders influence the types of remedies the CMA accepts at phase 1 or imposes at Phase 2?

C5: Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

C6: What lessons can be drawn from evidence in other jurisdictions, and behavioural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?

19. The basic distinction between structural remedies and behavioural remedies makes sense, but does not always do justice to the nuanced nature of many remedies. In addition to 'purely structural' remedies and 'purely behavioural' remedies, there exist structural remedies with behavioural elements (for example, a divestment remedy with transitional supply agreements) as well as 'quasi-structural' remedies, i.e. remedies which are behavioural in form but structural in nature, such as certain licensing arrangements). Merger remedies should therefore be considered to be on a continuous spectrum, rather than falling into two neat categories.

20. Based on our experience, behavioural remedies can work well and are particularly suitable in mergers involving vertical theories of harm (e.g. where access to an input is an issue), where they can help preserve efficiencies in a way a structural remedy would not.

CMA's approach to carve-out divestiture remedies

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

D.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?

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

D.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?

D.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)?

Assessing, monitoring and enforcing remedies

E.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?

E.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?

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

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

21. There are good options for the monitoring of remedies. The CMA has recognized the value of having an industry regulator, like Ofcom, monitor and enforce behavioural commitments (e.g., Vodafone/Three) and also makes frequent use of commercial Monitoring Trustees in cases which do not involve regulated sectors. While Monitoring Trustees are paid by the merging parties, their incentives are aligned with those of the CMA as their future success in the market is dependent on positive feedback from the authority. Monitoring Trustees will regularly have relevant industry expertise or will be able to access such expertise from independent consultants. Monitoring trustees can therefore be a useful tool in more complex cases, where the additional cost and burden on the parties is warranted.

22. In certain circumstances, it may be appropriate for the CMA to take a greater role in monitoring and enforcing remedies. This might be the case where remedies involve novel

aspects which the CMA may want to test. More generally, the CMA should ensure that it has sufficient 'in-house' expertise in the monitoring and enforcement of remedies.

23. In our experience, behavioural remedies are often obsolete after 5 years. Therefore, the duration of any behavioural remedy should generally speaking be limited to 5 years or at least be subject to an automatic review after the initial 5 year period with a presumption of termination in the absence of special circumstances warranting an extension. practice

Theme 2: Preserving pro-competitive merger efficiencies and merger benefits

CMA's approach to rivalry-enhancing efficiencies (REEs) and Relevant Customer Benefits (RCBs)

F.1: What evidence should the CMA look for to support the materiality and likelihood of claimed rivalry enhancing efficiencies?

F.2: Does the CMA's current approach to remedies effectively capture potential rivalry-enhancing efficiencies? If not, how can the current approach be improved?

F.3: What are the circumstances in which it would be possible to design effective remedies that can lock-in genuine Rivalry Enhancing Efficiencies?

F.4: What more can the CMA do to ensure that its approach to merger remedies encourages pro-competitive investment?

G.1: Does the CMA's current approach to remedies in phase 1 effectively capture RCBs? If not, how can the current approach be improved?

G.2: Does the CMA's current approach to remedies in phase 2 effectively capture RCBs? If not, how can the current approach be improved?

G.3: Should the CMA's current approach to the types of evidence for substantiating RCBs be revisited, within the confines of the legislative framework? If so, what types of evidence should the CMA accept in substantiating RCB claims?

G.4: How can the CMA best quantify and balance RCBs on the one hand with the SLC's adverse effects on the other?

24. In the past it has been difficult for merging parties to have any impact on the CMA's analysis of REEs and RCBs, particularly in phase 1. We acknowledge that the difficulties of reflecting REFs and RCBs in the merger control process are not specific to the CMA issues; other authorities also struggle with integrating these efficiencies into their assessment. [4]

[4] For example, we note that the Draghi report made recommendations that DG Comp decisions should *"emphasise the weight of innovation and future competition"*, noting that: *"Since the articles in the Treaty are already worded broadly enough to allow the Commission to account for innovation and future competition in its decisions, what is needed is a change in operating practices and updated guidelines to make the current Merger Regulation fit for purpose."*

25. The threshold that the CMA applies for accepting REEs and RCBs is high and out of line with the threshold it applies for substantive findings on SLCs, despite the fact that both are forward looking exercises. Further, the exercise of "balancing" REEs or RCBs rarely happens. In practice, it is typically the case that either (i) the CMA concludes that there is no substantive harm, and hence there is no need to consider REEs/RCBs, or (ii), if the potential for substantive harm is found, REEs/RCBs are quickly dismissed as not sufficiently concrete or of insufficient magnitude to outweigh any harm. Indeed, the CMA's own guidance notes that: *"in practice, the CMA has rarely exercised its discretion to apply relevant customer benefits as an exception to the duty to refer"*[5].

26. In these circumstances it is not surprising that many merging parties generally do not spend significant time and resources exploring the extent to which their transaction may lead to REEs and RCBs, as they understand that those efforts are very unlikely to have any impact on the outcome of the case. This risks a situation whereby potential merger efficiencies or RCBs (and the positive impact they could have on growth and investment in the UK) are not sufficiently recognised.

27. We welcome the CMA's recent willingness to take a more open-minded approach on this topic, as evidenced in the recent Vodafone/Three decision. In order to embed meaningful change in relation to REEs and RCBs, we suggest the following proposals.

28. First, the evidential standard applied to efficiencies should be brought in line with the evidential standard applied to the theories of harm. A higher standard for demonstrating REEs and RCBs than for demonstrating competitive harm would regularly lead to the prohibition of pro-competitive mergers.

29. Second, to allow REEs and RCBs to be properly assessed, they should be considered from the outset, in parallel with the assessment of the substantive concerns. They should be seen as a key part of the analysis, with the potential to have a substantial impact on the outcome of an investigation.

30. Third, where possible, the CMA should record its approach to efficiencies in more detail in its decisions and should develop a clear framework for doing so. The CMA should do this not only in those cases where efficiencies change the outcome of the case, but also in those cases where efficiencies, while ultimately not necessarily determinative, are significant enough to merit recording the assessment.

Theme 3: Running an efficient process

Phase 1 and phase 2 remedies process

H.1: What process barriers are there currently to reaching a phase 1 remedies outcome?

H.2: How can the CMA amend its phase 1 process to allow more complex remedies to be assessed within a phase 1 timeframe?

H.3: If the nature and/or scope of potential competition concerns are unclear, what steps can the CMA case team and merger parties take to ensure that they are best placed to engage effectively on remedies at the earliest possible stage in phase 1?

I.1: What barriers are there currently to reaching a phase 2 remedies outcome?

[5] CMA64 Mergers: Exceptions to the duty to refer

I.2: Does the current phase 2 process adequately facilitate early remedy engagement? If not, how can it be improved?

Engagement

31. In our view, there are a number of "process barriers" to reaching remedies outcomes.

32. First, it is difficult for merging parties to engage on substantive issues (either in relation to theories of harm or remedies), early in the process, with senior staff who have the ability, experience and authority to have meaningful discussions. In our experience, the CMA staff currently charged with doing much of the day-to-day work on merger cases, particularly at phase 1, are often relatively junior and, as a result, it can be challenging to engage on substantive issues in a meaningful way. Rather, discussions are typically restricted to process and next steps.

33. Second, the current process gives limited opportunities for merging parties and their advisers to engage directly with senior members of staff and/or the decision maker. Those opportunities that are baked into the process take place too late in the day to allow for any meaningful engagement on complex substantive issues and remedies and occur when much of the CMA's thinking has already crystallised.

34. As a result, merging parties often have to glean what they can about the CMA's substantive concerns via the CMA's requests for information and any limited informal engagement they can have with the case team during prenotification and phase 1. Understanding the specifics of the CMA's substantive assessment, which is essential for productive discussions about remedies, can therefore be very challenging until late in the process (e.g. at the point of the issues letter in phase 1), at which point is often too late to design and discuss complex remedies.

35. Third, given that the merging parties do not have access to the CMA's case file in phase 1, the lack of early and meaningful engagement on substantive issues can also result in the CMA basing concerns on submissions from third parties which later turn out to be incorrect.

36. Other agencies, in particular the European Commission, provide more opportunities for regular engagement on substantive issues, and facilitate a more open dialogue regarding substance and remedies throughout prenotification and the phase 1/phase 2 processes.[6] They are also are willing to have iterative discussions at a senior level earlier in the process (including in pre-notification).

37. To address these concerns, we suggest the following proposals. We welcome the CMA's recent commitments, for example in the Mergers Charter, to more open and constructive engagement with merging parties and think that real change in this area will help the CMA to narrow issues, create clarity, and drive better outcomes. We believe this is critical to addressing the concerns that have been raised by the Government and the business community around UK merger control.

38. Firstly, good merger control, and good remedy decisions, require experienced and senior staff – lawyers, economists and financial analysts – in sufficient numbers to handle the volume of cases going through the process at any one time efficiently and effectively.

[6] See DG Competition Best Practices on the conduct of EC merger proceedings, paragraphs 29-33.

39. To achieve the *"step change in more direct, open and constructive engagement with businesses and investors"*[7] that the CMA is targeting, the process needs to involve ongoing constructive engagement with staff who are senior and experienced enough to engage with the merging parties on substantive issues and potential remedies. In our view, to make this a reality, the staffing of CMA case teams, particularly in complex cases, should be reviewed. The ratio of senior to junior staff should increase, and senior staff should take a more active role in running complex cases, with a large portion of their time dedicated to doing so.

40. Secondly, the CMA's processes should be amended to better facilitate early and meaningful *engagement*, from pre-notification onwards, on both substance and remedies. It would make a real difference if senior staff were encouraged to have substantive discussions from the outset, and not just in formal meetings. Parties should be informed much earlier in the process, and ideally in pre-notification, who the phase 1 decision maker will be, and parties should have access to that person for substantive discussions from the outset. For example, it would be helpful to allow merging parties to present a "teach-in" during pre-notification.

41. Early engagement (from pre-notification onwards) on the CMA's substantive concerns is the first building block in creating a process that will allow more complex remedies to be *assessed* within a phase 1 timeframe. It should also help to address concerns regarding the lack of access to file in phase 1, as it should help to flush out potential issues or mistakes in the CMA's analysis that are based on mistakes or inaccurate or incomplete information.

42. Alongside early engagement on the CMA's substantive concerns, the CMA should keep an open mind to having meaningful engagement on a wide range of remedies from the outset, including in pre-notification. This would allow merging parties to present more complex remedies, suitably tailored to address the CMA's concerns. It would also allow time for the process to be iterative, with the quality of the remedies being improved by ongoing input from both sides. Other agencies, in particular the EC, provide examples in terms of the flexibility and the openness to early discussion around both substance and remedies.

43. Thirdly, we would refer to our suggestion in paragraph 17 above, that the CMA should establish a culture of "giving back" remedies that are not required. As noted above, merging parties are often concerned that engaging in remedies discussions will prejudice their chance of an unconditional clearance. If a culture is established of giving back remedies that turn out not to be required, this will give parties the comfort to engage in remedies discussions at an earlier stage in the process.

44. Fourthly, when carefully scrutinising evidence from all parties, particular regard should be had to the parties' motives. Naturally, motives can be particularly relevant when a third party has a commercial interest in the outcome of the merger review (for example a competitor who has a commercial interest in a deal not taking place).

Internal Checks and Balances

45. In our view, the light touch approach to judicial scrutiny in UK merger cases creates a risk of less rigorous decisions.

46. CMA merger decisions are subject to judicial review (s.120(4) EA02), meaning that the CMA's decision making is subject to only limited judicial scrutiny. This is in stark contrast to appeals of the CMA's decisions under the Competition Act 1998 which are subject to a full merits review and to the "manifest error of assessment" standard of review in EU cases.

---

[7] CMA Blog dated 13 February 2025: *New CMA proposals to drive growth, investment and business confidence*

47. The lack of in depth judicial scrutiny means that the CMA's substantive decisions on merger cases are rarely overturned. As noted above, since the CMA's inception, only very few decisions have been remitted to the CMA on substantive grounds and the ultimate outcome often remained unchanged. This might impact the CMA's incentives to test the evidence in as rigorous a fashion as it might do if it were subject to more intensive judicial scrutiny. The European Commission, for example, substantially reformed its merger control process in 2002 after three high profile losses before the European courts.

48. Given the light touch approach to judicial review, we would suggest that even stronger *internal* checks and balances are integrated into the CMA's merger review process. For example, as regards devil's advocate panels in complex cases, there could be an increased role for senior staff at an earlier point in phase 1.

49. In respect of checks and balances regarding remedies, one suggestion would be for the CMA to establish a panel of advisors on remedies (drawn for example from the CMA's panel members) which could act as critical friend, in particular in those cases where the CMA is intending to reject a remedy offered by the parties.

Working with other regulators

J.1: How can the CMA ensure its remedies process at phase 1 and phase 2 sufficiently takes account of parallel actions by other competition agencies?

J.2: How can the CMA ensure it utilizes the expertise of other UK government departments or sector regulators to increase the chance of a successful remedy outcome?

J.3: On the question of whether the CMA or others should take remedial action to address an SLC, should the CMA make more use of making recommendations to others to take action to remedy competition concerns arising from a merger and if so, what are the circumstances where it may be appropriate to do so?

50. In our view, the CMA should have regard for remedies proposed in other jurisdictions, particularly where they have already been accepted by relevant authorities. The CMA should seek, as far as possible, to align implementation timelines on global deals, particularly where the impact of the deal is primarily felt in other jurisdictions.