The Competition and Markets Authority
25 Cabot Square
London, E14 4QZ

12 May 2025

Re: BVCA Response to the CMA Merger Remedies Review – Call for Evidence

The British Private Equity and Venture Capital Association (BVCA) is the industry body and public policy advocate for the private capital industry in the UK. With a membership of over 600 firms, we represent UK-based venture capital, private equity and private credit firms, as well as their professional advisers and investors. There are almost 13,000 UK companies backed by private capital which currently employ over 2.5 million people in the UK. In 2024, £29.4bn was invested by private capital into UK businesses in sectors across the UK economy, ranging from consumer products to emerging technology. This increased investment has fuelled the growth of businesses across the UK, with six in ten (58%) of the businesses backed in 2024, located outside of the capital.

The BVCA welcomes the opportunity to respond to this call for evidence and appreciates the CMA's recent openness and willingness to engage with the private capital industry. We further welcome the CMA's new wider outreach programme with investors and start-ups and look forward to continuing to help increase understanding of how regulators can support innovation and investment in the UK's most promising businesses. In recent months, the BVCA, alongside senior members from venture capital and private equity firms have met with senior CMA officials and these conversations have been positive, allowing for direct dialogue, and fostering a more constructive relationship between the regulator and the industry. We encourage the CMA to continue this engagement, and are confident that future meetings, with more targeted agendas and clearer desired outcomes, can help create stronger foundations for UK growth and investment.

The BVCA supports the direction of travel for the CMA as set out in this call for evidence. We are supportive of the CMA's stated commitment to four key elements which encourage investment in the UK (the 4Ps approach) and allow businesses to thrive and innovate, and for the UK economy to grow productively and sustainably. Achieving these will require competition regulation that takes a common-sense approach, is applied consistently, and effectively balances growth with upholding world-class standards. The merger remedies framework and guidance are a core part of this and must be flexible, proportionate, and clear enough to allow capital to flow efficiently and predictably and the CMA should pursue the aim of selecting the least costly and intrusive remedy that it considers to be effective. We think it is also vital that the CMA considers the wider positive impact that private capital investment can have on UK businesses as it scales and grows them when it is conducting its work.

In responding to this call for evidence, the BVCA has provided detail on its overarching view that the CMA has been too focused on structural remedies which has often precluded genuine consideration of behavioural remedies. It is important for the CMA to send a strong signal of its willingness to assess behavioural remedies carefully and consider them on an equal footing with structural remedies. There should be a clear recognition that it is the result that matters and not the path to achieve the objective of mitigating any competition concerns. The Guidance is an opportunity to redress the balance between structural and behavioural

remedies in favour of an outcome-focused approach. Updating the guidance also presents an opportunity to build in flexibility in terms of how remedies are monitored (using trustees, self-reporting compliance statements, dispute resolution etc).

International comparison

Generally, the BVCA has observed an increasing appetite internationally to accept behavioural remedies, particularly taking into account the specific requirements in digital markets. For example, the German, French, and Polish ministries of economy and finances, who called in a joint communiqué to the European Commission for a new approach to "encourage behavioural remedies" for these reasons:

> "*The European Commission should pay more attention to the relevance of behavioural remedies (e.g. commitments regarding price, quality or choice of contractual partners), especially if competition conditions may change in the short run, since such remedies are more flexible than structural ones (including sales of assets and other one-off irreversible measures modifying the companies structure).* (...)."[1]

Similarly, the chairman of the Dutch competition authority, Martijn Snoep, said that behavioural remedies allow competition authorities to find "*the right balance*" between over- and under enforcement and that they should "*overcome their aversion to behavioural remedies*" especially in vertical and conglomerate cases.[2]

Statistics on the use of behavioural remedies from key antitrust enforcers in Europe show an increasing trend to rely on behavioural remedies to address competition concerns. The statistical evidence of significant reliance on behavioural remedies is often explained by the fact that the respective agencies regard behavioural remedies as the best and most proportionate fix for an identified concern.

- **France**. In 2020, the French Competition Authority ('FCA') conducted an extensive study on the use of behavioural remedies. This study concluded that – depending on the circumstances – behavioural remedies may be the only appropriate type of remedy to conditionally clear a transaction. This is reflected in statistics from the FCA preceding the report, with the share of behavioural remedies in relation to total commitments accepted by the FCA varying between 29% and 75% per year between 2009 and 2018.
- **Italy**. The Italian competition authority has also been heavily reliant on behavioural remedies, finding in its contribution to the OECD remedies working group, that "*the majority of the mergers cleared with remedies over the 2007-2017 period involves a mix of behavioural and structural measures. Behavioural remedies were the most frequently used, as they were prescribed in 19 out of 24 mergers. In six mergers, behavioural measures*

[1] Joint statement by the German, French, and Polish ministries for economy, accessible on the website of the German ministry here: https://www.bmwk.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile.

[2] CRA conference (Brussels), "Antitrust in Times of Upheaval – a Global Conversation", 10 December 2019.

were the only form of remedy to address the competition concerns at stake."[3] (emphasis added).

- **Spain**. Most recently, the head of the Spanish National Markets and Competition Commission ('CNMC') stated that National Competition Authorities should be less risk-averse when designing remedies in merger cases and highlighted the limited effectiveness of structural remedies during reviews of digital mergers.[4] Statistics reflect the CNMC's overall reliance on behavioural remedies: In 2024, seven mergers were approved during Phase I with remedies; four of these mergers were cleared with standalone behavioural remedies and two were cleared with a combination of behavioural and structural remedies.[5]

In line with the CMA's focus set out in its 2025 Annual Plan to support the UK Government's industrial strategy and using its powers to drive growth and unlock investments, behavioural remedies can preserve transaction-specific efficiencies and benefits, such as economies of scale, innovation, and improved consumer offerings. By allowing merged entities to remain intact—and not undergoing expensive (fire sale) structural changes directly post-transaction closing— behavioural remedies leave net positives of a transaction intact, while surgically addressing potentially problematic conduct.

One recent example of effective and predictable behavioural remedies that maintained transaction efficiencies has been the Amgen / Horizon Therapeutics merger, which generated pro-competitive efficiencies by enhancing R&D capabilities and improving patient access, particularly for rare disease patients relying on Horizon specialized therapies (due to Amgen's significant footprint). The FTC raised concerns that the merged entity could engage in exclusionary rebating and bundling practices, which could lead to "*sky-rocketing prices on essential medications*".[6] Instead of insisting on divestments of Horizon's medications for certain rare diseases (including Tepezza or Kystexxa for treatment of thyroid eye disease and chronic refractory gout (CRG)), the Parties settled and agreed that Amgen would be prohibited from bundling any Amgen product with either of these two Horizon medications – and that it could not condition any product rebate or contract terms related to an Amgen product on the sale or positioning of either one of these drugs. These behavioural remedies addressed key concerns of the US public healthcare sector, without imposing a complicated divestment process, that could have endangered efficiencies such as improved patient access to Horizon's medications.

Call for evidence

We have set out our views on the sections included in the call for evidence in the next section.

REMEDY THEME 1: CMA'S APPROACH TO REMEDIES

[3] OECD, Ex-Post Assessment of Merger Remedies – Contribution from Italy (December 2023), para. 13.

[4] GCR, Competition enforcers are too risk averse, Spanish antitrust chief says (4 April 2025).

[5] CNMC, Resoluciones de concentraciones (in Spanish). See: https://www.cnmc.es/vigilamos-la-competencia/fusiones-y-adquisiciones/resoluciones-de-concentraciones (last accessed April 24, 2025).

[6] FTC, https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

Figure 1

Questions on the CMA's current guidance approach

Approach to phase 1 remedies

Q 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?

The current guidance, CMA87, (the "**Guidance**") should be revisited and updated. The CMA should further consider the use of remedies and in particular behavioural remedies and this should be reflected explicitly in the Guidance. Structural and behavioural remedies should be viewed as equally capable, at least in principle, of meeting the legislative test outlined in section 73(3) Enterprise Act 2002 (the "**Act**").

The BVCA notes that section 73(3) of the Act requires the CMA to "*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*." The Guidance should provide more detail on what would constitute a "reasonable and practicable" solution pursuant to the Act.

The Guidance states that structural remedies are "*normally preferably to measures that seek to regulate the ongoing behaviour of the merger parties (so-called behavioural remedies)*"[7] and that remedies are more likely to distort market outcomes "*where behavioural remedies are used*".[8] The BVCA suggests that it is appropriate to amend this unequal footing between structural and behavioural remedies, because it gives case teams a bias towards structural remedies from the outset of a merger review, which may mean that insufficient consideration is given to whether a proposed behavioural remedy can provide a "*comprehensive solution*". The BVCA disagrees with the statement in the Guidance that "*behavioural remedies are unlikely to deal with an SLC and its effects as comprehensively as structural remedies*". For example, in *Vodafone/Three*, the CMA preferred a behavioural remedy to address the substantial lessening of competition ("**SLC**"). This was partially due to concerns regarding any structural remedy agreed, notably that the separating of the divestment business would be overly complex, but also due to the positive effects that the behavioural remedy would produce in the market. This demonstrates that behavioural remedies can be capable of effectively addressing SLC concerns, challenging the notion that "*behavioural remedies are unlikely to deal with an SLC and its effects as comprehensively as structural remedies."*

Moreover, it is important to recognise that structural divestments are often broad-brush and can be disproportionate as a consequence of this. Behavioural remedies are capable of being more targeted. For certain industries, there may not be any identifiable divestment business. For example, in software markets, divestment can be highly complex and difficult to achieve. This may discourage companies from entering into or pursuing deals that face risks of

[7] Guidance, paragraph 3.5(a)

[8] Guidance, paragraph 3.10

divestment remedy requirements. Behavioural remedies can provide a bridge where a divestment remedy would be disproportionate but an identified SLC needs to be addressed. Antitrust enforcement solely focused on structural remedies ultimately has a tangible chilling effect on investments and puts the UK at a clear disadvantage *vis-a-vis* other jurisdictions that are more open to behavioural remedies. Behavioural remedies can also be more targeted towards specified concerns (i.e. they can cover only certain geographies or certain customer groups, they can be tailored to directly target potentially problematic concerns). Behavioural remedies can also mandate positive change, such as specified investments in innovation.

The CMA should ensure it takes into account the specificities of each case. For example, in a recent phase 2 case, notwithstanding the time constraints, the acquirer proposed a behavioural (pricing) remedy at phase 1 which had significant merit for customers in the form of a proposal to cap prices for a reasonable period. Given the evident complexity of any structural remedy, which should already have been clear at phase 1 due to the nature of the acquisition, the CMA should have been able to engage more seriously with the behavioural remedy to conduct a thorough assessment of whether the proposal was indeed the most efficient and expedient outcome in the circumstances. However, there was very limited scope for phase 1 engagement on the behavioural remedy and the ultimate structural remedy agreed at phase 2 was complex and disproportionate. The CMA should give greater recognition to the fact that structural and behavioural remedies are equally capable of being complex and challenging to implement, depending on the nature of the transaction and the market. Divestment remedies may even be more complex to implement than behavioural remedies where there is not a neat carve-out. The CMA should therefore not automatically lean towards structural over behavioural remedies. The CMA should also recognise that, even if a behavioural remedy may not reinstate every aspect of competition, in circumstances where there is little scope to create an effective structural remedy, that behavioural remedy may ultimately serve to protect consumers better.

Consideration should also be given to the time and costs involved in implementing a structural remedy (divestment) when a behavioural remedy could equally address the SLC identified. The Guidance should expand on the meaning of where a "*remedy is disproportionate in relation to the SLC and its adverse effects*".[9] In particular, the BVCA notes the statement in the Guidance that "*the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties*".[10] However, this should be balanced against the proportionality of the remedy, especially in instances where a behavioural remedy could equally address the SLC. The CMA should pursue the aim of selecting the least costly and intrusive remedy that it considers to be effective.

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

Yes. The requirement for phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' should be relaxed to invite discussions on remedies which are potentially more complex. There should be no issue with complex remedies provided that they work in practice and address the SLC in question. It would be helpful if there was greater encouragement for

[9] Guidance, paragraph 3.6

[10] Guidance, paragraph 3.8

merging parties to start discussing remedies on a without prejudice basis during pre-notification, as well as during phase 1. If the CMA's requirements are less strict and greater time is allocated to remedies engagement at pre-notification and phase 1, this could result in fewer cases progressing to phase 2, which would achieve the CMA's objectives of 'Pace' and 'Process' (i.e. by engaging constructively with businesses and reaching sound decisions quickly). This approach would also provide greater opportunity for an iterative and collaborative process with regard to the development of a suitable remedy.

The CMA should revisit the statement that "*a behavioural remedy rather than a structural remedy is generally less likely to be considered sufficiently clear-cut*".[11] It would be helpful for the Guidance to elaborate on when a behavioural remedy is likely to be considered sufficiently clear. For example, in a pharmaceutical merger, the parties could agree to a price cap for a specified period in relation to key off-patent drugs, linked to a transparent and objective benchmark, such as the NHS Drug Tariff. The remedy could also be subject to oversight by an independent Monitoring Trustee with mandatory compliance reporting obligations. Non-compliance could trigger automatic and pre-agreed enforcement mechanisms, such as purchaser rebates or financial penalties, without the need for discretionary intervention by the CMA. This remedy is limited in scope and backed by clear enforcement mechanisms.

The Guidance states that remedies "*requiring ongoing monitoring and compliance activity*"[12] are less likely to be effective and practical. The CMA should consider softening this statement, given that a requirement for ongoing monitoring may be a necessary element of a behavioural remedy. There should be scope to discuss ways to reduce the monitoring burden so that such remedies are not dismissed without sufficient attention when they may be proportionate and effective. There is a variety of ways to ensure suitable monitoring of remedy compliance which would not result in additional cost to the CMA, for example a Monitoring Trustee could be used with the costs borne by the merging parties.

Effectiveness and Proportionality

Q 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?

The CMA's current approach should be revisited. The CMA's assessment should be more tightly linked to the legislative test. The Guidance should focus more on re-establishing the state of the market or competitive conditions, rather than specifically aiming to "*re-establish the structure of the market*".[13] The focus on the structure of the market places excessive emphasis on the need for a structural remedy.

The Guidance should recognise the dynamic state of many markets, whereby certain remedies may have greater impact over a longer term and a quick fix structural solution may not reflect the state of a market with evolving competitive conditions. The CMA should clarify what is meant by "long-term" and how this may vary according to market. This is particularly relevant

[11] Guidance, paragraph 4.13
[12] Guidance, paragraph 3.5(c)
[13] Guidance, paragraph 3.5(a)

to technology markets where behavioural remedies may be more suitable and feasible in addressing competitive concerns.

If a Monitoring Trustee is involved in the case (e.g. where an Interim Enforcement Order is in place) their views could also be considered when the CMA is assessing effectiveness and proportionality of remedies. Industry experts could also be consulted where relevant.

In terms of assessing the effectiveness of remedies, the CMA should also consider whether it would be sufficient to mitigate competition concerns rather than entirely eliminate them i.e. the remedy removes the substantial lessening of competition risk, but does not need to go further than that given the scope of the legislation. This could be reflected in the Guidelines, outlining circumstances where remedies that mitigate concerns may be sufficient. Depending on the scope of the SLC concerns, it may be helpful for the CMA to build this flexibility into the Guidelines to be able to accept remedies which are reasonable and timely and which mitigate concerns sufficiently without needing to comprehensively remove the concerns.

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

As discussed above, the Guidance clearly emphasises the preference for structural remedies and the need to re-establish the structure of the market. This may preclude genuine consideration of a behavioural remedy which inevitably would not re-establish the "structure" of the market.

The BVCA considers that there should be greater openness to behavioural remedies in the Guidance. For example, the statement that such remedies are "*unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies*"[14] appears outdated and incapable of taking account of the evolving state of many markets. *Google/Fitbit* is an example of where behavioural remedies were proposed and accepted by the EC. The EC accepted commitments from Google to silo Fitbit health and wellness data from Google advertising services, maintain existing access to users' health and fitness data through the Fitbit Web Application Programming Interface (API), and ensure free access for Android to certain APIs. These remedies were designed to address competition concerns in nascent digital healthcare markets and ensure that market dynamics and innovation were not stifled. At the time, comments from Andrea Coscelli indicated that the CMA would have been unlikely to accept the type of behavioural remedy that was accepted by the EC.[15]

Adopting a more flexible approach to behavioural remedies is crucial for the CMA, especially in light of its commitment to promoting economic growth and investment.[16] As mentioned in response to Question A.1, the CMA's current approach can have a chilling effect on investments in the UK due to the perception that behavioural remedies will not be accepted. Companies that are contemplating an investment may decide against it because it would rely on a behavioural rather than structural remedy in the event that an SLC was identified.

[14] Guidance, paragraph 3.5(a)
[15] 2021 Australian Bannerman Competition Lecture, online, 9 February 2021
[16] CMA Annual Plan 2025-2026 emphasises the importance of driving growth and unlocking investment across the UK economy.

Changes to the Guidance that reflect a more open and balanced approach would support a more growth-focused agenda.

Figure 2

Questions on the CMA's approach to behavioural remedies

Q C.1: 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?

The BVCA does not consider this distinction helpful, as it creates an outright bias in favour of structural remedies without considering the specific nature of each case and the nature of the affected market(s). From the outset, the Guidance should consider both types of remedies equally and provide more detail on the different factors applicable to these remedy types which would make them effective to address an SLC. As currently drafted, the Guidance risks (and in practice has the effect of) discouraging merger parties from offering behavioural remedies which may be the most effective and proportionate means of remedying an SLC. This is because the Guidance makes clear that the CMA has a strong preference for structural remedies and, as a result, given the timing constraints for offering and discussing remedies, merger parties may consider that it is simply not worthwhile attempting to present a clear-cut behavioural remedy. It is also worth noting that certain remedies do not neatly fit the definition of structural or behavioural. Some may be described as "quasi-structural" remedies, such as licensing or providing access. A binary distinction distracts from the key purpose which is to effectively address an identified SLC on a case-by-case basis.

Q C.2: In what circumstances are behavioural remedies likely to be most appropriate?

Behavioural remedies can be appropriate in a whole host of circumstances. They are most likely to be appropriate in circumstances:

- In vertical or conglomerate mergers, where firewall provisions might be useful to prevent sharing of competitively sensitive information through the customer that has become part of the merged entity. For example, SAMR required firewalls in *Nvidia/Mellanox* to protect confidential information about third parties that compete in adjacent markets in which either of the parties is active;
- Where divestiture packages may not have sufficient assets and resources to operate as an independent entity;
- Where it may be difficult to separate the divestment business from the rest of the business;
- In regulated sectors, where a sector regulator (e.g., Ofcom and Ofgem) can support compliance monitoring;
- In dynamic or fast-moving markets, where behavioural remedies offer flexibility, adapt to changes in the market and can preserve pro-competitive outcomes like interoperability and access to data; and

- That allow for the preservation of efficiencies and customer benefits.

Given that SLCs are often concerned with increased costs and lower quality of service or product to customers, a behavioural remedy may be effective if it provides for the following:

- guaranteed prices for a fixed period or set caps on prices charged to customers;
- specific criteria for service levels or product quality;
- guarantee of contract terms;
- mechanisms for redress in the event that any service level or product quality criteria are not met or not perceived to have been met; and
- removal or reduction in barriers to entry.

The Guidance states that the CMA will "*generally only use behavioural remedies as the primary source of remedial action where: (a) structural remedies are not feasible...*".[17] The BVCA urges the CMA to revise this statement because it does not take into account that a structural remedy may be disproportionate as compared to a behavioural remedy which could address a given SLC. The test should not be whether a structural remedy is feasible, because this would have the effect of discouraging merger parties from proposing behavioural remedies. This encourages CMA case teams and third party stakeholders to favour a structural remedy whenever it is conceivable without giving due attention to an alternative.

Internationally, it has been recognised that behavioural remedies can be well-suited to digital markets including telecoms. For example, the European Commission has imposed access remedies such as in *Broadcom/VMware*, where an independent trustee was appointed to monitor compliance with the remedy. SAMR has also used similar remedies, such as requiring the merged entity to maintain the same level of interoperability for third party products as for its own products. SAMR typically reserves the right to supervise implementation of behavioural remedies either by itself or through a supervisory trustee. The primary purpose of access remedies is to ensure that competitors continue to have fair and non-discriminatory access to essential facilities, inputs, or markets. This helps maintain competitive conditions by preventing the merged entity from using its increased market power to restrict access and foreclose competition. These remedies have been common in for example the digital sector (with interoperability remedies); the telecommunications sector (with access to network remedies); in the media sector (access to TV content); and airline mergers (with slot remedies).

During a recent CMA merger review, the Parties submitted a behavioural remedy which was intended to comprehensively address the CMA's interim finding that new entry/expansion into the affected market would not be sufficiently timely to mitigate an SLC. The purpose of the behavioural remedy was to resolve the provisional SLC by bringing one or more competitors into the affected market. The Parties demonstrated how the proposed remedy would not engender a substantial risk profile in terms of specification, circumvention, distortion and monitoring/enforcement risks:[18]

[17] Guidance, paragraph 7.2
[18] Guidance, paragraph 7.4

- the operation of the behavioural remedy was clearly defined with specifiable inputs, thereby providing a clear and effective basis for monitoring compliance;
- the proposed remedy would be overseen by a monitoring trustee in order to minimise any circumvention risk;
- the remedy did not carry distortion risk. In fact, it was aimed at developing dynamic pro-competitive outcomes by fostering the expansion of credible competitors within a two-year timeframe; and
- any monitoring and enforcement burden was confined to a small number of customers who have sophisticated in-house legal teams reducing the need for additional oversight. The proposal of an independent monitoring trustee covered off the need for additional independent oversight.

Therefore, we think that behavioural remedies can comprehensively address competition concerns and the CMA should look to increase their usage.

Q C.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)?

The most effective way to assess behavioural remedies is through early engagement with the merging parties. Inevitably, the merging parties are industry experts by virtue of experience and have the greatest knowledge of how the proposed remedy would work in practice. The CMA should also initiate earlier engagement with the relevant sectors and with particular experts in the sectors to achieve a more holistic engagement. The CMA can also engage with the regulators of those industries where relevant. More generally, Monitoring Trustees may be able to provide helpful input of the effectiveness of remedies in completed mergers, if they are involved.

The CMA should be wary of placing undue emphasis and weight on feedback from customers or competitors. It is important to take into account their inherent biases, as well as recognising that their level of engagement with and knowledge of the proposed remedy may be limited.

Q C.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 obligations under remedy undertakings and orders influence the types of remedies the CMA accepts at phase 1 or imposes at phase 2?

The BVCA considers that the ability to issue penalties (either a fixed or daily penalty or a combination of both) could increase the CMA's confidence in and willingness to engage with remedies that rely on future conduct commitments. The risk of penalties and reputational damage that accompanies those penalties would have a deterrent effect on a merged entity that has offered commitments that require ongoing compliance. This approach is expected to strengthen the CMA's appetite for a broader range of remedies.

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

Behavioural remedies should be treated in the same way. Whilst the BVCA recognises that phase 2 offers more time for the CMA to assess remedies, the CMA should be equally willing to consider and analyse behavioural remedies offered at phase 1 which may be capable of remedying any SLC without requiring a lengthy phase 2 process. The objective of behavioural remedies is the same as structural remedies: to ensure that competition is protected in a given market. The CMA should consider carefully how a remedy can achieve this without distinguishing as regards the type of remedy or how it achieves the intended outcome.

Q C.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 as comparable (for example, markets or sector regulation)?

We think the key considerations that the CMA should draw lessons from are covered in our introductory remarks.

Figure 3

Questions on the CMA's approach to carve-out divestment remedies

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

Divestiture remedies are appropriate in circumstances where behavioural remedies are not feasible.

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

The BVCA does not consider that there are specific industries where the risks are greater than others.

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

It may be helpful to involve monitoring or divestment trustees more closely in carve-out divestiture processes to mitigate risk. For example, in *NECSWS/SSS*, the CMA (i) appointed a Monitoring Trustee to monitor compliance with the Final Undertakings, and (ii) reserved the right to appoint a Divestiture Trustee to ensure the sale of the divestiture business. The use of a Divestiture Trustee can help reduce the risks associated with carve-out divestitures. They provide a useful channel of communication between the merging parties and the CMA and they can be effective mediators provided that their role does not become duplicative of the CMA's role.

Q 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?

Once the CMA reaches an SLC decision, the third parties that have been most active in the review process are typically the potential beneficiaries of a structural remedy. They will have a very particular interest in the divestment business being as broad and financially reasonable as possible. They will also be aware of the specific circumstances under which the sale is taking place and these circumstances skew the usual commercial bargaining positions of the buyer and seller, placing the buyer in a more advantageous position and providing the buyer with more leverage. This should be acknowledged and taken into account by the CMA. Balance and appropriate caution is required in regards to the involvement of potential third party purchasers.

As an example, in a previous case, the potential purchasers provided contradictory evidence which was commercially motivated by the desire to receive more of merged entity's business, even though this would have been disproportionate to the SLC identified. The CMA should be alive to the variety of partial incentives contained in third party submissions and should ensure that evidence coming from third parties is placed within its relevant context. The Guidance should address this and outline the approach the CMA expects to take regarding types of evidence and associated value.

Q 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)?

The European Commission has recognised in its guidance that treatment of structural remedies can vary depending on the relevant markets. For example, the EC recognises that in the pharmaceutical sector, divestitures of assets such as IP rights (rather than standalone businesses) have been accepted.

Figure 4

Questions on assessing, monitoring and enforcing remedies

Q 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?

The BVCA considers that the increased use of Monitoring Trustees would be beneficial for the purposes of monitoring and enforcing remedies and would help to increase CMA willingness to engage with more complex remedies requiring ongoing oversight. The BVCA notes that Trustees are more commonly implemented in other merger control regimes. For example, in *Microsoft/ Skype*, the European Commission imposed behavioural remedies to ensure Skype's interoperability and data portability. A trustee was appointed to oversee compliance by checking data-handling practices and other agreed measures. In addition, in *Google/Fitbit*, the European Commission accepted behavioural commitments to address concerns over Google's potential use of Fitbit health data, especially in relation to digital advertising markets. A trustee was appointed with broad powers, including access to Google's records, personnel,

and technical information for the full 10 year duration of the commitments in order to ensure compliance.

By making greater use of Monitoring Trustees, the CMA could have increased confidence in adopting behavioural over structural remedies in appropriate cases. Having a well-resourced and independent third party monitoring compliance with CMA remedies on an ongoing basis both de-risks the remedy and gives the CMA greater flexibility to conditionally clear cases where, while not free of competition concerns, a divestiture may be unfeasible or disproportionate to the harm identified or simply too blunt a solution.

In terms of the costs of doing so, financial costs for the CMA should be nominal as the merger parties would cover the Monitoring Trustee's fees. There would be some additional resources required to allow for reporting by the Monitoring Trustee to the CMA case team and, if necessary, rule on any points of conflict between the merger parties and Monitoring Trustee; however, this would require significantly less resources than if the CMA were to take on the role of overseer itself.

Overall, Monitoring Trustees, at the cost of the merger parties, could help to mitigate any concerns as to whether behavioural remedies are appropriately and consistently implemented. The CMA has expressed this concern in relation to proposed behavioural remedies during discussions on remedies in recent cases. A Monitoring Trustee could increase the CMA's confidence in the effectiveness of behavioural remedies because the Monitoring Trustee would contribute their expertise in assessing compliance. The BVCA notes that there are a number of firms active in the UK and globally which have sufficient resources and sectoral experience to make them well-placed to act as Monitoring Trustees and oversee party compliance with CMA remedies. Remedies cases involving Monitoring Trustees benefit from robust reporting mechanisms to monitor compliance which, combined with the CMA's powers to fine parties which are found to have breached their remedy undertakings, as mentioned in response to Q C.4, could increase the CMA's confidence in and willingness to engage with remedies that rely on future conduct commitments.

Q 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?

The BVCA considers that the CMA's role should focus on resolving fundamental points of contention and enforcement for any potential breach of undertakings rather than ongoing monitoring of the merger parties' compliance. The CMA could ask merger parties to regularly self-report, including providing evidence of compliance, in order to reduce the burden on the CMA to review and assess ongoing compliance. This is the standard process adopted for any remedies/commitments agreed with the Investment Security Unit (ISU) under the National Security and Investment Act (NSIA) regime, pursuant to which parties are required to audit and confirm compliance at regular intervals (see response to Q E.4 below). Under the NSIA, self-certification processes are taken very seriously and typically a member of senior management would manage the compliance reporting process. The risk of fines for non-compliance also ensures that the compliance process is effective. Self-reporting is clearly also a cost-efficient approach, because the onus is on the Parties to regularly investigate and

monitor compliance across the business and provide evidence of such compliance at regular reporting intervals.

In more complex cases where Monitoring Trustees are involved, the CMA's role should be focused on ensuring robust reporting mechanisms are in place and reporting obligations are clearly set out so that any instances of non-compliance can be dealt with appropriately. Given resource constraints, it is unlikely that taking on an additional role of overseer would be the best use of the CMA's time or expertise and it is therefore better outsourced. To the extent the CMA is monitoring and enforcing the remedy, it should therefore be largely monitoring the actions and judgments being taken by the Monitoring Trustee.

In those limited cases where there is no relevant sector-specific regulator or it is not possible to appoint a Monitoring Trustee, the CMA could itself undertake effective monitoring and enforcement of certain types of behavioural remedies. The benefit of this would be enabling the case team to identify the remedy that would be most effective and least costly in mitigating SLC concerns, rather than focusing on which remedy could be monitored/enforced by a third party.

Q 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?

There will most likely be Monitoring Trustees with appropriate sectoral experience who can act in complex remedy cases. The CMA can also draw on the expertise of sector regulators. For example, in *Vodafone/Three*, both the CMA and Ofcom are responsible for oversight of the merging parties' commitment to deliver on their pre-agreed business plan (including maintaining a minimum number of sites). This approach has also been taken by foreign competition authorities, for example in *Korean Air/Asiana Airlines*, the remedies are being overseen by the Ministry of Land, Infrastructure and Transport alongside the KFTC. In addition to sectoral regulators, the CMA could appoint industry experts to assess complex remedies. In previous cases, the CMA has considered appointing an industry expert to verify the submissions and supporting evidence provided by the merging parties (who are inevitably industry experts) in relation to the proposed remedy. However, it should be incumbent on the CMA to fund the appointment of an industry expert should the CMA consider it necessary for independent verification purposes.

The CMA could also consider appointing industry experts to oversee the implementation of remedies. In *Intel/McAfee*, the European Commission approved the appointment of the former CEO of Nokia as the monitoring trustee. His extensive background and expertise in the technology industry made him well-suited to ensure Intel's commitments were effectively implemented.

Q E.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?

As discussed above, the CMA can practically monitor such remedies by involving a Monitoring Trustee with specialist knowledge and sufficient past Trustee experience to act as overseer.

The cost of appointing the Monitoring Trustee will be borne by the merger parties and the CMA's role would be limited to receiving reports and, to the extent necessary, opining on disagreements between the parties and the Monitoring Trustee.

In more simple cases involving behavioural remedies (such as supply or production commitments), the CMA might be able to rely more on parties to self-report. In cases under the NSIA where the parties agree commitments, they self-report to the ISU, usually on an annual basis, that they have complied with the commitments. Similarly, the CMA uses this self-reporting process following certain infringement findings in investigations. This process could in principle also be adopted for some CMA merger cases, and it would always be open to the CMA to spot-check/intervene if it wished.

With regards to conflict-of-interest issues, this is a procedural point which would be dealt with through a normal conflicts clearance process before appointing a Monitoring Trustee. Ensuring potential Trustees do not have a prior relationship with the parties involved will ensure their objectivity and independence is not impaired.

REMEDY THEME 2: PRESERVING PRO-COMPETITIVE MERGER EFFICIENCIES AND MERGER BENEFITS

Questions on the CMA's current approach to rivalry enhancing efficiencies

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

The CMA should assess information provided by the parties that supports any claimed rivalry enhancing efficiencies and consider whether on the balance of probabilities such efficiencies will be realised. Independent industry experts would be well placed to assess the materiality and likelihood of rivalry-enhancing efficiencies. Economists are well placed to assess the incentives of the merging parties and consider the circumstances in which they would be induced to act as stronger competitors to their rivals. It is important for the CMA to keep in mind potential commercial incentives that impact the evidence the CMA receives from third parties. For example, in *Spreadex/Sporting Index*, the potential purchasers of the divestiture business had an interest in the outcome of the CMA's review and it was noted that "*it is not clear in the PFs that the CMA has properly taken into account the more supportive feedback provided nor the motivation of the respondents when weighing up the evidence*."[19] The CMA should always ensure that full account is taken of the commercial motivations of third parties and place greater weight on the input of third parties without a direct interest in the outcome of the review because they would be less likely to have an 'agenda' when providing evidence.

Merger-related synergies that would contribute to rivalry-enhancing efficiencies can often be found in the merging parties' internal documents. The intentions of the merging parties to capitalise on synergies and pass on the benefits to customers may be recorded and this would

[19] Parties' Response to Provisional Findings, paragraph 4.12.

form useful evidence of likelihood, particularly where those internal documents were produced prior to CMA engagement.

Generally, a substantial amount of information is required for the CMA to recognise efficiencies and the burden of proof is set very high. This has the effect of discouraging merging parties from submitting evidence and explanations regarding efficiency claims because there is a general impression that they are not considered in any detail.

It would be helpful for the CMA to provide more detail on the types of evidence that would satisfy the CMA threshold for accepting Rivalry-Enhancing Efficiencies ("REE") claims. The current CMA129 guidance refers only briefly to providing evidence from previous mergers showing how efficiencies were realised.[20] A more focused and streamlined approach to supporting efficiency claims would help the merging parties to present the most relevant evidence and allow the CMA to thoroughly assess claims without incurring excessive time and resource implications.

Q 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?

The CMA should pay close attention to the potential loss of merger-related synergies that may arise from a remedy.

Where the CMA is concerned about the timeliness and likelihood of rivalry-enhancing efficiencies, a remedy may help to deliver greater certainty.

The CMA should outline clearly in its Guidance how merging parties can show either (i) how remedies may jeopardise rivalry-enhancing efficiencies; or (ii) how remedies could in theory support and 'lock in' claimed efficiencies.

The CMA's call for evidence cites *Vodafone/Three* as an example of remedies being used to "lock in" REEs that may not otherwise have fully materialised, and thereby address the CMA's concerns that such REEs were not "likely". Such REEs can include economies of scale leading to greater efficiencies (and, consequently, lower prices), increased investment, and the creation of stronger competitors in the market, which may elicit a competitive response from other market players.

The BVCA considers that it would be beneficial if the CMA's approach in *Vodafone/Three* was applied in future cases, where appropriate. A greater willingness to take REEs into account and accept remedies that preserve them allows for increased openness and collaboration with the merging parties to achieve the best outcome for competition which includes maximising pro-competitive efficiencies.

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

The BVCA is not aware of any specific circumstances in which certain remedies could lock in specific REEs, as this is dependent on the merger in question and the relevant market(s). The

[20] CMA129, paragraphs 8.13 and 8.15.

BVCA considers that REEs in the context of remedies should be assessed on a case-by-case basis.

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

Streamlining the process, enabling early and material engagement with remedy proposals and engaging proactively with pro-competitive efficiency claims will all assist the CMA to discharge its duties in the most effective and pragmatic way. In general, a significant amount of time, resource and cost is expended on divestiture remedies. It may be that other forms of remedy can be achieved more quickly and at lower cost, as well as securing merger-specific efficiencies.

Questions on the CMA's current approach to RCBs

Q 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?

Q 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?

Q 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?

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

Q G.5: Are there any barriers to merger parties engaging on RCBs with the CMA throughout the different stages of a case (either at phase 1 or phase 2)?

The BVCA notes that the CMA has rarely exercised its discretion to apply RCBs as an exception to its duty to refer at phase 1 or to clear mergers at phase 2.

The Guidance should provide more detail on when RCBs might be considered sufficient to alter the CMA's view on the choice and design of remedies and in particular how RCBs will be valued. In particular, the Guidance should place a requirement on the CMA to more closely consider how a behavioural remedy might preserve RCBs in circumstances where a structural remedy might not. Recent experience has shown the importance of the CMA taking full account of RCBs that would arise from the proposed behavioural remedies that may be absent from a structural remedy.

REMEDY THEME 3: RUNNING AN EFFICIENT PROCESS

Phase 1 process

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

Timing constraints present key issues to substantive engagement in remedies discussions at phase 1. One possible way to increase engagement could be to engage in more remedies discussions at the pre-notification stage on a Without Prejudice basis. It would be helpful to receive indications from the CMA on their likely reaction to remedies that could be proposed.

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

It would be helpful to engage in proactive remedy discussions during pre-notification where possible. Once the CMA has started the phase 1 process, it may be appropriate to introduce an option for extending the time for remedy discussions at the end of the phase 1 period. Whilst this would extend the phase 1 review time, it would be highly beneficial and effective if it dispensed with the need for a phase 2 review. The current arrangement (5 working days for the merger parties to propose remedies and 5 working days for the CMA to consider whether those remedies are viable) can be too short to engage in any meaningful dialogue.

Q 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?

It may be helpful to propose remedies based on the current understanding of the potential competition concerns, allow time for market testing and then build in opportunities for review of the remedies to check that they have worked in practice.

Phase 2 remedies process

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

As explained in response to Question A.1, the Guidelines should revisit the difference in treatment of structural and behavioural remedies.

Carve-out divestitures may not be capable of redressing competitive conditions in circumstances where a behavioural remedy might actually be more effective. The capability of a buyer to operate the business on a long-term basis in a way that redresses competitive conditions needs to be carefully considered from the outset, in conjunction with any proposed alternative behavioural remedies. The CMA should also give greater recognition to the fact that structural carve-out divestitures are time-consuming for the merger parties and can be highly costly.

In general, it would be helpful to be able to engage with the Panel and case team on remedies during the main party hearing. Under the new phase 2 process, discussion on remedies is reserved to the remedies hearing which has the effect of pushing discussions into later stages in the phase 2 process. The first remedies consultation takes place too early. Previously third parties had an opportunity to consult on the remedies working paper.

When consulting on remedies with third parties, the extent to which third parties can comment meaningfully on remedies depends on the nature of the information provided and this should be taken into account when the CMA considers the level of detail provided. For

example, a short summary of the merging parties' remedy proposal may be insufficient to elicit valuable and meaningful input from third parties. Moreover, it is important for the CMA to publish all third party responses in a timely manner to ensure that the merging parties can review and take full account of those third-party responses when adapting and finessing their remedy proposals. The input from third parties would be more useful if it was based on a more detailed explanation of the remedy proposals and if it was shared with the merging parties at an earlier stage. The CMA should provide the merging parties with greater insight into its market testing, including sharing all responses received from third parties.

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

At phase 2, engagement only takes place after the interim report when the merging parties submit remedy proposals. Remedies are not typically discussed during the Main Party Hearing under the new process. This means that the first opportunity to receive substantive feedback from the CMA is during the Remedies Meeting which is usually around weeks 16-18. Third party feedback is not published until around week 18. It would be helpful to have substantive engagement with remedy proposals at an earlier stage, both with the CMA and third parties.

Questions on working with other regulators

Q 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?

Parties should keep the CMA updated on any parallel merger reviews. The CMA should continue to seek waivers to facilitate the sharing of information between competition agencies. For merging parties, it is preferable to have a single set of global remedies. Allowing time for early consideration of remedies can help to align remedy decisions internationally. The CMA could consider allowing flexibility to reassess and adjust remedies in line with remedies agreed in other jurisdictions. For example, this approach has been taken by the KFTC where it adjusted the conditions imposed in *Korean Air/Asiana* to reflect completed reviews by foreign competition authorities.

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

It is also useful for the CMA to keep any relevant government departments involved (including the ISU, which manages a similar process under the NSIA regime) and be transparent with merging parties when doing so.

The CMA can also draw on sector regulators for knowledge and expertise of the relevant industry. Experts within sector regulators could also be utilised for evidence-gathering purposes, as mentioned above in Question C.3 and E.3.

Q 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?

Yes – the CMA may consider that legislation is required to remedy a competition concern adequately, for example such recommendations are sometimes made following market investigations.

Question on any other processual changes

Q K.1: Are there any other ways, not covered by the specific questions above, in which the CMA could improve its remedy processes, at either phase 1 or phase 2?

We think the key considerations are covered above.

External support

Q L.1: How should the CMA access external expertise, for example using Monitoring Trustees and/or industry experts in its remedy assessment and implementation, including oversight of divestment sales processes, divestment purchaser suitability assessments, or monitoring of remedy implementation and/or compliance?

As the merging parties will be funding the cost of a Monitoring Trustee, they could propose a Monitoring Trustee to the CMA or they may ask the CMA to provide a list of acceptable companies offering trustee services (this is currently standard practice). The CMA could also ask the merging parties and third parties within the relevant industry to provide a list of industry experts.

The BVCA looks forward to further engagement with the CMA during the course of this review. If you have any questions or points it would be helpful to discuss further, please contact Ciaran Harris (charris@bvca.co.uk) and Tom Taylor (ttaylor@bvca.co.uk).

Yours faithfully,

Clare Gaskell

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