



Competition and Markets Authority Consultation

Draft Revised Merger Remedies Guidance

Response of Herbert Smith Freehills Kramer LLP

Introduction

Herbert Smith Freehills Kramer LLP welcomes the opportunity to respond to the CMA's consultation of 16 October 2025 on the draft revised merger remedies guidance (CMA 87) (Draft Revised Guidance). We support the CMA's proposals to update its merger remedies guidance, based on the responses received to its call for evidence and designed to incorporate the 4P's framework in its merger remedies guidance.

We have set out our comments based on the following key themes, in the order they appear in the Draft Revised Guidance:

- Updates relating to the objectives and principles of remedial action
- The CMA's proposed approach to structural remedies
- The CMA's proposed approach to behavioural remedies
- Monitoring and review of merger remedies
- Updates relating to the merger remedies process

The comments set out below are those of Herbert Smith Freehills Kramer LLP and do not represent the views of any of our individual clients.

1. Updates relating to the objectives and principles of remedial action

1.1 We broadly welcome the CMA's proposed amendments to the objectives and principles of remedial action, and frameworks for the assessment of effectiveness, proportionality, and relevant customer benefits, as set out in its guidance. While the Draft Revised Guidance retains the existing core analytical approach of sequentially considering the effectiveness and then proportionality of merger remedies, it provides helpful further detail and clarification on the CMA's remedy assessment framework.

Effectiveness

1.2 We welcome the CMA's recognition that the current analytical framework allows for greater flexibility in the effectiveness assessment than is set out in the CMA's current guidance, and that there is scope to consider a wider range of possible remedies to be effective. The additional detail in the Draft Revised Guidance around how the CMA assesses parameters of effectiveness is also helpful for certainty and transparency (paragraph 3.8).



Proportionality

- 1.3 The Draft Revised Guidance makes helpful amendments that we consider improve the clarity and certainty of the CMA's proportionality assessment. We agree with the proposal to remove the reference in the current guidance to the CMA choosing between two "equally effective" remedies in its proportionality assessment, on the basis this may imply the CMA will only consider the proportionality of remedies that are effective to the exact same degree.
- 1.4 We also agree with the CMA's proposed approach not to pursue remedies where even the least onerous but effective remedy might be expected to incur disproportionate costs to the scale of the SLC and its adverse effects, and to consider partially effective remedies in such circumstances (paragraph 3.23). Signalling the CMA's willingness to take such an approach, in suitable circumstances, is a positive step for the wider flexibility and proportionality of the UK merger control regime.
- 1.5 However, while acknowledging the CMA's consideration of the costs of remedies on third parties, the CMA and other monitoring agencies, we note the CMA does not provide any justification for the apparent proposed downgrading of the role of such costs incurred by merger parties. Whereas the CMA's existing guidance notes that the CMA will generally attribute less significance to these costs, the Draft Revised Guidance now supplements that the CMA will generally attribute "considerably" less significance (paragraph 3.16). We do not think this amendment is justified, and moreover consider it could breed uncertainty as to whether the CMA's policy has changed in this regard (and if so, why). We believe the CMA should maintain the existing wording in its guidance on this point. We note this would otherwise be potentially inconsistent with other parts of the Draft Revised Guidance – for example paragraph 3.20, in which the CMA recognises that behavioural remedies will often be less intrusive from the merger parties' perspective than structural remedies.

Relevant Customer Benefits (RCBs)

- 1.6 We support the greater detail and clarity provided by the Draft Revised Guidance regarding the CMA's approach to RCBs. This sends an important signal as to the CMA's willingness to engage with appropriately reasoned arguments on RCBs from merger parties, particularly given that in our experience there has been some scepticism in the past as to its willingness to do so. In turn, this promises to have a positive effect on businesses' presentation of reasoned RCB submissions, given the increased transparency regarding the CMA's approach.
- 1.7 In particular, we think the following clarifications proposed in the Draft Revised Guidance are positive for transparency and certainty:



- Where RCBs lost as a result of any effective remedy are likely to outweigh the SLC and its adverse effects, the CMA may be willing to accept partially effective UILs (paragraph 3.31);
- The CMA's proposed explanation of how RCBs can influence the remedy assessment (paragraph 3.32);
- The CMA's recognition that the provision of evidence from merger parties on RCBs does not imply that they accept the existence of an SLC (paragraph 3.36).

1.8 However, we consider it would also be helpful for the Draft Revised Guidance to provide additional clarification on the statutory requirement that an RCB should accrue within a "reasonable time period" (paragraph 3.29). This could be done either by additional explanations in the guidance, and/or by reference to the CMA's practical experience, and would enhance businesses' ability to assess whether RCBs are likely to be deemed sufficient by the CMA (with consequent resource benefits for case teams).

2. **The CMA's proposed approach to structural remedies**

2.1 We welcome the expansion of the CMA's guidance on structural remedies and the greater clarity around the CMA's position in a number of areas. There are however certain points where we would invite more detailed guidelines and examples. There are also certain positions which, as currently drafted, risk being at odds with the CMA's aim to instil greater proportionality across its decision-making. We set out our views on these points below.

'Mix-and-match' divestiture packages

2.2 At paragraph 6.15 of the Draft Revised Guidance, we note the CMA's cautious approach to mix-and-match remedies (i.e. comprising assets from both merger parties) and its concern that such packages may undermine proportionality.

2.3 We would encourage the CMA to expand on where mix-and-match divestitures might be appropriate and acceptable – such as where these may be expected to provide a more targeted and proportionate solution, particularly in local market cases or where the overlap is asymmetric. We note that these remedies may, for example, be appropriate where the divestiture of a standalone business would be excessive relative to the competition concern identified.

2.4 We recommend that the CMA provide objective tests or criteria for assessing mix-and-match remedies, along with examples of past cases where such remedies have been accepted. This would assist parties in designing remedies that are both effective and proportionate, and aligned with the CMA's statutory duties.

Divestiture of an existing business or 'carve-out' package of assets



- 2.5 We welcome the additional guidance on carve-out remedies (paragraphs 6.21 to 6.27 of the Draft Revised Guidance), including the articulation of evidentiary factors and mitigants. However, we remain concerned that the CMA's cautious default position could in some circumstances prevent a pragmatic and proportionate decision being taken and may deter parties from proposing otherwise viable and proportionate solutions. We would encourage the CMA to develop further and more nuanced guidance on this topic, recognising that carve-outs may offer a flexible and effective remedy in circumstances where the sale of a full standalone business or business unit would go beyond the scope of the competition concern identified.
- 2.6 We would also urge the CMA to provide greater clarification on the evidentiary factors that will be taken into account here, by expanding on the list at paragraph 6.26. In particular, we would welcome further guidance on how comparator analysis regarding divestment performance would be selected, and the extent to which parties would be able to comment. We would also invite the CMA to provide further guidance on the circumstances where it may be amenable to arguments that a divestment purchaser could compensate for the deficiencies of a divestiture package (which we note the CMA "*will not typically accept*" (paragraph 6.40).
- 2.7 We further recommend that the CMA publish illustrative examples demonstrating successful carve-out remedies (including the use of reverse carve-outs and fall-back packages), with references to previous cases.
- 2.8 As regards the use of Interim Measures during the divestiture period, we note the CMA "will consider on a case-by-case basis whether the scope of [hold-separate and asset maintenance obligations [...] may be limited to obligations in relation to the divestment business" (paragraph 6.46). Given depending on the perimeter of a divestment and the scope of the competition concerns identified, there will be scenarios where lifting Interim Measures around parts of a merging business represents a more proportionate approach, we would encourage the CMA to set out further guidance. Such guidance should cover the related procedure, the relevant considerations that the CMA would take into account, what the CMA would expect to see by way of evidence, and the role of third parties such as monitoring trustees.

Default maximum divestiture period

- 2.9 We note the CMA's proposal to adopt a default maximum divestiture period of six months at Phase 2 (paragraph 6.48). While we appreciate the CMA's objective of ensuring timely implementation and mitigating asset risk, in our view, adopting a rigid six-month default period risks not adequately reflecting the practical realities of complex divestiture processes.



2.10 In many cases, the timeline for divestiture is influenced by factors beyond the control of the merger parties, including customer consent processes, regulatory approvals (particularly in multi-jurisdictional transactions), and operational disentanglement in complex carve-out scenarios.

2.11 We urge the CMA to provide clear guidance on the circumstances in which longer divestiture periods may be appropriate, supported by illustrative examples.

IP divestitures

2.12 We note that while the CMA recognises that IP licensing remedies may, in certain circumstances, function as quasi-structural remedies (paragraphs 6.51 to 6.56), these continue to be treated with caution for reasons relating to specification and monitoring risks.

2.13 We recommend that the CMA further clarify the features of acceptable IP licensing remedies, including exclusivity, irrevocability, and royalty-free terms; distinguish clearly between licensing and divestiture of IP; and set out expectations regarding residual rights and access. We would also recommend that the CMA include examples of successful IP remedies by way of illustration (e.g. *Vodafone/Three* and *Reckitt/K-Y*).

2.14 We would also encourage the CMA to promote the use of independent experts to assess the adequacy and viability of IP remedies, particularly in technically complex sectors. These steps would improve predictability and support the design of remedies that preserve innovation and competitive dynamics.

3. **The CMA's proposed approach to behavioural remedies**

3.1 We are broadly supportive of the CMA's revised approach to behavioural remedies. We note that the Draft Revised Guidance makes several positive changes to the CMA's approach on behavioural remedies which we welcome, including:

- generally adopting a more pragmatic approach to assessing behavioural remedies;
- removing the presumption against behavioural remedies in Phase 1; and
- recognising that behavioural remedies can be used to address uncertainty that the CMA may have in the delivery of merger efficiencies (paragraph 7.17).

3.2 However, there are some areas where the CMA should go even further to support the implementation of its 4Ps framework in the Draft Revised Guidance, namely:

- First, despite the more pragmatic approach set out in the Draft Revised Guidance, the CMA still states that structural remedies are more likely to be effective than behavioural remedies (paragraph 4.8). In our view, whether a remedy – be it structural or behavioural – is effective depends on appropriate remedy design. Therefore, we would recommend



that the CMA revise the Draft Revised Guidance to ensure that genuinely equal consideration is given to both structural and behavioural remedies.

- Second, the Draft Revised Guidance states that the CMA prefers enabling remedies (e.g., access remedies) over controlling remedies (e.g., remedies which constrain the merged entity's conduct). In our view, there is no material difference between the effectiveness of enabling remedies and controlling remedies. Similar considerations are relevant to both types of behavioural remedies and, in practice, the success of such remedies depends on effective remedy design. As such, we would welcome the CMA removing the preference for enabling remedies over controlling remedies and adding additional appropriate guidance for controlling remedies (e.g., reinstating its guidance on price controls). At the very least, the CMA should expand the circumstances described in paragraph 7.37 of its Draft Revised Guidance to include additional situations where controlling remedies would be appropriate (for example where the SLC is time limited) as the current drafting is unduly narrow.
- Third, we consider that greater prominence should be given to the role of a Monitoring Trustee in facilitating the monitoring of behavioural remedies, including controlling remedies. The Draft Revised Guidance states that the presence of an industry regulator is helpful to reduce the risks associated with behavioural remedies (paragraphs 7.9 and 7.38). We agree – but also consider a similar monitoring role could be effectively undertaken by a Monitoring Trustee. As such, we would suggest giving greater prominence to this in the Draft Revised Guidance (e.g., by referring to a Monitoring Trustee in paragraph 7.9(d)).

4. **The CMA's approach to monitoring and review of merger remedies**

- 4.1 We support the CMA's intention to provide greater flexibility for early engagement with monitoring trustees and industry experts in cases involving complex or highly technical remedies. This approach can improve the quality of remedy design and give the CMA greater confidence in the effectiveness of proposed solutions. In particular, early involvement may help merger parties develop remedies that are more practical and workable from the outset.
- 4.2 We also consider the ability to involve an independent expert to be a helpful development. Independent experts can provide objective, specialist insights into remedy design and implementation, particularly where sector-specific knowledge is critical. Their input can assist in verifying the scope and feasibility of proposed remedies and identifying any technical or operational challenges early on. This can ultimately support a more efficient and informed decision-making process, while ensuring that remedies deliver their intended competitive outcomes.



4.3 That said, we encourage the CMA to adopt a proportionate framework that avoids unnecessary duplication of roles or excessive reliance on external appointees. While independent expertise can be valuable, the appointment of multiple trustees or specialists could significantly increase costs and administrative complexity for merger parties, without a corresponding benefit in all cases. We suggest that the guidance should make clear that such appointments should be targeted and justified by the specific characteristics of the remedy, rather than becoming a routine expectation. This will help strike the right balance between efficiency, cost control, and effective oversight.

5. **Updates relating to the CMA's merger remedies process**

5.1 We welcome the CMA's proposed changes to the remedies process at phase 1, which now includes additional guidance for the merger parties on engaging with the CMA on remedies throughout the process, including early without-prejudice discussions on remedies, a dedicated remedies meeting after the issues letter response and specific guidance for fast-track cases including fix-it-first remedies.

5.2 We agree that there should be benefits to pace and proportionality from achieving a more challenging phase 1 remedy outcome and avoiding the time and cost of a phase 2 referral and believe that the proposed changes to the phase 1 remedies process will to some extent contribute to achieving this.

5.3 We broadly support the proposed changes set out in Appendix A to the Draft Revised Guidance and agree with the approach to include these in an updated version of CMA 2 on jurisdiction and procedure. We have set out some comments on these proposals that would in our view improve the proposed process further.

Paragraph 9

5.4 Where engagement on remedies takes place before the SLC decision, this will typically be with members of the CMA case team. While the decision maker is not involved at this stage and will not be informed whether any UILs were discussed until after the decision on the SLC, the case team is involved. How does the CMA propose to ensure that the case team is not prejudiced by these discussions - would the CMA consider additional safeguards to ensure this is the case?

5.5 The Draft Revised Guidance refers to the merger parties choosing to involve the phase 1 decision maker at an earlier stage, including during pre-notification. Unless the parties are conceding an SLC it is unclear in what circumstances this would be beneficial for the merger parties. The Draft Revised Guidance would benefit from some examples of circumstances in which the CMA envisages this will be helpful. Also, if the decision maker



is involved early on, it is not clear how the CMA will ensure that this does not influence their decision in relation to the SLC.

Paragraph 11

- 5.6 The Draft Revised Guidance flags that early engagement is particularly important where the merger parties are contemplating a potentially complex remedy proposal. We believe this section should cross-refer to behavioural remedies, where this is separately suggested.

Paragraph 14

- 5.7 In addition to the merger parties choosing to involve the phase 1 decision maker in remedy discussions, this paragraph also provides that, in exceptional circumstances, the phase 1 decision maker may decide to be involved in remedy discussions prior to taking the SLC decision, having regard to the risk profile of the remedy being proposed. The question here is, how will the decision maker know that such discussions are happening. Paragraph 9 provides that the phase 1 decision maker will not be informed whether any UILs were discussed until after the decision on the SLC has been made. Presumably it should be made clear here that this can only happen with the express agreement of the parties.

Paragraph 19

- 5.8 This paragraph refers to a separate meeting to discuss potential UILs, after the issues meeting or at the end of the issues meeting, which can take place with or without the phase 1 decision maker present. We assume that it will be up to the parties to decide whether the phase 1 decision maker should be present, and if so, this should be clarified in the text.

Paragraph 32

- 5.9 Under its approach to global mergers the CMA may cooperate with authorities in other jurisdictions to ensure that remedies in different jurisdictions are consistent or mutually compatible. The Draft Revised Guidance flags that waivers are important where the parties consider that cooperation and alignment on remedies across jurisdictions would be beneficial, as the CMA is unlikely to be in a position to align remedies with other jurisdictions if it cannot exchange information about the remedy directly with the agencies in those jurisdictions.
- 5.10 In our view a waiver will similarly be necessary in circumstances where the CMA needs to satisfy itself that its concerns are met as a result of a remedy adopted by another authority and this should also be captured in the Draft Revised Guidance.