Law Society of Scotland

Consultation Response

Competition and Markets Authority Review of its Merger Remedies Approach

May 2025

Photo: Kylesku Bridge, Sutherland

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Competition Law Sub-Committee (**Committee**) welcome the opportunity to consider and provide comments on the Competition and Markets Authority (**CMA**) Review of its Merger Remedies Approach (**Review**). The Committee has the following comments to put forward for consideration.

General Comments

We note that the CMA is currently in a transitional period with regard to how it exercises its merger control functions, both in terms of jurisdictional changes to mergers under the Digital Markets, Competition and Consumers Act 2024 (**DMCCA**), and in terms of the UK Government's expectation that the CMA's regulation and enforcement of Competition Law does not act as an obstacle to economic growth and investment in the UK. The latter of these points was noted in the recent consultation on the Government's Strategic Steer to the CMA. Details of our Committee's previous response to this can be found here.

Our response to this Review acknowledges the need for the CMA's remedies approach to be consistent with that Strategic Steer and to avoid imposing remedies that could act as an unnecessary barrier to merger and acquisition activity, in turn undermining economic growth and investment in the UK.

Specific Comments

Remedy Theme 1 – the CMA's Approach to Remedies

Whilst we see no reason to depart from the existing approach of requiring remedies to be clear cut and capable of ready implementation, we would welcome greater clarity on how those requirements are to be interpreted if they are to be retained. For example, it is not entirely clear when a remedy will be sufficiently "clear cut" to satisfy this criterion, what is meant by the general requirement that this means implementation is "feasible within the constraints of the Phase 1 timetable", and whether a clear cut remedy has to be targeted at a given SLC

issue. Current guidance offers even less instruction on the meaning of the term *"capable of ready implementation"*. For example, is a remedy to be assessed by how quickly it may be put into practical deployment by the merging parties, how complex its preparation or deployment is likely to be, how much ongoing monitoring it will require, or some other guiding principle?

We would invite the CMA to consider whether prior experience and decisional precedent would allow for the development of a bank of template remedies that could be capable of ready adaptation to a given merger, in a manner that may allow for more complex remedies to be agreed at Phase 1. We would also suggest that it would be consistent with the CMA's Strategic Steer for it to be prepared to take a more "risk-based" approach to those mergers where mitigating an SLC would be sufficient, such that the CMA would not have to be entirely convinced that an SLC would be eliminated entirely before agreeing to a given remedy at Phase 1.

Structural and Behavioural Remedies and the Assessment, Monitoring and Enforcement of such Remedies

We believe that a balance needs to be struck between the use of structural and behavioural remedies with more emphasis in CMA guidance on when it will accept behavioural remedies (and of what kind) and when it will insist on structural remedies. Recent decisions suggest a shift in the CMA's practice towards the acceptance (and acceptability) of behavioural undertakings. However, we would encourage the CMA that such a shift in practice should not simply be a response to short-term pressure from government to be more "pro-growth". In particular we do not consider that it is self-evident that behavioural remedies are necessarily less of a burden on businesses (and that they are less liable as a result to have a broader chilling effect on merger activity). Behavioural remedies that require complex monitoring structures are just as likely to stifle business innovation as structural remedies, and should not be seen as an "easy" option. Instead the CMA should consider the proportionality of remedies in the round, and in particular balance the burden they impose against the actual extent of any anticipated SLC.

Should the CMA adopt a greater presumption in favour of the use of behavioural remedies, we would suggest that significant further thought is given to how the CMA can assist with standardising and streamlining the enforcement and monitoring of those remedies, noting in particular recently reported intentions regarding reductions in CMA headcount.

Clearly reductions in available CMA resources raise questions as to who precisely will be responsible for enforcement and whether the CMA will look to increase the use of Monitoring Trustees (**MT**). The use of MTs is as a general rule at the parties' expense and we would assume this would continue to be the case. The CMA should give greater consideration to the costs of that in its decisions on what remedies (and monitoring requirements) to impose in order to be consistent with the Strategic Steer.

We would also flag that greater use of behavioural remedies will mean greater demand for a readily available pool of well-trained MTs, all of which fully understand and are well versed in the CMA's approach to its merger remedies. We return to this point below.

We would, finally, welcome greater guidance from the CMA in terms of standardising its approach to the role of the MT and, in particular, the discretion that an MT has to consent (or not) to activities in a manner that binds the CMA. Uncertainty as to which decision maker has authority over which decision, and how much discretion they enjoy, has (as with all legal uncertainty) a chilling effect on business activity.

Remedy Theme 2 – Preserving Pro-Competitive Merger Efficiencies and Merger Benefits

Rivalry Enhancing Efficiencies (REE)

On the question as to what evidence the CMA should look for to support the materiality and likelihood of a claimed REE, we consider that it is inevitable that such evidence will almost entirely come from the merging parties themselves, perhaps alongside other market participants. In regulated markets (including, now, digital markets) the CMA and concurrent regulators will have their own pool of expertise available to assess and scrutinise claimed REEs, but more broadly (and including in those markets) we would encourage the CMA to engage more proactively with other market participants including through the use of information gathering powers where it is proportionate to do so.

We would also encourage the CMA to bear in mind the complexities and difficulties in assessing REEs in rapidly developing and nascent markets, as compared to well-established markets. In particular we would encourage the CMA not to depart too readily from its recent approach to taking account of the potential for a transaction to produce an REE in one (well-established) market while having significant adverse effects on competition in another market (which may, or may not, be adjacent to the established one).

Relevant Customer Benefits (RCB)

Recent decisional practice in the telecoms and high-tech sectors raises three important questions,

1. how *"consumers"* should be defined for the purposes of an RCB; and
2. what constitutes a useful definition of a *"reasonable period"*; and
3. how RCB's are gauged within this period.

In considering these questions, we acknowledge and welcome the CMA's recent heightened focus on what future markets might look like and would encourage the CMA to continue to consider how to ensure that RCBs in one market are properly balanced against an SLC in a different market. We believe that in doing this, it is important that the CMA properly identifies and considers the differences between

the needs of consumers in different markets and accepts that there may be (on occasion) certain market constraints that may well benefit certain consumers from within that market whist negatively impacting others. It is, in particular, important that the CMA maintains its long-term outlook (as befits an independent agency) and properly balances the needs of present consumers (who may in theory receive no RCBs from a given transaction) and future consumers (who may enjoy all of the RCBs the CMA identifies). The CMA's willingness to accept behavioural remedies in its recent Vodafone/Three decision can be viewed in this way rather than as a retreat from a general scepticism about the ability of behavioural remedies to properly remedy SLCs in nascent markets.

Remedy Theme 3 – Running an Efficient Process

Timeframes

In terms of how the Phase 1 and Phase 2 process can be improved, clearly timeframes present a potentially significant obstacle to the acceptability of more complex remedies at the Phase 1 stage. For example, should a remedy be proposed at Phase 1 that requires market testing, this may be difficult to achieve within the Phase 1 timetable. A possible approach could be to pause the Stage 1 process to allow for any such market testing to take place.

The issue here is that delaying a timetable at Phase 1 could run the risk of the process becoming a mini-phase 2 analysis. Furthermore, whilst there would clearly be potential benefits to greater use of the existing possibility to engage on complex remedy structures prior to Phase 1 (that is, during pre-notification engagement), there is clearly a significant risk of parties being unwilling to do so at a stage where they will primarily be focused on challenging the presence of an SLC. Previous attempts have been made to address this conflict (such as the use of confidential fireside conversations) but remedies will often be so specific to merging entities that to discuss their details would likely disclose the identities of the merging parties to regulators.

We would again encourage the CMA to consider the development of adaptable template remedies alongside a greater acceptance of a level of acceptable risk in the use of remedies that have not been comprehensively market tested.

External Assistance Merger Remedy Monitoring and Compliance

On the question of how the CMA should access external expertise, we believe that sectoral regulators and industry experts have a significant part to play in assisting with remedy formulation and testing, implementation, monitoring and compliance. The use of industry expertise will clearly be more vital in sectors such as pharmaceuticals which have no concurrent regulator but where significant technical expertise is likely to be required. The key consideration is how the CMA will be able to access this knowledge and we would advocate an approach that casts the net far and wide. A greater reliance on independent sectoral consultants with relevant technical knowledge, instead of specialist MT practitioners (who will

generally lack industry-specific technical knowledge), would allow access to that broader expertise but would clearly require the CMA to carry a greater burden with regard to providing those experts with adequate training and ongoing support to enable them to carry on a monitoring role.

Guiding Principles for an Increased Use of Monitoring Trustees

As noted above, in returning to the point of any increase to the use of Monitoring Trustees, we believe that consideration needs to be given as to the level of training and ongoing support that the CMA will offer to allow any MTs to effectively perform their role.

Should the CMA look to utilise more complex behavioural remedies through the use of specialist MTs, we anticipate that certain support functions will need to be offered to a greater degree than is currently the case, such as the use of a professional secretariat that would enable the provision of suitable training to be offered by the CMA (and the provision of supporting services on an ongoing basis). Industry specialists with relevant expertise, who would be capable of acting as MTs (for example those who have retired or transitioned into sectoral consultancy work) are unlikely to have access to a pool of support services (including competition economics, audit, financial advisory and regulatory compliance) without those being provided by the CMA itself.

Key Jurisdictional Learnings

On the point of key jurisdictional learnings that have been sought in this consultation, we would strongly encourage the CMA to consider that certain strengths in the approach to merger remedies can be found within the European Union. The EU Commission has adopted delegated legislation which is referred to in a comprehensive Notice on Remedies (2008/C 267/1) which provides details about the types of remedies that could be acceptable, the procedure to be followed for submitting remedies, the timing and the role of any MTs. The Notice refers to a Model Text for Divestiture Commitments and a Model Text for Trustee Mandates (Notice, para. 21). The Model Text for Trustees mandates is available here.

The CMA has also issued guidance on Merger Remedies (see the link here: Merger Remedies) but it is less formalised and includes fewer details about the role of MT's. Whilst this ensures that the CMA retains flexibility, we believe that this makes it more difficult for the parties and their advisors to be clear about the commitments procedure. The ability to submit proposed commitments at any time may be counterproductive for the parties as if submitted too late, the remedies may be rejected due to lack of time.

Additionally, we note that the French Competition Authority (**FCA**) are currently consulting on the possible introduction of a so-called power of evocation (**PoE**) targeted more towards catching mergers that fall below current merger control thresholds.

The consultation builds on work launched by the FCA in 2017 in light of mergers that do not meet existing merger control thresholds but potentially affect trade between Member States and significantly impact competition in the requesting Member State (i.e. France).

The decision of the ECJ in *Illumina v Grail (Case C-611/22 P) (2024)*[1] has limited the scope of Article 22 of the EU Merger Regulation (EUMR) and has prompted national competition authorities to adopt their own mechanisms to catch such mergers.

The French consultation launched on 24 January 2025 albeit note that the FCA is yet to finalise its response. The PoE would be subject to qualitative and quantitative criteria (which are yet to be fully defined).

The purpose of the PoE is to enable either the full or conditional authorisation of mergers falling below existing thresholds or their prohibition according to criteria that would involve:

i) The establishment of new, lower significant/indicative thresholds;
ii) A genuine link test to prevent operations that have no impact on France from being prohibited;
iii) A risk assessment test; and
iv) The establishment of clear procedural mechanisms to enable undertakings to regulate their behaviour.

If the PoE is adopted, adapted binding remedies would have to be implemented. Currently, the FCA is considering two broad remedies: a structural remedy that would mitigate the impact of mergers falling below existing thresholds on market structures such as when they involve acquisition by purchase of assets, and behavioural remedies aiming to mitigate the impact of the undertaking post-acquisition such as by controlling its commercial/trade policy.

This PoE already exists in Denmark, Hungary, Iceland, Ireland (ROI), Italy, Latvia, Lithuania, Norway, Slovenia, and Sweden. Other EU countries such as Czechia, Finland, and Netherlands are currently considering the introduction of a similar power.

The PoE would likely be exercisable through delegated powers. Alternatively, the FCA has suggested two alternatives to the PoE: either introducing new mandatory notification criteria for undertakings that have a dominant position only as recognised by the EU Commission or limiting its intervention to post-acquisition agreements (cf. Art. 101) and abuses of dominant position (cf. Art 102) by undertakings falling below existing thresholds. The former alternative is inspired by the approach of the Swiss Competition Authority and is intended to enable the French Competition Authority to become the regulator of designated markets and widen its role.

[1] EUR-Lex - 62022CJ0611 - EN - EUR-Lex

Concluding Remarks

We thank the CMA for consulting on its approach to merger remedies and the way that the use of remedies addresses the possible anti-competitive effects arising from any planned merger. We acknowledge the difficulties of this task particularly in the context of the UK Government's expectation that the regulation and enforcement of merger remedies must not impose constraints that would stand disproportionately in the way of economic growth and investment.

We welcome the CMA seeking views from broader market participants and the wider legal profession as to how best to approach merger remedies.

Should you require any clarification on any of the points raised in the above then we would be happy to assist.

For further information, please contact:

Richard Male
Policy Team
Law Society of Scotland
DD: 0131 476 8113
richardmale@lawscot.org.uk