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CMA'S DRAFT REVISED REMEDIES GUIDANCE: WHAT IT GETS RIGHT, AND WHERE THE FINAL GUIDANCE COULD GO FURTHER

On 16 October the CMA launched a consultation on its draft revised remedies guidance. There is much in the draft guidance to applaud. In this briefing we pull out five things the draft guidance gets right, and five points where the CMA could go further to align the final guidance with the government's priorities and fully embed the '4Ps' framework into its merger remedies processes.

What the draft guidance gets right

1. Softening of stance on behavioural remedies

Dealmakers will take heart from the formalising of the CMA's softened stance on behavioural remedies, first seen last year in the groundbreaking clearance of *Vodafone/Three* and built on since in recent public statements and practice (e.g. *Schlumberger/ChampionX*). In particular, the draft guidance introduces "*remedies to secure merger-specific rivalry-enhancing efficiencies*" as a category of enabling behavioural remedies.

The removal of the presumption against behavioural remedies at phase 1 is also welcome, although whether this will have much effect in practice remains to be seen, given the guidance does not introduce any flexibility in the application of the "clear-cut" standard as the first hurdle for remedies to overcome at phase 1. The list of measures to mitigate the perceived risks of behavioural remedies is also generally sensible, although there is scope for the final guidance to go further, such as by identifying third parties in addition to an industry regulator with the expertise to effectively monitor and enforce the remedies.

2. The behavioural / structural distinction is not always clear-cut

Whilst maintaining the distinction between behavioural and structural remedies, the draft guidance accepts that "*some remedies, however, fall within a spectrum of the two classifications, with varying degrees of both structural and behavioural characteristics*". This acknowledgment adds nuance to the categorisation and should prove helpful for parties presenting complex remedies which do not easily fit a binary categorisation.

3. Clarity for local markets cases

The revised approach to certain local markets cases – whereby the CMA may no longer require a divestment of the full increment in cases where it applies a "filter" or "decision rule" – brings welcome clarity and proportionality. Given the call for evidence did not ask for submissions on this topic it also comes as something of a surprise, and a positive indication of the CMA's openness to a wide range of ideas on how to improve its processes across the board.

4. Openness to earlier engagement

The draft guidance builds on the positive changes effected by the recently revised CMA 2, including by adding an option for parties to involve the decision maker in remedies conversations as early as pre-notification. There is, however, still some room for improvement here – see below.

5. Recognising the potential uses of monitoring trustees and experts

Although already standard practice in many complex cases, it is helpful that the draft guidance explicitly recognises the role that monitoring trustees and independent experts can play in supporting the CMA in its assessment – and not just monitoring - of remedies.

Where the final guidance could go further

1. The effectiveness and proportionality assessment is better done in parallel

Despite the calls of several stakeholders, the draft guidance maintains the sequential assessment of the effectiveness and proportionality of potential remedies. We would urge the CMA to reconsider this position in the final guidance as parallel assessment would allow for a more nuanced approach, where case teams could consider the benefits and risks of potential

remedies holistically – rather than proportionality playing second fiddle to effectiveness.

2. Mitigations may be relevant in a wider range of circumstances

In line with the '4Ps' the final guidance should allow for a wider range of circumstances where mitigations – rather than remedies – might be found to resolve competition concerns. This would be in addition to the specific case recognised in the draft guidance, of where the loss of relevant customer benefits (**RCBs**) outweighs the substantial lessening of competition (**SLC**). Further examples might include cases where the only alternative remedy is prohibition, which would be disproportionate in the circumstances; and cases where the merger's impact is predominantly ex-UK, so that a prohibition remedy would necessarily have a significant impact outside the UK.

3. Much more can be done with RCBs

The draft guidance affords some additional prominence to RCBs but the landscape here remains substantively unchanged. Since the CMA has scope under the existing legislation to take into account the wider out-of-market benefits a merger may bring to promote growth and sustainability (amongst others), RCBs provide a real – and so far, missed – opportunity for the CMA to demonstrate its full commitment to the '4Ps'. If not addressed in the final guidance, we are encouraged that the CMA has indicated that it will consider RCBs again in the context of its upcoming work on the substantive assessment of efficiencies.

4. More faith should be placed in the M&A process when it comes to carve-outs

The draft guidance continues to overstate the risks associated with carve-out divestitures, showing little faith in businesses' abilities to assess for themselves whether a DD process is sufficiently robust. The final guidance would benefit from dialling down this position, which seems contrary to the Mergers Charter and the quest for growth.

5. Meaningful early engagement requires meaningful early feedback

Early engagement on remedies can only yield results to the extent that merger parties already have concrete, meaningful feedback on the competition concerns that the CMA considers require remedying. The final guidance should build on the momentum of the revised CMA 2 by overtly empowering case teams to provide this clear direction at an early stage. It should also be explicit that those parties who choose to follow the traditional sequential process of discussing remedies only after the competition concerns have been fully set out will not be prejudiced – and that the new guidance that early engagement increases the chances of meeting the "clear-cut" standard will not in practice close down the traditional route.

We will make these points in our response to the CMA's consultation. If you have any comments or questions, please get in touch.

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