



12 May 2025

To: The Competition and Markets Authority (“CMA”)

**Sub: Merger Remedies Review – Call for Evidence**

Dear Sir/Madam,

We have great pleasure in enclosing a submission on behalf of the Mergers Working Group of the International Bar Association (“IBA”) in response to the CMA's Call for Evidence on the Merger Remedies Review process.

The Co-chairs and representatives of the Mergers Working Group of the IBA would be delighted to discuss the enclosed submission in more detail with the CMA if that would be useful.

Yours sincerely,

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Co-Chair Antitrust Section

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Co-Chair Antitrust Section



**INTERNATIONAL BAR ASSOCIATION**

**ANTITRUST SECTION**

**COMMENTS ON THE  
CMA MERGER REMEDIES REVIEW – CALL FOR EVIDENCE**

**12 MAY 2025**

## 1. INTRODUCTION

- 1.1 The International Bar Association's ("IBA") Antitrust Section ("**Section**") would like to thank the Competition and Markets Authority ("**CMA**") for the opportunity to provide feedback on its merger remedies approach and associated Call for Evidence of 12 March 2025 ("**Call for Evidence**").
- 1.2 The Section congratulates the CMA on its willingness to engage in a review of its approach to merger remedies, in particular in light of the CMA's commitment to improve pace, predictability, proportionality and process (the "**4Ps**") and the Government's recent draft Strategic Steer for the CMA to prioritise pro-growth and pro-investment interventions. The Section offers this submission for the CMA's consideration.

## 2. ABOUT THE IBA

- 2.1 The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including the UK, and it has considerable expertise in assisting the global legal community.
- 2.2 The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The contributions of the Section's Mergers Working Group ("**MWG**") draw on the considerable experience of the Section's members in merger control law and practice around the world.<sup>1</sup>
- 2.3 The MWG is responsible for following merger control developments in different jurisdictions across the world covering procedural, jurisdictional and substantive issues. It provides input and comments on various consultations on proposed new and reformed legislation to which the IBA's international perspective and the members' collective expertise and experience can bring significant added value.
- 2.4 As a general principle, the MWG believes that there should be a convergence toward agreed best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty, and procedural fairness.
- 2.5 The International Competition Network ("**ICN**") has issued Recommended Practices for Merger Notification and Review Procedures (the "**ICN Recommended Practices for Merger Notification and Review Procedures**") and the Recommended Practices for Merger Analysis (the "**ICN Recommended Practices for Merger Analysis**"), which the MWG considers are relevant and insightful in the context of considering the implementation of the potential changes to the CMA's approach to merger remedies. The ICN Recommended Practices for Merger Notification and Review Procedures and the ICN Recommended Practices for Merger Analysis Document are further referred to in this submission where relevant.

## 3. OVERVIEW

- 3.1 In order to provide an international perspective, the MWG has sought contributions from members whose home jurisdictions include Brazil, Chile, the EU, Mexico and Singapore

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<sup>1</sup> Further information on the Antitrust Section and its Working Groups is available at: <https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001>.

(hereinafter referred as the “**International Jurisdictions**”), as well as the UK. The MWG presents its contributions below according to the three broad remedy themes in the Call for Evidence: (i) The CMA’s Approach to Remedies, (ii) Preserving Pro-competitive Merger Efficiencies and Merger Benefits and (iii) Running an Efficient Process.

3.2 For the avoidance of doubt, the following comments represent collectively the views of the MWG and not the position of any individual member within the MWG.

#### 4. **REMEDY THEME 1: THE CMA’S APPROACH TO REMEDIES**

##### **INTRODUCTION**

4.1 The majority of competition authorities around the world follow similar principles when it comes to accepting remedies in order to address competition concerns arising from mergers.

4.2 As a common principle, the test followed by authorities in the International Jurisdictions is that competition should be restored following the implementation of remedies and that such remedies should be effective, feasible, and proportionate to the identified competition issues.

4.3 Below is a high-level overview of the different approaches taken in the International Jurisdictions.

- In the EU, the European Commission (“**EC**”) may declare a concentration compatible with the common market if, after modifications, it no longer raises serious doubts as to its compatibility with the internal market (in Phase I) or no longer significantly impedes competition (in Phase 2). The EC can accept remedies in either Phase 1 or Phase 2, but the application of the test differs due to the fact that at the end of Phase 1 the EC must open an in-depth investigation if the concentration (as modified by any remedies) still raises serious doubts as to its compatibility with the common market. In Phase 1, therefore, commitments can only be accepted where the competition problem is readily identifiable and can easily be remedied.<sup>2</sup>
- In Brazil, the Administrative Council for Economic Defense (“**CADE**”) is usually open to discuss remedies both at the level of the General Superintendence or once the merger case reaches CADE’s Tribunal. Although the timing of the remedies negotiation may differ, the applicable standards tend to be the same at both stages of the merger investigation. The remedies must identify the potential competition harm that arises from the transaction and mitigate that as a means to ensure the enforceability and effectiveness of the transaction.<sup>3</sup> To ensure effective remedies, the proposal must emphasize proportionality, timeliness, feasibility, and verifiability. Remedies must be proportional, addressing competition issues without exceeding necessary measures, and maintaining potential synergies. Timeliness is crucial, preferring remedies that quickly mitigate competition issues to reduce monitoring costs and risks. Feasibility ensures remedies can be implemented and monitored effectively, avoiding significant costs and risks of non-compliance. Verifiability involves clear obligations, efficient monitoring, and mechanisms to ensure compliance, reducing implementation risks and facilitating judicial enforcement if needed.
- The Chilean antitrust authority (“**FNE**”) follows a similar standard to the EU and declares that remedies need to be effective, feasible to implement, execute and monitor, and proportionate to the competition concerns identified. The FNE’s Remedies

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<sup>2</sup> EC Remedies Notice, paragraph 81.

<sup>3</sup> See Articles 125 and 168 of CADE’s Internal Rules and Article 61 of Law No. 12,529/2011.

Guidelines enable a market test of the mitigation measures to be carried out in Phase 1 and Phase 2.

- In Mexico, the Federal Economic Competition Commission (“COFECE”) establishes that parties may offer undertakings in lieu of reference (“UILs”) to prevent a Substantial Lessening of Competition (“SLC”), although it is uncommon that the parties submit UILs during Phase 1 in practice<sup>4</sup>. The test used by COFECE to determine whether remedies are acceptable or not is determined on a case-by-case basis but generally it seeks to correct the negative effects of the transaction on the markets involved and ensure that the remedies are proportionate to the intended correction.
- The Competition and Consumer Commission of Singapore (“CCCS”) can implement remedies through directions or acceptance of commitments and these will be assessed based on their effectiveness, proportionality, and associated costs. The test for accepting remedies does not *per se* differ between Phase 1 and Phase 2 under Singaporean competition law.

4.4 In the UK, the CMA's approach to remedies at Phase 1 and Phase 2 (set out in the CMA's Merger Remedies Guidance (“CMA87”)) aligns with the common themes observed in the International Jurisdictions. The CMA will assess remedies on the basis of whether they are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective<sup>5</sup>. Further, the CMA will seek to ensure that no remedy that is deemed effective is disproportionate in relation to the SLC and its adverse effects.

#### EFFECTIVENESS AND PROPORTIONALITY

4.5 The Enterprise Act 2002 (the “Enterprise Act”) requires that the CMA, when considering remedies, has regard to the need to achieve as comprehensive a solution as is reasonable and practicable, for the purpose of remedying, preventing or mitigating the SLC and any adverse effects arising from it<sup>6</sup>.

4.6 In this respect, the Enterprise Act is clear that mitigation of any SLC may be sufficient. As a result, the MWG considers that there is scope for the CMA to be more open in practice to remedies that seek to mitigate the identified competition concerns and not just those that seek to prevent or fully remove the concerns. In particular, this may be appropriate in circumstances where a mitigatory remedy is a more proportionate response to the identified SLC. In other words, there should be scope to consider proportionality as part of the CMA’s effectiveness assessment (and not just following the ‘effectiveness’ assessment when the CMA is required to choose the least costly and intrusive remedy where there is more than one remedy that would be effective). This would be more in line with the CMA’s 4Ps and in particular its proportionality objective.

4.7 Relatedly, the MWG encourages the CMA to be more open to accepting remedies that reduce -rather than eliminate- all of the substantive overlap brought about by a merger, where the remedy still addresses the competition concerns.

4.8 For example, where the CMA identifies a competition concern at a particular market share threshold, then a “market share reduction” remedy should be considered as an effective remedy

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<sup>4</sup> Rather, usually they are filed once COFECE preliminarily identifies anticompetitive concerns resulting from the transaction and issues an official communication describing them.

<sup>5</sup> CMA87, paragraph 3.4.

<sup>6</sup> Section 73(3) of the Enterprise Act.

(so long as the other conditions for an effective remedy are met). For example, this type of remedy was accepted by the EC in Case *M.9829 – AON / WILLIS TOWER WATSON*. It might also be appropriate in retail transactions where the merging parties' market share is made up of several retail sites such that the merged entity could divest one (or more) site so as to reduce its combined share to below the relevant market share threshold without having to divest all of the overlapping sites.

#### **APPROACH TO PHASE 1 REMEDIES**

- 4.9 As indicated in paragraph 4.4, the standard applied to remedies at Phase 1 is largely consistent across the International Jurisdictions (including the UK), in the sense that the remedy must be clearly defined and capable of quick, effective implementation.
- 4.10 Nevertheless, there are potential differences in the way that the standard is applied. Indeed some International Jurisdictions such as Chile apply a higher standard of remedy acceptance at Phase 1 since the FNE is not able to perform an in-depth review at Phase 1. The same is potentially the case in the UK where, as stated by CMA87, the CMA may accept a more extensive remedy offer at Phase 1 than might be needed if the merger were to receive a detailed Phase 2 investigation guidance.<sup>7</sup> While it is the case that the CMA is not practically able to undertake the same level of review at Phase 1 than it does at Phase 2, the Phase 1 review is nevertheless a thorough Phase 1 review.
- 4.11 As a result, the MWG considers that there is scope for the CMA to accept more complex remedies at Phase 1 while still respecting the 'clear-cut' and 'capable of ready implementation' standard. In practice, this would mean being more open to more complex divestment remedies (such as carve-outs and 'mix-and-match' remedies) as well as the potential to accept non-divestment remedies. The recent Schlumberger/ChampionX CMA decision and the acceptance of a licensing remedy (as part of the remedy package) at Phase 1 is a welcome sign of the CMA being flexible in respect of remedy design and acceptance and willingness to accept less standard divestment remedies.
- 4.12 The MWG appreciates that the 'clear-cut' standard also reflects practical considerations because complex remedies cannot sometimes be feasibly implemented within the constraints of the short Phase 1 timetable. In this regard, please see the comments in Section 6 below on possible ways of improving the process at Phase 1 which could help mitigate these timing constraints, thereby facilitating the possibility of the CMA accepting more complex remedies at Phase 1 in the future.

#### **APPROACH TO STRUCTURAL AND NON-STRUCTURAL REMEDIES**

- 4.13 Broadly speaking, remedies can take two basic forms: (a) structural remedies, which involve a direct change to the competitive market structure (e.g. divestments), and (b) non-structural remedies, which involve modifications or constraints on the future conduct of the merged entity (e.g. commitments with respect to certain contractual clauses)<sup>8</sup>.
- 4.14 The CMA has traditionally had a strong preference for structural remedies at Phase 1 on the basis that behavioural UILs are unlikely to be sufficiently clear-cut to address identified competition concerns.<sup>9</sup>

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<sup>7</sup> CMA87, paragraph 3.7.

<sup>8</sup> ICN Recommended Practices for Merger Notification, Part XI, C, Comment 2.

<sup>9</sup> CMA87, paragraph 3.32.

- 4.15 The MWG acknowledges that certain other regulators have a preference for structural remedies over behavioural remedies. For example, within the International Jurisdictions:
- The EC generally prefers structural remedies on the basis that this type of remedy is deemed to be more likely to ensure competitive market structures on a lasting basis<sup>10</sup>.
  - CADE also has a preference for structural remedies since the main source of competition issues would derive from the change in the structure of a relevant market, according to the position held CADE's Guidelines on Remedies in Merger Control ("CADE's Guidelines"). CADE takes the view that divestitures would target the cause of potential competitive harm more directly and would impose less monitoring costs, fewer risks of market distortion and reduce incentives for coordinated behaviour. That being said, as explained below, CADE still accepts behavioural remedies when they prove to be the most appropriate tool to mitigate the competition concerns on a particular case.
  - COFECE in Mexico also generally prefers structural remedies as usually it is easier to monitor their compliance.
  - The CCCS in Singapore considers that structural remedies are preferable as they are more likely to address changes in the market structure arising from the merger and require little monitoring and enforcement.
- 4.16 The MWG believes that this preference may in practice increase the risk of being overly focussed on categorising a remedy as structural or behavioural, instead of focusing on the real issue of whether the remedy is appropriate and effective to prevent or mitigate the competition concerns.
- 4.17 In this regard, there are certain circumstances where structural remedies are either not possible or not appropriate to address the competitive harm and a non-structural remedy may be more effective and/or appropriate.<sup>11</sup>
- 4.18 Under the EU regime, the EC stresses that the question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis<sup>12</sup>. In addition, the EU Courts have clearly held that any type of remedy can (and should) be accepted where it removes the identified competition concern.<sup>13</sup>
- 4.19 Behavioural remedies are more likely to be accepted where the competition concerns do not result from horizontal overlaps, where they can be argued to have structural effects due to the particularities of the respective market conditions, and where they can be easily monitored. Some examples of EC cases where behavioural remedies have been accepted are set out below:
- *Case M.9064 – Telia Company / Bonnier Broadcasting Holding (2019)*: the EC addressed foreclosure concerns regarding access to TV distribution, streaming services and advertising space. Telia committed to various licensing obligations on the basis of FRAND terms.
  - *Case M.8306 – Qualcomm / NXP (2018)*: the EC pursued theories of harm related to technology foreclosure and interoperability concerns. Qualcomm committed to

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<sup>10</sup> EU Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, paragraphs 15 and 22.

<sup>11</sup> ICN Recommended Practices for Merger Notification, Part XI, C, Comment 6.

<sup>12</sup> EC Remedies Notice, paragraph 16.

<sup>13</sup> ECJ, judgment in Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraph 86.

offering licenses to certain NXP technology and trademarks as well as ensuring interoperability with competitor products. In addition, Qualcomm committed to refrain from the acquisition of NXP's standard-essential patents.

- *Case M.7822 – DENTSPLY / SIRONA (2016)*: the EC determined that remedies other than divestiture were best suited to directly address the concerns raised in the conglomerate context. The commitments pertained to supply and licensing obligations to remedy foreclosure concerns.
- *Case M.8124 – MICROSOFT / LINKEDIN (2016)*: one of Microsoft's commitments offered was addressed to allow competing professional social network service providers maintain the current levels of interoperability with Microsoft's Office suite of products through the so-called Office add-in program and Office application programming interfaces.
- *Case M.5984, INTEL / MCAFEE (2011)*: the EC approved the transaction conditional upon a set of interoperability commitments offered by Intel, among others, to ensure that vendors of rival security solutions will have access to all necessary information to use functionalities of Intel's CPUs and chipsets in the same way as those functionalities used by McAfee. Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets. The EC concluded that the commitments were suitable to remove the competition concerns identified while preserving the efficiencies of the merger, because they were designed to maintain interoperability between the merged entity's products and those of their competitors, thereby ensuring competition on an equal footing between the parties and their competitors.

4.20 According to CMA87, the CMA does not inevitably refuse behavioural remedy offers at Phase 1, particularly in situations where divestments would be clearly impractical or are otherwise unavailable. In addition, the CMA recognises that mergers raising vertical concerns are potentially more suitable to some form of behavioural undertaking.<sup>14</sup>

4.21 The MWG acknowledges the above but would suggest that the CMA be more willing to accept behavioural remedies in practice. To support this suggestion, the MWG brings to the attention of the CMA the approach followed in Chile by the FNE which -even in horizontal concentrations- has accepted behavioural remedies where the following conditions are met: (a) the parties demonstrate that the measures offered are equally effective to prevent the transaction from substantially reducing competition; (b) the risks appear to be temporary given the characteristics of the market (e.g., rapid technological changes); (c) there are considerable proven efficiencies, which could be lost in case of opting for divestitures; or (d) a divestiture is not feasible and prohibition is not suitable to prevent the materialization of the risks identified.

4.22 Here are some examples of cases approved in Chile on this basis:

- *Discovery/WarnerMedia (2021)*: The FNE cleared with mitigation measures the acquisition by Discovery of certain businesses, operations and activities of Warner Media. The FNE identified two risks: the increase of bargaining power in the granting of licenses to Paid TV Operators and the risk of transfer of commercially sensitive information through the director of the new entity. The mitigation measures were, among others, the prohibition of tying and bundling, the prohibition of cross default clauses in contracts, an arbitration clause in contracts, and affidavits of the directors/executives. The FNE considered behavioural measures suitable to mitigate the identified risks.

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<sup>14</sup> CMA87, paragraph 3.32.

- *Fiat Chrysler/Peugeot (2020)*: The FNE cleared in Phase II and with mitigation measures the concentration between Fiat Chrysler and Peugeot. The transaction would entail potential unilateral effects on prices, in the segment of new light vans, if approved outright. To mitigate the risks, the parties agreed with the FNE to keep the import and wholesale distribution of RAM, Citroën and Peugeot-Opel brand products separate and to unilaterally offer a certain annual capacity of vans for Chile in favour of Toyota if requested (quasi-structural remedy).

4.23 CADE’s Guidelines also consider that, if effective to mitigate the competition concerns, behavioural remedies should be imposed when structural remedies fail to successfully address such concerns or, due to regulatory or factual matters, may be inefficient. In particular, behavioural remedies are usually considered in the context of vertical cases, as they are more adequate to maintaining potential efficiencies of a merger while also mitigating the risk of market foreclosure.

#### **ROLE OF MONITORING TRUSTEES**

4.24 With regard to the role of a Monitoring Trustee (“MT”) in the context of merger reviews in the International Jurisdictions, this primarily relates to the implementation and monitoring stage of remedies and less so to its design and the MT is generally appointed only after remedies have been accepted.

4.25 The MWG respectfully encourages the CMA to consider if there is scope to make more use of MTs, particularly where the CMA does not have the in-house capability or expertise to monitor a remedy. MTs often have industry experts that can bring valuable sector experience. Moreover, they are not a burden on CMA resources and are still subject to the same independence requirements that are a standard requirement for an MT.

#### **5. REMEDY THEME 2: PRESERVING PRO-COMPETITIVE MERGER EFFICIENCIES AND MERGER BENEFITS**

5.1 In this submission, the MWG also wishes to briefly address the treatment of merger-related efficiencies in the context of remedies design and bring this element to the CMA’s attention.

5.2 The ICN has acknowledged the significance of preserving merger efficiencies during remedy design<sup>15</sup>:

*“Efficiencies can be important to merger remedy design. When feasible, merger remedies should eliminate the likely anti-competitive effects of a merger in the relevant market without unnecessarily sacrificing substantiated efficiencies in the same or other markets or aspects of the transaction.”*

5.3 While certain competition authorities, such as the EC or the CCCS, do not address the consideration of merger-related efficiencies in their guidelines, the FNE for example has in

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<sup>15</sup> ICN Recommended Practices for Merger Analysis, Part VIII, A, Comment 5.

practice accepted remedies related to efficiencies. Therefore, the MWG respectfully encourages the CMA to factor in pro-competitive efficiencies on a case-by-case basis.

## **6. REMEDY THEME 3: RUNNING AN EFFICIENT PROCESS**

### **PHASE 1 REMEDIES PROCESS**

- 6.1 As noted above, effective remedy design requires constructive and iterative engagement between the merging parties and the competition authority. It is, therefore, important that the process at Phase 1 allows merging parties to have sufficient and effective engagement with the CMA. In this regard, not revealing the CMA's concerns in a detailed manner before the Issues Letter stage leaves only a very short time for merging parties to engage on remedies with the CMA.
- 6.2 In practice, this means merging parties will typically need to engage with the CMA prior to this stage. To the extent the process allows, the MWG would encourage the CMA to provide for earlier engagement on remedies, including by providing earlier indications of any potential concerns.
- 6.3 In this respect, merging parties are sometimes concerned about upfront engagement on remedies while the agency is still considering its substantive assessment of the case. Therefore, to give parties greater comfort to engage in early remedies discussions, the MWG encourages the CMA to consider ways to strengthen the nature of the "without prejudice" discussions. This could potentially be achieved by engaging with the CMA's remedies team without (all or most of) the case team involved in the substantive assessment, or the inclusion of more detail in its guidance on the processes the CMA would typically put in place to ensure that early remedy discussions are not prejudicial to the SLC assessment.

### **PHASE 2 REMEDIES PROCESS**

- 6.4 Similar issues arise in relation to Phase 2. For example, while early engagement on remedies is now expressly permitted under the new Phase 2 process, it is important that merging parties have sufficient clarity on the scope of the CMA's concerns in order to be able to engage effectively with the CMA. In practice, this requires the CMA to provide constructive feedback on any potential concerns as soon as possible, for example at the Initial Substantive Meeting (*ISM*) and at the first Update Call following the ISM.
- 6.5 It is also important that the CMA makes itself available for regular and frequent interactions with the merging parties. Such ongoing constructive engagement is critical to ensure that a viable and robust remedy can be achieved. By having regular interactions, merging parties are better able to understand and respond at pace to potential concerns the CMA has about their remedy offer as they arise.
- 6.6 Further, as set out above in relation to Phase 1 remedies discussions, merging parties can be discouraged by the lack of formal safeguards to ensure that the case team / Inquiry Group are able to "divide their minds" as between remedies and substance, such that discussions are genuinely without prejudice. Any safeguards that can be put in place to assist with this issue would help improve the process.

### **INTERNATIONAL COOPERATION**

- 6.7 The MWG welcomes the UK Government's draft Strategic Steer that the CMA should consider actions being taken by agencies in other jurisdictions internationally, and, where appropriate,

seek to ensure parallel regulatory action is timely, coherent and avoids duplication where these parallel actions effectively address issues arising in markets in the UK.

- 6.8 This is consistent with the ICN Recommended Practices for Merger Notification and Review Procedures which identify a number of benefits from regulatory enforcement cooperation, including: fostering efficient merger review (by removing unnecessary duplication of work and burden for merging parties and agencies), promoting merger enforcement, in particular by reducing gaps in information available to agencies, and leading to consistent / non-conflicting outcomes.
- 6.9 In light of the above, the MWG encourages the CMA to coordinate effectively with agencies in other jurisdictions in line with the draft Strategic Steer and ICN Recommended Practices. In particular, the CMA should consider whether remedies that are being proposed in other jurisdictions are effective to remedy any SLC that it has identified.

## **7. CONCLUSION**

- 7.1 The Antitrust Section would like to take this opportunity to thank the CMA in advance for considering these comments. The Section would like to commend the CMA on consulting on its remedies approach and hopes that this submission will enable the CMA to improve and continue to refine its merger remedies guidelines.
- 7.2 If the CMA would like to discuss the points raised in this submission, please contact the Section Officer identified in the cover letter.