CMA Consultation – Review of Merger Remedies

Submission from civil society organisations

INTRODUCTION

We are a coalition of civil society organisations concerned about the detrimental effects of concentration of corporate power on the economy, society and individual well-being. Through our submissions to European competition authorities, we support a strict and vigorous enforcement of competition rules to keep markets open, fair and resilient.[1] We welcome the opportunity to share our observations on the CMA's consultation on the design and implementation of merger remedies.

With declining competition across a wide range of industries,[2] ensuring that competition rules and merger control are enforced effectively is more important than ever. Over the past few years, the United Kingdom has been respected as a jurisdiction that has struck the right balance between flexibility and vigour in effectively tackling harms to competition in merger control and market investigations.[3] In merger control, the CMA has been one of the few agencies willing to stand in the way of harmful acquisitions: it almost blocked the merger between Microsoft and Activision and prohibited Facebook from purchasing the start-up Giphy.

Despite these positive developments, we fear that the UK is set to reduce its efforts to enforce competition law vigorously. Recently, the UK government has implied that there is a tension between competition enforcement and economic growth. In October 2024, Prime Minister Keir Starmer promised to "*rip up the bureaucracy that blocks investment*" and to "*make sure that every regulator in this country, especially our economic and competition regulators, takes growth as seriously as this room does*".[4] On 24 December 2024, the Prime Minister addressed a letter to several regulators, including the CMA, highlighting that "[w]*e have heard too often examples of UK regulators and regulations inhibiting private sector*".

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[1] For instance, we intervened in several mergers cases before the European Commission (Amazon/iRobot: https://www.somo.nl/wp-content/uploads/2023/02/Civil-Society-Groups-Submission-to-the-EC-on-Amazon-iRobot.pdf and Nvidia/Run:ai : https://www.article19.org/wp-content/uploads/2024/12/M.11766-Nvidia-Run-ai-CSO-submission-20241210.pdf) and took part in EU consultations on Article 102 draft guidelines (https://www.article19.org/wp-content/uploads/2024/11/Article-102_DraftGuidelines_Submission-from-civil-society-coalition_FINAL.pdf) and the state of competition in Generative AI (https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/65f1c73cfa65534db0d5bdf2/1710343997184/EU_GenAI_CivilSociety.pdf). In the United Kingdom, we took part in several consultations and asked that the CMA investigates partnerships in AI and Microsoft's partnerships with Open AI (see https://www.iccl.ie/wp-content/uploads/2024/05/20240513-AI-Partnership-CSO-Submission-To-CMA.pdf and https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/659c58b14b34d41d81619408/1704745138035/20240108-CSOs-Submission-To-CMA-on-MS-OpenAI-partnership_FINAL.pdf).

[2] European Commission, Protecting competition in a changing world, June 2024, https://competition-policy.ec.europa.eu/system/files/2024-06/KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf; CMA, The State of UK Competition, 2024.

[3] Examples of this balance includes the voluntary and non-suspensory merger control and the market investigation tool. The German Market investigation tool introduced in 2023 was inspired by the UK toolkit (https://one.oecd.org/document/DAF/COMP/AR(2024)13/en/pdf).

[4] https://www.gov.uk/government/speeches/pm-international-investment-summit-speech-14-october-2024.

Far from being inimical to growth, strong competition enforcement drives business dynamism and innovation. Preventing concentration of market power through robust merger control keeps markets open and dynamic, thereby protecting consumers and workers, supporting innovation and fostering market entry by new players.[5] As Simon Holmes recently said, "*where a merger is challenged it is to protect competition and keep alive an environment where the merging companies' competitors can thrive and potentially grow*."[6] This is particularly crucial in the field of AI , where dominant firms are using strategic acquisitions and partnerships to consolidate their power. Last year, our group pushed for close scrutiny of AI partnerships by the CMA.[7]

Our submission stresses the importance of ensuring that UK merger control remains effective, with a focus on designing appropriate remedies able to comprehensively address the expected anticompetitive effects arising from proposed transactions. In particular, we make the following points:

1. The application of the new **pace and proportionality principles must not result in unworkable remedies**. Although we see the benefits of acting expeditiously and proportionately, this should not be at the expense of the thorough analysis needed to assess and address the potentially complicated anti-competitive harms arising from complex concentrations.

2. Among competition authorities, there is a broad and longstanding agreement that **structural remedies are generally the most effective type of remedy,** particularly compared to behavioural remedies seen as burdensome, difficult to design and requiring ongoing monitoring. This is not to say that behavioural remedies are never appropriate. At times, behavioural measures, or a mix of structural and behavioural measures, may be most effective to preserve competition.

   Yet, increased reliance on behavioural remedies, which the CMA is considering, could weaken merger control and thus harm businesses, consumers and the UK economy. We encourage the CMA to **keep on pursuing its existing policy**. We are not convinced that there is sufficient empirical evidence to justify the proposal for an increased acceptance of behavioural measures. The CMA needs to **substantiate its position with available studies and further ex-post assessments of its merger control decisions**.

   In any event, it should focus on ensuring that remedies it accepts are always effective. Should they be unworkable, the CMA must not shy away from prohibiting transactions as it has done in the past.

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[5] European Commission, Protecting competition in a changing world, June 2024; CMA, Wider Benefits of Competition Policy and Enforcement, January 2025, https://www.gov.uk/government/publications/wider-benefits-of-competition-policy-and-enforcement/wider-benefits-of-competition-policy-and-enforcement-cma-microeconomics-unit-literature-review.

[6] See Simon Holmes letter in the Financial Times Letter: World of profitable exits and killer acquisitions, January 2025. Simon Holmes also recalls that "*there is a common misconception that mergers and acquisitions are inherently good for investment*". They may or may not be depending on the circumstances of the case and how the merging parties implement the transaction.

[7] See our calls for the CMA to review the Microsoft-Open AI partnership and various AI partnerships (https://www.iccl.ie/wp-content/uploads/2024/05/20240513-AI-Partnership-CSO-Submission-To-CMA.pdf and https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/659c58b14b34d41d81619408/1704745138035/20240108-CSOs-Submission-To-CMA-on-MS-OpenAI-partnership_FINAL.pdf).

3. The Call for Evidence suggests using remedies to enhance "pro-competitive merger efficiencies" or "customer benefits" brought about by a merger.

   Claims of efficiencies or other benefits made by merging businesses are often overstated and rarely materialise, and **should therefore not become the focus of merger control**. The CMA should also **assess the long-term effects** of transactions and consider their impacts on a **wide range of parameters** beyond short-term efficiencies, for instance market dynamism and supply chain resiliency.

   When assessing Relevant Customer Benefits, the CMA **should not view the consumer interest in isolation**. Transactions affect direct customers and end-users, but also workers hired by the merging parties, suppliers, citizens, supply chain resiliency, diversity and other broader societal interests such as media pluralism and democracy.

4. The CMA intends to increase its dialogue with businesses during the review of merger remedies. We encourage the CMA to **extend this dialogue to a wider range of stakeholders** including civil society organisations, labour unions, citizens and other regulators. The CMA should also put in place safeguards to ensure that this dialogue does not jeopardize its independence.

1. The "pace" and "proportionality" principles must not weaken merger control

Under the current Merger Remedies Guidance, the CMA must design remedies that are (1) **effective** to address the substantial lessening of competition and (2) **proportionate** in a way that is the least costly and intrusive to tackle the substantial lessening of competition.[8]

We are concerned that the application of some of the principles in the CMA's new Merger Charter, in particular "pace" and "proportionality", may result in ineffective remedies and weak overall UK merger control.[9]

a) Although we recognize the benefits of timely enforcement, **"expeditious" processes** must not come at the expense of rigorous analysis. For similar reasons, the CMA should not abandon the requirement that a Phase 1 remedy should be clear cut and ready for implementation. This approach could result in problematic transactions being approved too quickly and potentially subject to weak conditions and/or unworkable remedies.

   As merger decisions are definitive and very difficult – if not impossible – to undo, we strongly encourage the CMA to conduct thorough assessments, including through Phase 2 investigations if need be, before approving transactions.

b) Although **requests for information** sent to merging parties and other stakeholders should be proportionate and targeted, they should not be drastically scaled down to

[8] CMA Merger Remedies Guidance 2018, para 3.4.

[9] https://www.gov.uk/government/publications/mergers-charter-how-to-work-with-the-cma-on-a-merger-investigation/mergers-charter. See CMA, "*New CMA proposals to drive growth, investment and business confidence*", https://competitionandmarkets.blog.gov.uk/2025/02/13/new-cma-proposals-to-drive-growth-investment-and-business-confidence/.

"minimise burden" on businesses. Robust merger decisions require sufficiently detailed data and information, and it is for the CMA to determine what is necessary on a case-by-case basis. Similarly, detailed market testing of potential remedies necessitates that the CMA gathers sufficient evidence from merging parties and other stakeholders.

Since merger reviews are forward looking and rely on existing facts to evaluate how markets will evolve in the future, competition authorities benefit from collecting evidence and feedback from a wide range of stakeholders to understand market conditions and verify declarations made by merging parties. We encourage the CMA not to let its pace and proportionality principles eclipse the need for detailed information requests to enable it to carry out its merger functions effectively and to a high standard.

2. *Designing the right remedies*

Competition authorities agree that the **most effective remedies are generally structural in nature.**

- Structural remedies are usually preferable as they are more likely to address changes in market structure brought about by a merger, they do not require burdensome monitoring and often have a lasting competitive impact.[10] Indeed, in the European Union, from 2018 to 2023, 80% of conditional clearances relied on structural measures.[11] And in the United States, this share reached more than 90% from 2017 to 2021.[12]

  In contrast, behavioural remedies tend not to restore an equivalent pre-merger market structure, are burdensome for agencies as they require ongoing monitoring, are vulnerable to circumvention by the parties and can be outpaced by changes in the technologies and business models.[13] It can also be difficult for regulators to predict how they will work in the future, and their uncertainty can raise risks of improper implementation.[14]

- Several authorities, including the CMA, have consistently pursued this line of argument. In 2021, the CMA, Bundeskartellamt and the Australian Competition Authority publicly stated that structural remedies are more likely to preserve competition.[15] In 2022,

[10] European Commission, Notice on Remedies, 2008; Bundeskartellamt, Guidance on Remedies in Merger Control, 2017.

[11] Margrethe Vestager, Keynote speech at the International Forum of the Studienvereinigung Kartellrecht: "Recent Developments in EU merger control", 25 May 2023: "*looking at the past 5 years, 80% of our conditional clearances relied on structural remedies*" https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_23_2923/SPEECH_23_2923_EN.pdf.

[12] https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/economic-analysis-of-merger-remedies#footnote-096-backlink.

[13] CMA, Mergers Remedies Guidance. 2018.

[14] OECD, Ex-post Assessment of Merger Remedies, 2023, https://www.oecd.org/en/publications/ex-post-assessment-of-merger-remedies_84c232b6-en.html.

[15] https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement "*The increasing complexity of dynamic markets and the need to undertake forward-looking assessments require competition agencies to favour structural over behavioural remedies. It is widely acknowledged that complex behavioural remedies that create continuing economic links and dependencies are unlikely to recreate the pre-merger competitive intensity of the market, can raise significant circumvention risks, and can quickly become outdated as market conditions change*."

Margrethe Vestager reiterated that the European Commission also prefers structural remedies: "*parties are well aware of our preference for 'clean slate' remedies, by which I mean stand-alone divestitures. Clean slate remedies address competition concerns, and there is no need for long-term monitoring, which is resource intensive and increases the risk of regulatory avoidance over time*".[16]

- Ex-post assessments of merger remedies confirm this. According to the 2019 and 2023 UK Merger Remedies Evaluations, "*behavioural remedies are more complex and carry significantly higher risks than structural remedies and generally require more work both in upfront design and implementation and especially ongoing monitoring, enforcement, and review*". [17] Similarly, a recent study by the European Commission found that behavioural remedies in antitrust cases were less effective than structural ones.[18]

This is not to say that behavioural remedies are never appropriate. At times, behavioural measures, or a mix of structural and behavioural measures, can be properly monitored and may be the most effective way to preserve competition.[19] However, this will be merger specific and will depend on the relationship between the parties.

Despite this broad and established consensus on the effectiveness of structural measures, the CMA appears to be changing tack. According to the Call for Evidence, the CMA will explore the likely effectiveness or associated risks of behavioural remedies. Considering the evidence from ex-post assessments that structural remedies are generally the most effective means of addressing anti-competitive mergers, we encourage the CMA to keep on pursuing its policy. We are not convinced that there is sufficient empirical evidence to justify the proposal for an increased acceptance of behavioural measures. The CMA needs to substantiate its position with available studies and further ex-post assessments of its merger control decisions.

Over-reliance on behavioural remedies could weaken UK merger control and ultimately harm businesses, consumers, workers, resilience and the UK economy as a whole. In that regard, we regret that the CMA accepted behavioural remedies in the Vodafone/Three case, a decision that reduced the number of competitors in the market to just three and which is projected to cause consumer harm of about £216 million per year.[20]

The Call for Evidence also asks whether the CMA's current approach to judging effectiveness has precluded potentially effective remedies being considered as part of its **proportionality** assessment.

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[16] Margrethe Vestager, Keynote speech at the Global Competition Law Centre Annual Conference: "Competition Policy: Where We Stand and Where We're Going" (25 March 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2079 .

[17] CMA, Merger remedy evaluations, 2019 https://www.gov.uk/government/publications/understanding-past-merger-remedies and 2023 https://www.gov.uk/government/publications/understanding-past-merger-remedies-2023-update.

[18] European Commission study on antitrust remedies, 2024.

[19] OECD, Ex-post Assessment of Merger Remedies, 2023, https://www.oecd.org/en/publications/ex-post-assessment-of-merger-remedies_84c232b6-en.html.

[20] CMA Final Report, https://assets.publishing.service.gov.uk/media/6756f990f96f5424a4b877b7/Final_report_9_December_2024.pdf, para. 8.335 "*We have found that this would imply an annual loss in welfare to UK consumers of approximately £216 million a year (in 2023 GBPs)*" and "*Alternative analysis suggests that* [….] *the cost to UK consumers could therefore be significantly larger than the £216 million a year (in 2023 GBPs) reported above*".

When assessing which remedy would be most proportionate, the CMA should not lose sight of the goal that remedies seek to achieve, i.e. to address competition harms that will result from a merger. We believe that the goal should be interpreted broadly in order to fully restore competition on the market.

In practice, the CMA should only clear transactions that are fully compatible with merger rules. Should remedies be unworkable, the CMA must not shy away from blocking mergers as it has done in the past with Microsoft/Activision or Giphy/Facebook. In the Vodafone/Three merger, the CMA found a substantial lessening of competition on a wide scale, but nevertheless approved the merger, accepting less competition in exchange for investment commitments and time-limited price controls. This might be construed as a deal for extra investment in exchange for extra market power, while the introduction of semi-permanent quasi-regulation will be a heavy bureaucratic burden on the CMA and Ofcom. Even with monitoring, it is not clear how the merged entity will be held to account and whether the investment will bring the benefits claimed by the merging parties given that history has shown that the market is better placed to determine investments.[21] Clearing these mergers allows companies to build market power across the UK and is not in the interest of consumers or the economy.[22]

3. Preserving or enhancing merger efficiencies or customer benefits

The Call for Evidence invites stakeholders to identify to what extent merger remedies could safeguard or enhance pro-competitive merger efficiencies and/or relevant customer benefits (e.g. lower prices, higher quality of goods or services) arising from a merger.

a) Claims of efficiency savings, in the form of pro-competitive merger efficiencies, have been a standard part of the lobbying playbook for over a decade and have led to serious market distortions. Efficiency defences are often exploited to distract regulators from concrete harms caused by mergers.

   The **prospect of highly uncertain future economic efficiencies should not come at the expense of effective competition in the UK economy**. Efficiencies are uncommon and rarely materialise, especially in highly concentrated markets.[23] They cannot be used

[21] See a study showing that higher market concentration in mobile telecommunications does not lead to higher investment : Lear, E.CA Economics, Fideres, Prometeia, the University of East Anglia and Verian (2024), Exploring aspects of the state of competition in the EU: Final report, https://competition-policy.ec.europa.eu/system/files/2024-06/KD0224126enn_exploring_aspects_of_the_state_of_competition_in_the_EU.pdf.

[22] See Balanced Economy Project submission on the case: https://assets.publishing.service.gov.uk/media/66fd3343080bdf716392ec82/Balanced_Economy_Project_response_to_the_notice_of_possible_remedies.pdf .

[23] OECD, Efficiencies in merger control 2025, https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/05/efficiencies-in-merger-control_35afdef5/f4ce548f-en.pdf finding that "*there is evidence ex-post that efficiencies from mergers that substantially reduce competition are limited, short in duration or do not end up occurring, and academic studies that conclude that efficiencies tend not to materialise in highly concentrated markets*". Australian Competition and Consumer Commission, Submission on Merger Reform, https://www.accc.gov.au/system/files/merger-reform-submission.pdf stating that "c*) The majority of mergers analysed resulted in higher prices suggesting that: i. efficiencies from the mergers were not particularly common;* [...] *d) Price increases from mergers can occur in markets with a significant number of remaining competitors, but are more likely in more concentrated markets.*" (p. 15; see also p. 32 section "*What is the likelihood and size of efficiency benefits from merger*"). Also see the CMA 2021 Merger Assessment Guidelines relying on a study by John Kwoka "Reviving Merger Control: a comprehensive plan for reforming policy and practice" to say that "[s]*ome studies have found that firms often do not fully realise the expected synergies from their mergers and, even for the synergies that they do realise, firms do not always pass on the benefits*

as a shield from illegality[24] and should therefore not be given undue prominence in merger control. The CMA must prioritise safeguarding competition and ensuring that markets remain fair and open.

As merging parties have a strong incentive to overstate the existence and size of these so-called "benefits" to see a transaction cleared, we encourage the CMA to be cautious and not accept weak remedies purely on the basis of hypothetical pro-competitive merger efficiencies or customer benefits.

b) We would also encourage the CMA to **consider the long-term and broader consequences** of a transaction when reviewing merger efficiencies or customer benefits.

Even though transactions may give rise to identifiable efficiencies and benefits, their positive effects are likely to be short-lived.

Also, although transactions may give rise to efficiencies in a narrow sense (e.g. relating to cost savings or quality of the products), they may also have a detrimental effect on a wider range of parameters including market dynamism, innovation, supply chain resiliency, independence and sustainability. Overall, the transaction could have a detrimental effect on an ecosystem or could prevent the market from remaining fair, open and contestable in the future despite creating an efficiency in a narrow sense.

c) When assessing Relevant Customer Benefits, the CMA **should not view the consumer interest in isolation**. Transactions affect direct customers and end-users, but also workers hired by the merging parties, suppliers and citizens. By reducing the number of players on the market, a merger can also affect supply chain resiliency, independence and diversity. Other broader societal interests that can be affected by a merger include media pluralism and democracy.[25] All these interests should be considered when reviewing Customer Benefits.

4. Process

The Call for Evidence seeks to identify how the CMA's remedies processes can be further improved. According to the Merger Charter, the CMA will "*ensure direct and constructive*

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to their customers." https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_--_.pdf.

[24] The US Supreme Court has held that "*possible economies* [from a merger] *cannot be used as a defense to illegality*". See the US Merger Guidelines, 2023. See also Open Markets Institute submission on Merger Enforcement in 2022 and on the Draft Merger Guidelines in 2023 (https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/6261b1cd824c931f5dfc5910/1650569677801/Open+Markets+Institute_+Request+for+Information+on+Merger+Enforcement_4-21-22.pdf and https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/6508b7519a09d16de987eed5/1695070033315/Comment+on+Guidelines+-+for+submission-1.pdf).

[25] The European Commission took account of media plurality in the Vivendi/Hachette merger (M.10433). In the Google Android case, the EU General Court upheld the Commission's view that Google's practices were not in line with competition on the merits and did not "*ensure plurality in a democratic society* » (case T-604/18). More generally, in the *Meta* case, the Court of Justice confirmed that a competition authority may examine whether a company complies with other rules than those relating to competition rules (case C-252/21, paragraph 48 – see also Ariel Ezrachi & Viktoria H.S.E. Robertson, 'Can Competition Law Save Democracy? Reflections on Democracy's Tech-Driven Decline and How to Stop It' (2024) Journal of Antitrust Enforcement).

engagement with businesses".[26] It will be willing to discuss remedies with merger parties from the outset of a Phase 2 inquiry.[27]

We encourage the CMA to adopt this transparent and open approach with a wider group of stakeholders that includes civil society organizations, consumer organisations, labour unions, and other regulators such as Ofcom and the Information Commissioner's Office. CMA merger decisions would greatly benefit from input from other stakeholders, including by reducing information asymmetries, increasing the diversity of perspectives considered, and filling in gaps in expertise.

In addition, it is critical that increased dialogue with businesses does not affect the CMA's independence and objectivity. The CMA should put in place safeguards to minimise risks of capture.

Finally, the Call for Evidence mentions that the CMA will consider how its processes "*can effectively take account of the parallel actions of other competition authorities*". This follows the UK government draft Strategic Steer calling for the CMA to let peer regulators intervene and avoid "*duplication where* [...] *parallel actions effectively address issues arising in markets in the UK*".

Although the CMA should cooperate with other agencies to identify the most appropriate remedies to shared concerns, it should not accept weak undertakings simply because other agencies are planning on adopting remedies that may – or may not – have an effect in the UK. Peer agencies will not take decisions that specifically address competition harms arising in UK markets. Under its mandate, the CMA must preserve competition in the UK by accepting effective remedies or blocking a merger if remedies cannot resolve competition concerns. [28]

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12 May 2025

Signatories

Article 19

Balanced Economy Project

Open Markets Institute

Rebalance Now

SOMO

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[26] CMA Merger Charter https://www.gov.uk/government/publications/mergers-charter-how-to-work-with-the-cma-on-a-merger-investigation/mergers-charter.

[27] CMA, 2025 Call for Evidence, paragraph 65.

[28] See Open Markets Institute and Balanced Economy Project responses to the UK Government Strategic Steer (https://www.openmarketsinstitute.org/publications/open-markets-final-submission-to-the-uk-government-on-strategic-steer-to-the-cma and https://www.balancedeconomy.org/latest/1srusnocibjgq2ngd2a1wzc0me2zdk-d39a8-5e3pw-7ytzw-xt6yy-twkxm-kf86n-p5ah6-g7bgm-2kdx5-ywdzp-agywg-9k3lt-y4ym4-3k5r8-ztydl-wnncy-4p69w-b7al6-yhc4b-hwc2n-rmpwl-5f2fg-dhbxz-2txf6-758tm-p3axf-eyt9z).