
**Mergers: Guidance on the CMA's Jurisdiction and Procedure
Response by Cleary Gottlieb Steen & Hamilton LLP
To the Competition & Markets Authority's Consultation**

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1. Cleary Gottlieb Steen & Hamilton LLP welcomes the opportunity comment on the CMA’s draft revised guidance on jurisdiction and procedure (**Revised J&P Guidance**) and the CMA’s mergers intelligence function (together, the **Draft Guidance**).
2. The comments in this response are made on our own behalf. They are based on our experience representing clients in merger control proceedings before the CMA and other competition authorities. They do not necessarily represent the views of our clients. We confirm that this response does not contain any confidential information and it may be published on the CMA’s website.
3. Overall, the Draft Guidance is helpful and clear. We welcome the updates that reflect developments in case law, evolution in the CMA’s policies and procedures, and changes to the legal framework concerning public interest mergers. We also welcome the CMA’s efforts to streamline the Draft Guidance in light of guidance that has been issued on other aspects of merger control, including remedies, interim measures, and internal document requests.¹
4. Rather than addressing every point, our comments are limited to discussing the following five issues in the Draft Guidance: the description of the share of supply test (**Section I**); the use of formal interview powers (**Section II**); reference decisions issued in fast-track cases (**Section III**); coordination with other agencies in multi-jurisdictional mergers (**Section IV**); and the time between receipt of an issues letter and an issues meeting (**Section V**).

I. Greater clarification around the share of supply test

5. At ¶¶4.63(a)-(d) of Revised J&P Guidance, the CMA provides a revised description of how it will apply the share of supply test. As currently drafted, we are concerned that the guidance does not allow merging parties to determine in a quick and reliable way whether a transaction qualifies for review. This conflicts with the Government’s intention when introducing the Enterprise Act that “*the thresholds have to be simple and easy to determine quickly*” to ensure “*a clear, consistent and predictable merger-control regime*.”²
6. The Revised J&P Guidance reinforces the CMA’s intention to continue applying the share of supply test flexibly, by referring to descriptions of goods that do not necessarily correspond to relevant markets, may not be reasonably anticipated by the merging parties, and may still be in the pipeline and uncertain ever to reach the market.³ The implication of the Revised J&P Guidance is that the CMA may assert jurisdiction by calculating

¹ See Merger Remedies (CMA87); Interim measures in merger investigations (CMA108); and Guidance on requests for internal documents in merger investigations (CMA100).

² Hansard Record: Commons Standing Committee B, 30 April 2002.

³ Revised J&P Guidance, ¶4.63(b).

shares using metrics that are unfamiliar to the merging parties and which only the CMA is in a position to compute.

7. We appreciate that the CMA has a statutory duty to investigate transactions that may adversely affect competition in the UK. The approach set out under the Revised J&P Guidance, however, remains uncertain and difficult to predict.⁴ It is unsatisfactory that merging parties cannot readily determine whether a given transaction may fall within the scope of UK merger control rules.⁵ This also conflicts with the Government's explanation at the time of introduction of the Enterprise Act that: "*The purpose of the [share of supply] test is to take out of the scope of merger control a large number of transactions that are of no economic concern and to give business regulatory certainty that they will not fall within merger control.*"⁶
8. We are concerned that the broad latitude afforded the CMA under the Revised J&P Guidance risks the possibility for stretching the wording and legislative intention of the Enterprise Act to establish jurisdiction in situations where the relationship between the merging parties is in reality vertical or conglomerate. Doing so would conflict with Parliament's intention that the Enterprise Act should apply only to horizontal overlaps.⁷
9. These issues will become more pronounced after the Brexit transition period ends, and the CMA will be reviewing around 50 additional transactions each year in parallel to the European Commission (EC). An overly flexible approach to establishing jurisdiction over transactions with a minimal nexus to the UK would risk undermining the voluntary nature of the regime (especially absent a reliable *de minimis* safe harbour), creating costs for businesses, and discouraging potentially procompetitive transactions.
10. The most comprehensive solution for the lack of clarity in the share of supply test would be an amendment to the Enterprise Act to provide a bright-line jurisdictional test, for example one that is based purely on turnover. Absent legislative change, we recommend that the CMA update the Revised J&P Guidance in relation to the share of supply test to give merging parties greater certainty and predictability about its application. In our view, this could be achieved in five main ways:

⁴ For example: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc. (ME/6831/19), CMA decision of 16 December 2019; Completed acquisition by Google LLC of Looker Data Sciences, Inc. (ME6839/19), CMA decision of 13 February 2020.

⁵ One of the fundamental principles of a well-designed system of merger enforcement is that it should include "bright-line" jurisdictional rules: International Competition Network, Recommended Practices For Merger Notification and Review Procedures, amended May 2017 (thresholds should be "*clear, understandable, and easily administrable 'bright-line' tests*"); and Recommendation of the OECD Council on Merger Review, 23 March 2005 (countries should "[u]se clear and objective criteria to determine whether and when a merger must be notified or [...] when a merger will qualify for review").

⁶ Hansard Record: Commons Standing Committee B, 30 April 2002. Somewhat ironically, the Government rejected a market share test at the time of introducing the Act because it considered "*it would take longer to calculate a more complex economic market share,*" which might "*encourage more notifications on a prudential basis, increasing the administrative burden on the OFT.*" The operation of the share of supply test under the Revised J&P Guidance, however, can be more complex and take longer than a simple market share calculation.

⁷ The House of Commons Research Paper published at the time of the Enterprise Bill confirms that "*[t]he Government has decided against introducing a third threshold test which would have caught mergers in linked (but separate) markets*", see Enterprise Bill, Research Paper 02/21 (4 April 2002), page 44.

11. **First, provide greater clarity on what constitutes a reasonable description of goods or services.** The CMA could provide greater clarity on the basis on which the share of supply will be determined. In particular, the Revised J&P Guidance could provide additional explanations on which activities, products, or services will qualify as a “*reasonable description*” of goods or services for the purposes of the test, and how shares of those products or services are likely to be calculated.
12. At a minimum, these additional explanations could acknowledge that the CMA will rely on established market definition precedent (from, *e.g.*, the CMA and EC) and publicly available market data to determine shares of supply wherever possible. Where, for example, the CMA or EC have defined a relevant market in previous cases, merging parties ought to be able to rely on that definition to determine whether the share of supply test is met.⁸
13. The Revised J&P Guidance could also explain that if there is a standard business approach to describing goods or services in the industry in question, or if goods or services are described in a particular way in the merging parties’ internal documents, the CMA will rely on those description as a reasonable description of goods or services. At present, the Revised J&P Guidance provides the opposite – explaining that the CMA may deviate from standards recognised by industry, without providing any explanation or clarification as to when the CMA might do so.⁹
14. **Second, make clear that there must be a real and tangible nexus with the UK for the CMA to exercise its jurisdiction.** By definition, the share of supply test is relevant to mergers with a more limited UK nexus (because the turnover test is not met). There should, though, still be some UK nexus for the CMA to assert jurisdiction under the share of supply test. As the CMA explained in *Roche / Spark*, the Enterprise Act allows the CMA to intervene in transactions only that “*are relevant to UK markets or activities and may be expected to raise competition concerns that could impact UK consumers.*”¹⁰ The Revised J&P Guidance should reflect this principle by making clear that the CMA will seek jurisdiction under the share of supply test only if there is a real and tangible prospect that the merger will affect competition and consumers in the UK.
15. **Third, create consistency with the treatment of internal supply for the share of supply test and substantive assessment.** The Revised J&P Guidance states that the CMA may “*aggregate, for example, intra-group and third party sales even if these might be treated differently in the substantive assessment.*”¹¹ We have several concerns with this passage:

⁸ In our view, this would be consistent with the Government’s explanation at the time of introducing the Enterprise Act that the purpose of the share of supply test applying to a reasonable description of goods or services, rather than an antitrust market, was to increase certainty for businesses (*supra* fn. 6). If precedent already delineates a well-established market, it makes little sense for the CMA to rely on a *different* description of goods or services – that simply increases uncertainty.

⁹ Revised J&P Guidance, ¶4.63(b).

¹⁰ Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc. (ME/6831/19), CMA decision of 16 December 2019, ¶81, emphasis added.

¹¹ Revised J&P Guidance, ¶4.63(b).

- It may allow the CMA to capture purely vertical mergers, contrary to Parliament’s intention at the time of introducing the Enterprise Act and the later discussion at Revised J&P Guidance, ¶4.64(d). This is because many purely vertical mergers could be viewed as combining a firm that supplies on the market with a firm that supplies itself.
 - There is an incoherence between the CMA’s approach to internal supply for the purposes of the share of supply test and the turnover test. Under the turnover test, applicable turnover does not generally include internal supply.¹² There is no rationale for this incoherence, given that the overall intention of the two jurisdictional tests is the same.
 - The CMA’s Guidance on Merger Assessment explains that self-supply is not relevant to the assessment of mergers if there is no prospect of volumes being diverted to the merchant market in response to a SSNIP.¹³ It makes little sense if such self-supply is considered for the share of supply test – which ultimately seeks to identify transactions of “*economic concern*” – but not the substantive assessment (because the self-supply is considered to have no competitive relevance).
16. Accordingly, we recommend that the Revised J&P Guidance make clear that the CMA will treat internal supply for the purposes of the share of supply test in the same way that it would for the substantive assessment.
17. **Fourth, establish a *de minimis* safe harbour for small mergers.** The Revised J&P Guidance could establish a *de minimis* safe harbour for small mergers, below which the CMA would not launch an investigation.¹⁴ In our experience, the *de minimis* exception for the duty to refer is an unsatisfactory tool for these purposes because merging parties face a costly and time-consuming Phase 1 investigation before the CMA decides whether to exercise its discretion. Moreover, it is somewhat perverse that the test for the CMA to exercise its discretion under the *de minimis* guidance is more complex than the standard SLC test (and, in fact, mirrors the “balance of harms” test proposed by the Report on Unlocking Digital Competition that the CMA rejected as being unworkable).¹⁵
18. **Fifth, clarify the relevance of pipeline products when considering the share of supply test.** The Revised J&P Guidance explains, by reference to the *Roche/Spark* case, that the CMA considers that “*competitive interactions between firms may not be reduced to overlaps in directly-marketed products or services but can result, for example, from overlaps involving pipeline products or services.*”¹⁶ This description forms part of the

¹² Amounts derived from transactions between enterprises that are and will remain, post-merger, under the same common ownership or common control, are excluded from the turnover test. See Revised J&P Guidance, Annex A, ¶A.18; and Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, Schedule, ¶8.

¹³ Merger Assessment Guidelines (CC2/OFT1254), September 2010 (¶5.2.20): “*The [CMA] will generally follow the principle that captive production by the firms will be included in the relevant market only if it can be demonstrated that it would be profitable for the supplier to forgo its use and sell into the merchant market in response to a SSNIP.*”

¹⁴ Compare, for example, the binding *de minimis* safe harbours in Germany (€10 million worldwide turnover), Poland (€10 million local turnover), and India (c. €123.9 million worldwide turnover).

¹⁵ CMA’s response to the Digital Competition Expert Panel Final Report, 21 March 2019.

¹⁶ Revised J&P Guidance, ¶4.63(b).

CMA's guidance on the application of the share of supply test. In that context, the description is potentially misleading. It could be read to imply that a pipeline product overlap, of itself, provides a basis for meeting the share of supply test.

19. In *Roche/Spark*, the CMA applied the share of supply test by considering the number of UK-based employees engaged in the relevant activities and the number of UK patents procured by the parties.¹⁷ The CMA did not consider the overlap in pipeline products, by itself, constituted a basis for meeting the 25% share of supply test – even to the Phase 1 “realistic prospect” standard. We recommend that the Revised J&P Guidance explain that, even though pipeline products may be relevant to the CMA's substantive assessment, pipeline products are not, by themselves, a basis for finding an overlap or increment for the purposes of the share of supply test.
20. In summary, we believe that implementing these clarifications to the Revised J&P Guidance would bring about substantial benefits to both the CMA and merging parties. It would provide greater certainty for merging parties, avoid unnecessary and protracted investigation on jurisdiction at the pre-notification stage, and enable the CMA to focus quickly on substantive issues raised by truly problematic transactions that affect competition and consumers in the UK.

II. Explaining the situations when the CMA may exercise its formal interview powers

21. At ¶9.8(c) in the Revised J&P Guidance, the CMA envisages, in some cases, issuing section 109 notices under the Enterprise Act requiring an individual to give evidence in a formal interview. The Revised J&P Guidance stresses the formality of this process: “[t]his is a more formal process than an ordinary information-gathering call with the merging parties (or third parties), and a failure to comply with such a notice can result in enforcement action...”¹⁸
22. We acknowledge that situations may exist where the CMA considers it important to conduct formal interviews as part of a thorough merger investigation. Preparing for and attending formal interviews can, however, be burdensome for merging parties. Because merging parties are already required to certify the accuracy and completeness of the merger notice and any documents or information provided in response to section 109 notices, we would expect that these formal interview powers will be used only in extraordinary circumstances.
23. There is, though, no explanation in the Revised J&P Guidance on the types of cases where the CMA expects to use these powers, the considerations the CMA will take into account before using them, or the categories of individuals that the CMA expects to call to be interviewed. Nor is there a recognition that these powers would only be utilised sparingly. We recommend that such guidance be provided.
24. In addition, further guidance on the procedures that will be employed during formal interviews would be welcomed. For example, the Revised J&P Guidance should make clear that the interviewee's legal advisors will be permitted to be present during the

¹⁷ Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc. (ME/6831/19), CMA decision of December 16, 2019, ¶¶104-111.

¹⁸ Revised J&P Guidance, ¶9.8(c).

interview; that the interviewee will have access to documents during the interview; and that merging parties will have access to recordings and transcripts after the interview.

III. Clarification around short-form decisions for fast-track references

25. The clarifications in Chapter 7 of the Revised J&P Guidance on the procedure and investigatory steps in cases where the parties request a fast-track process are helpful. The Revised J&P Guidance notes that “...*the CMA is required to publish a reasoned decision at the end of a phase 1 investigation in fast track cases.*”¹⁹
26. The fast-track process can facilitate the efficient conduct of merger investigation processes, for example, by allowing the alignment between a CMA inquiry and that of another competition authority. To achieve that efficiency objective, we recommend that the CMA implement a practice of issuing only a short-form reference decision at the end of Phase I, and update the Revised J&P Guidance accordingly. While the CMA has a duty to publish a reasoned decision under section 107 of the Enterprise Act, there is no reason why such a decision could not be substantially shorter, for example, by simply noting that the parties accept that the test for reference is met and the CMA’s duty to refer applies on that basis.²⁰
27. In our view, this approach may encourage more parties to agree to a fast track, thereby enhancing procedural efficiency for the CMA. At present, parties may have a disincentive to agree to a fast-track reference because there is a risk that a detailed adverse Phase 1 decision may prejudice the Phase 2 investigation. A short and simple Phase 1 reference decision would dampen that disincentive and create procedural benefits for the CMA.

IV. Coordination in multi-jurisdictional mergers

28. After the Brexit transition period ends, the CMA is expected to review a large number of complex mergers that are simultaneously being reviewed by other agencies around the world. In this context, we agree that it can be beneficial for the CMA to “*communicate and coordinate extensively with other authorities in reaching decisions on the competition assessment and remedies.*”²¹ We suggest two ways that the Revised J&P Guidance could be clarified to help coordination between the CMA and other competition agencies.
29. **Aligning information requests.** In recent years, the CMA has routinely required the production of thousands, sometimes hundreds of thousands, of internal documents. In most cases, competition agencies in different countries will be investigating similar or closely related issues, and may have issued parallel document discovery requests. It is inefficient and time-consuming for parties to face similar but slightly different requests from authorities in different countries. It also makes document discovery slower.

¹⁹ Revised J&P Guidance, ¶7.6.

²⁰ For example, the *Tesco/Booker* reference decision after a fast-track request is 62 pages and the *Sainsbury’s/Asda* reference decision is 21 pages.

²¹ Revised J&P Guidance, ¶18.5.

30. Agreeing the scope of any document product exercise in advance with the merging parties – including the relevant custodians, keywords, and timeframes – and aligning with other relevant agencies would lead to faster and more efficient document discovery. Accordingly, we recommend that the Revised J&P Guidance explain that the CMA will align its information gathering requests, in particular requests for large numbers of internal documents, with other competition agencies’ requests in multi-jurisdictional mergers.
31. **Decision not to make a reference to Phase 2 in multi-jurisdictional mergers.** The Draft Guidance notes that, in deciding whether to open an investigation on its own initiative, the CMA may take into account any merger control proceedings in other jurisdictions. In particular, the CMA may decide not to open an investigation if any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK.²² This is pragmatic and will help to merging parties to streamline the merger review processes involved in large multi-jurisdictional mergers.
32. While this clarification is welcomed, we recommend extending its application to include situations where the CMA has already opened a Phase 1 investigation. This would mean that the CMA would continue to consider the impact of other merger processes after it has started its own inquiry. If there were an investigation ongoing by another competition authority, such as the EC or the United States Federal Trade Commission or Department of Justice (**DoJ**), which found there to be no competition concerns on a global market or accepted remedies that address concerns in the UK, the CMA would take these facts into account and consider not referring the case to Phase 2.
33. Such a policy would create efficiencies for the CMA and the merging parties. It would allow the CMA to focus its resources and ease the burden on merging parties subject to multiple parallel merger reviews. It would also reflect the CMA’s existing practice in cases like *CME/NEX*, where the CMA cleared a merger in a global market at Phase 1.²³ The CMA’s Phase 1 clearance decision explained that the US DoJ conducted a “*parallel review*” of the transaction; that the DoJ had cleared the transaction a fortnight earlier; and that the CMA had “*liaised closely with the DoJ during its investigation.*”
34. To that end, we recommend updating ¶8.3 of the Revised J&P Guidance to read:

“In deciding whether to open an investigation on its own initiative, the CMA may take into account any merger control proceedings in other jurisdictions. The CMA may decide not to open an investigation, **or make a reference for a phase 2 investigation**, if any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK **or if those proceedings have found no competition concerns in the UK**. This could be the case, for example, where all of the markets that are relevant to the transaction are broader than national in scope.” (additions in bold)

V. Timing between receipt of issues letter and issues meeting

35. The current guidance states that the CMA will provide the merger parties with “*an interval of at least two working days*” between receipt of the issues letter and the date of

²² Revised J&P Guidance, ¶8.3.

²³ Anticipated acquisition by CME Group of NEX Group plc (ME/6751-18), CMA decision of 31 October 2018.

the issues meeting. The Revised J&P Guidance weakens protections for the merging parties by diluting this requirement. It notes that the CMA will provide merger parties “with a short interval (usually 48 hours, not counting weekends or public holidays) between receipt of the issues and the issues meeting.”²⁴

36. In our view, 48 hours (with the apparent possibility for even less time) is unreasonable and too short a period between an issues letter and meeting:
- The purpose of the issues meeting is for the parties to present the case against reference as set out in the issues letter. In our experience, 48 hours is an insufficient time period for the parties to prepare meaningful evidence, data, and explanations to rebut the – possibly numerous – theories of harm in any issues letter.
 - The Revised J&P Guidance notes that the CMA “will wish to speak to senior management in the business” at the issues meeting. As the CMA will appreciate, preparing senior management for an issues meeting takes time. 48 hours is often not enough time to brief senior management – who have other full time responsibilities – on the theories of harm set out in an issues letter and on which they are asked to respond in person at the issues meeting.
 - Often, an issues letter is sent after months of detailed pre-notification discussions, kick-off meetings, multiple RFIs, white papers, and economic analyses. The “*timing constraints of a Phase 1 investigation*”²⁵ that supposedly justify the 48-hour period are not relevant where there has been six months of pre-notification. We see no principled reason why the CMA cannot send the issues letter earlier in the Phase 1 timetable, to give the parties adequate time to prepare. Indeed, we are aware of complex cases where the CMA has sent issues letter over a week in advance of an issues meeting.
37. Providing for a longer period between the issues letter and the issues meeting would benefit all stakeholders. It would allow merging parties to meaningfully prepare and respond to the issues letter’s theories of harm, including with the support of senior management and economists. A longer period would also enable the CMA to ground its Phase 1 decision on a more complete evidence-base.
38. Accordingly, we recommend that the Revised J&P Guidance provide that the CMA should send an issues letter at least 72 hours before an issues meeting. At a minimum, the Revised J&P Guidance should make clear that the 48 hours is an absolute lower bound for the period that parties will receive (rather than the time period that will “usually” be allocated).

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39. We would be pleased to discuss any of the above points further should that be of assistance to the CMA.

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²⁴ Revised J&P Guidance, ¶9.31.

²⁵ Revised J&P Guidance, fn. 153.