

Proposed changes to the CMA's mergers guidance and merger notice template – Response of Ashurst LLP

6 August 2025

Introduction

- 1.1 We welcome the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on the proposed amendments to its guidance on the CMA's jurisdiction and procedure (**Draft Revised Guidance**) and merger notice template (**MNT**) (20 June 2025). This response contains our own views, based on our experience advising and representing clients on the application of the CMA's merger control regime under the Enterprise Act 2002, and is not made on behalf of any of our clients.
- 1.2 We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our response.

Draft Revised Guidance on the CMA's jurisdiction and procedure

Question 1: Overall, are the changes introduced by the Draft Revised Guidance sufficiently clear and useful?

- 1.3 The changes introduced by the Draft Revised Guidance provide a helpful outline of the CMA's plans to incorporate the '4Ps' framework within its work on merger control. However, there are several aspects of the guidance that would benefit from additional clarity (as explained in our combined response to questions 2 and 3 below).

Question 2: What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

Question 3: Are the changes Draft Revised Guidance consistent with the CMA's '4Ps framework' and likely to promote the pace, predictability, proportionality and engagement in the CMA's merger investigation process?

Pre-Notification and Phase 1 Review Process

Pre-Notification KPI

- 1.4 We welcome the proposal in the Draft Revised Guidance to reduce the current period for pre-notification from 65 to 40 working days. However, we would request that the CMA clarify in the Draft Revised Guidance that, in practice, the criteria for the commencement of the pre-notification period (set out in paragraphs 6.27 to 6.29 of the Draft Revised Guidance) will be applied in a reasonable and pragmatic manner. Where the merging parties submit a draft Merger Notice which is substantially complete, save for a small number of matters where relevant information or supporting documents are in the process of being obtained, this should not unduly delay the commencement of the pre-notification process. For example, in practice, merging parties do not generally have readily available contact details relating to competitors, and locating this information can be a time-consuming exercise.
- 1.5 If the criteria for the commencement of pre-notification are rigidly applied, this may have the consequence of actually delaying the overall transaction timetable for the merging parties, which would undermine Pace. This would also be inconsistent with the CMA's statutory duty to act expeditiously. Indeed, from the perspective of the merging parties, the formal duration of any pre-notification period is less important than the overall period of time between the merging parties' first contact with the CMA and the CMA's phase 1 decision.
- 1.6 We understand that there are reasons why merging parties may wish to opt-out of the 40 working day KPI in a particular case or that there will be exceptional cases where the CMA considers that the pre-notification KPI should not apply. In this regard, it would be helpful to confirm that the CMA intends to adopt a pragmatic approach to the disapplication of the KPI, for example, by avoiding situations where merging parties are required to respond to questions with unrealistic deadlines in order to satisfy the KPI.
- 1.7 Finally, merging parties would benefit from the CMA publishing statistics on the number of cases that fall within, or outside, the pre-notification KPI and the length of time that these cases take. Publishing this information would provide merging parties with greater certainty regarding the timing of the pre-notification period and would contribute to Predictability.

Teach-in during pre-notification

- 1.8 The Draft Revised Guidance proposes that the CMA will invite the merging parties to a teach-in at the beginning of the pre-notification stage. The opportunity for business personnel from the merging parties to deliver a teach-in is a welcome development.

- 1.9 However, it is important that holding a teach-in does not become a default expectation of the pre-notification process, as there are likely to be cases where a teach-in is not required and would create additional and unnecessary work for the parties (eg in cases where the CMA has previously investigated the sector).

Informal update calls

- 1.10 The Draft Revised Guidance envisages the case team delivering an informal update call approximately 20 working days into the pre-notification period and a further informal update call shortly before commencement of Phase 1. We would welcome the opportunity to engage with the case team at an early stage of its investigation, including in respect of any theories of harm that the case team might be contemplating, or to understand the evidence that the case team has received from third parties. However, as noted above, it is important to ensure that the update calls are informal in nature and do not create a further resource intensive formalistic step in the process that may introduce delay in the pre-notification process.
- 1.11 Additionally, we would recommend that the Draft Revised Guidance should confirm that the teach-in and informal update calls will be attended by senior case team officials who are in a position to provide substantive engagement and to answer any questions that the merging parties may have in "real time", which would further facilitate 'Pace'.

Material influence (MI) test

- 1.12 The Draft Revised Guidance has been updated to include "*other sources of material influence*", including references to previous cases where commercial agreements, financial agreements and agreements to provide consultancy services have been found, in themselves, to give rise to MI.
- (a) However, the Draft Revised Guidance would benefit from further clarification as to the circumstances in which "*other sources of material influence*" may give rise to MI. In particular, there would be merit in amending the Draft Revised Guidance to reflect the observations of the Competition Appeal Tribunal (**CAT**) in *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30, which sets out the circumstances in which commercial agreements between parties might give rise to MI; as currently drafted. Footnotes 59 and 61 are essentially circular as they state, in effect, that economic dependence will only amount to material influence when it confers the ability materially to influence strategic commercial decisions (which is essentially the definition of material influence).
- 1.13 Secondly, we note that the Consultation Document and the Draft Revised Guidance do not refer to the MI test under the National Security and Investment

Act 2021 (**NSI Act**). However, we note that the [Government's Guidance](#) on the NSI Act expressly refers to the CMA's guidance in relation to MI and we assume that any amendments to the Draft Revised Guidance take account of the implications for the NSI regime.

Share of supply test

- 1.14 The Draft Revised Guidance includes the following proposed wording in relation to the share of supply test: "*[t]he CMA will typically only focus on the factors specified in the Act to determine whether the 25% threshold is met, for example value, cost, price, quantity, capacity and number of workers employed*" (paragraph 4.72; emphasis added).
- 1.15 The factors cited as examples exclude the provision in the Enterprise Act 2002 (section 23(5)) which refers to "*some other criterion, of whatever nature*". The Draft Revised Guidance should be amended to clarify that this "*catch-all*" proviso is not one of the factors that the CMA will typically focus on when applying the share of supply test (ie by deleting the words "for example" to ensure that the list of cited factors is exhaustive).
- 1.16 In addition, the "*number of workers employed*" is a factor that the CMA has only applied in a small number of cases (eg BlackRock / Prequin (2025), CVS / Quality Pet Care (2023) and Roche / Spark (2020)). It would therefore not be accurate to state that this is a criterion that is "*typically*" applied under the Share of Supply test. We would welcome the CMA's confirmation that this criterion will only be applied in exceptional cases, which would be more consistent with the CMA's decisional practice.
- 1.17 Finally, we note that the Draft Revised Guidance has been amended to confirm that when applying the share of supply test: "*[i]n determining the description of goods or services, the CMA will consider those which are relevant to any potential competition concerns arising from the merger*" (paragraph 4.64, emphasis added).
- 1.18 This paragraph could be more clearly expressed so that it is consistent with footnote 105 of the Draft Revised Guidance, which refers to the CAT's ruling in Sabre,¹ and the CAT's finding that "*there needed to be a sufficient prospect of a competition concern arising from an overlap in a relevant commercial activity as to render it worthy of investigation by the CMA*" (paragraph 144, emphasis added).
- 1.19 Paragraph 4.64 should therefore be amended to confirm that the CMA "*will only consider*" potential competition concerns that arise from a share of supply overlap that confers jurisdiction. In other words, the share of supply overlap should directly relate to the competition concern.

¹ Sabre Corporation v Competition and Markets Authority [2021] CAT 11.

The 'wait and see' approach

- 1.20 We welcome the CMA's proposed 'wait and see' approach to exclusively global or at least broader-than-national markets which, in principle, is consistent with the CMA's commitment to proportionality.
- 1.21 However, further guidance is required as to how the CMA intends to apply its 'wait and see' policy in practice. For example, it is important that businesses are not left in a position where there is uncertainty as to whether CMA might intervene at a late stage and with limited warning (eg a scenario where a detailed investigation is undertaken by another competition authority which is sequentially followed by the CMA initiating a separate merger investigation, thereby adding significantly to the overall deal timetable), which would not be consistent with the principles of Pace, and Predictability. The Draft Revised Guidance should therefore explain that, after an informal review and engagement with the merging parties, the CMA will provide assurances to them that it does not intend to open an investigation and will keep the parties updated as to any concerns that might arise so that the parties have sufficient opportunity to address such concerns through their engagement with other international competition authorities. Only if that is not possible, should the CMA open an investigation. In other words, there should be no "late surprises".

Question 3: Are there any additional changes that may further contribute to these priorities?

- 1.22 The amendments to the Draft Revised Guidance primarily focus on the CMA's procedure during pre-notification. However, there are other opportunities to implement the 4Ps across the CMA's work on merger control. For example, it remains the case that merging parties are not granted access to the file during Phase 2 investigations, which contrasts with the approach that is adopted by the European Commission and many other competition authorities. Access to the file would lead to a more transparent process and enable parties to prepare more relevant submissions that address concerns raised by third parties, which would have additional benefits in terms of both Pace and Predictability and running a fair Process.

Draft revised mergers notice template

Question 4: Are the proposed amendments to the current Merger Notice template sufficiently clear and useful?

Question 5: Are the proposed amendments to the current Merger Notice template appropriate in order to provide the CMA with the necessary information to conduct an efficient pre-notification process?

Question 6: Are the proposed amendments in the current Merger Notice template in line with the '4Ps' framework?

Question 7: Do you have any other suggestions for additional or revised content of the current Merger Notice template?

We have no comments in relation to the above questions, other than as set out below.

Question 8 of the MNT

- 1.23 We do not have any comments on the amendments to Question 8 of the MNT.

Question 9 of the MNT

- 1.24 Question 9 has been amended to include a request for documents that address the competitive conditions, market conditions, market shares, competitors, or the merging parties' business plans in relation to the "Relevant Markets", which include vertical and conglomerate markets (in addition to horizontal markets). The market share threshold for which documents are required to be provided under this question has also been decreased from 15% to 10%. This raises a number of potential concerns:

- (a) the volume of documents that may be responsive to this question are likely to be significant, particularly in cases involving merging parties that are active in a large number of overlapping vertical and conglomerate markets;
- (b) it is highly unlikely that a market share threshold of 10% or more raises competition issues in the context of vertical or conglomerate markets. A more appropriate threshold would be 30% (which would align with the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022); and
- (c) in practice, it is likely that merging parties will need to engage across a much wider number of business departments in order to locate documents that are responsive to this question (merging parties that operate businesses in different vertical and conglomerate markets are likely to appoint different senior management teams in respect of those markets).

- 1.25 A requirement for merging parties to submit documents in respect of vertical and conglomerate markets by default would not be consistent with the CMA's commitment to Pace, Proportionality and Process. A more pragmatic approach would be for the CMA to request documents relating to horizontal overlaps and to confirm at an early stage during pre-notification whether it intends to issue a similar request in respect of relevant vertical and conglomerate markets that are identified in Question 11.

Other

- 1.26 We note that in previous consultations on proposed amendments to its guidelines, the CMA has frequently published a redline to illustrate the changes that have been made. However, on this occasion, we note that redlines of the Draft Revised Guidance and MNT were not published with the consultation document.
- 1.27 We would be grateful if, in future consultations, accompanying redlines could be provided as a matter of standard practice. Although respondents may have the software tools to create in-house digital comparisons, these comparison methods are not always reliable and may not be available to all respondents. This is particularly important in cases where there are multiple significant changes to guidance documents that are not fully set out in the consultation document (as in the present case) .

Ashurst LLP

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