1 August 2025

UPDATES TO THE CMA'S MERGERS GUIDANCE (CMA2) AND MERGERS NOTICE TEMPLATE
Cleary Gottlieb's Response to CMA Consultation

1 INTRODUCTION

1.1 Cleary Gottlieb Steen & Hamilton LLP (**Cleary Gottlieb**) welcomes the CMA's decision to update its mergers guidance on jurisdiction and procedure (**CMA2**). Updating the Guidance provides an opportunity to align the CMA's merger control regime with the objectives set out in its 4Ps framework—Pace, Predictability, Proportionality, and Process—and to ensure that the UK system is efficient, transparent, and business-friendly.

1.2 We are broadly supportive of a number of the CMA's proposed changes. In particular, we welcome:

- the CMA's focus on improving pace, through the introduction of a 25-working-day KPI for straightforward clearances;
- on enhancing process, via earlier and more structured engagement during pre-notification;
- on promoting proportionality, by recognising that multi-jurisdictional mergers concerning global markets may not always require UK intervention; and
- clarifying its interpretation of the jurisdictional tests.

1.3 These measures have the potential to streamline merger reviews, reduce unnecessary burdens on business, and improve alignment with international practice.

1.4 At the same time, we have concerns that some proposals may not fully deliver on the goals of predictability and proportionality. In particular, the CMA's proposed 'wait and see' approach to global mergers risks undermining predictability by providing insufficient certainty as to whether, and when, the CMA may open an investigation. Without clearer guidance, this approach exposes parties to the risk of a late-stage UK intervention, even where remedies have been agreed in other jurisdictions, which could unreasonably delay closing. We are also concerned that the proposed changes to the share of supply test and material influence assessment continue to leave considerable jurisdictional uncertainty, and that, without further clarification, the proposed pre-notification KPI could inadvertently lengthen the overall review process.

1.5 We have structured our response by topic and offer constructive suggestions to help ensure that the final guidance delivers fully on the 4Ps framework, while safeguarding legal certainty, transparency, and procedural fairness for merging parties.

2 'WAIT AND SEE'

2.1 We welcome the CMA's clarification that it is less likely to prioritise investigating multi-jurisdictional mergers that concern exclusively global (or broader than national) markets with little UK-nexus, and where any remedies imposed or agreed in merger control proceedings in other jurisdictions would be likely to address any competition concerns that could arise in the UK. We are supportive of the CMA taking measures to reduce duplicative merger control proceedings and, potentially, remedies, thereby alleviating the significant burden on merging parties in transactions subject to review in multiple jurisdictions. The flexibility that the UK merger rules allow creates unique opportunities for the CMA to introduce a more proportionate and business-friendly approach that prioritises cases only when intervention is warranted.

2.2 We also consider that the CMA is on solid statutory footing to implement this change. The CMA has a statutory duty under sections 22 and 33 of the Enterprise Act to make a reference where it is or may be the case that the merger has resulted, or may be expected to result, in a substantial lessening of competition. It also has a duty of expedition. Under its current guidance, the CMA states that it will decide to investigate a merger if it believes there is a "reasonable chance" that the test for a reference to an in-depth Phase 2 investigation will be met.[1] But that threshold is not triggered where the relevant markets are broader than national and there are good grounds to believe that reviews by other authorities will adequately assess—and, if necessary, remedy—any competition concerns affecting the UK. In such cases, there is arguably no "reasonable chance" that a UK-specific SLC would arise, and therefore no obligation on the CMA to intervene or act expeditiously.

2.3 That said, we have several concerns about how the CMA proposes to implement this policy.

- First, the 'wait and see' approach provides no legal certainty for merging parties. Under the proposed approach, the CMA may still open an investigation late in the process if it comes to the view that remedies elsewhere will not resolve UK concerns. But the CMA cannot always predict this outcome in advance. Parties are therefore exposed to the risk of a late CMA intervention, which could unreasonably and unexpectedly delay closing (potentially beyond a long-stop date) or force an unnecessary UK notification purely to mitigate that risk. This is unlike the residual risk that merging parties generally bear due to the voluntary nature of the CMA's regime, because it is much harder to predict whether (and if so, when) the CMA will intervene in a 'wait and see' case.

- Second, the proposal creates an opportunity for third parties to game the system by submitting complaints at a late stage—particularly once overseas investigations have reached the remedies phase. If the CMA concludes that such complaints identify concerns unlikely to be addressed by remedies elsewhere, it could trigger its duty to investigate. A well-timed complaint, perhaps coupled with a prepared appeal against a CMA decision not to investigate, could disrupt transactions that had otherwise progressed smoothly.

[1] Guidance on the CMA's mergers intelligence function, CMA56, December 2020

- Third, there is a risk that the CMA will default to a 'wait and see' approach in global deals where it would otherwise have sent a 'no further questions' letter. These letters currently provide some measure of legal certainty to merging parties, which would be lost if the CMA decides to stop issuing them in all multi-jurisdictional mergers. It would be helpful for the CMA to clarify how it will decide between issuing a 'no further questions' letter and adopting a monitoring posture under the wait and see policy.

- Fourth, the proposed approach would put the CMA in a challenging position should it determine only at a late stage that remedies proposed in other jurisdictions would not address UK concerns. Calling in the transaction for review at that stage would likely cause signification disruption to the merging parties and delay closing for a global transaction specifically as a result of the CMA's wait and see approach. But declining to review the transaction in such circumstances could conflict with the CMA's statutory duty to make a reference where it is or may be the case that the merger has resulted, or may be expected to result, in a substantial lessening of competition.

2.4 We recommend that the CMA adopt a clearer framework to signal its intentions. Where it adopts a wait and see approach, the CMA should provide the parties with a designated point of contact and regularly engage on its emerging views. This would allow parties to keep the CMA informed of developments in other jurisdictions and pre-empt any UK-specific concerns.

2.5 The CMA should provide greater clarity on how it will proceed if it decides to call in a 'wait and see' case for investigation. Opening a full investigation—encompassing pre-notification, Phase 1, and potentially Phase 2—after a transaction has already undergone intense scrutiny by other regulators would be the worst-case scenario for merging parties. It would introduce further delay, cost, and uncertainty at a late stage. We urge the CMA to regard such outcomes as highly unsatisfactory and to work closely with merging parties to avoid them wherever possible.

2.6 In many cases, the CMA may be able to take comfort that remedies agreed in other jurisdictions will extend to the UK and address any relevant concerns. Where further assurance is needed, a more proportionate response would be to adopt a fast-track-to-UILs process—enabling the CMA to accept undertakings promptly (ideally aligned with overseas review timelines), with minimal disruption to the transaction. This would still meet the CMA's statutory duties, including its obligation to consult and to publish a reasoned decision. It would also be helpful for the CMA to confirm that such interventions will remain the exception, and that in the vast majority of 'wait and see' cases, the authority will rely on the scope and enforceability of remedies accepted by other competition agencies.

2.7 Finally, the CMA should remain open to submissions from merging parties that it would be unnecessary to extend remedies imposed in other jurisdictions to the UK, including due to differences in the relevant legal standards or differences in competitive conditions.

3 SHARE OF SUPPLY TEST

3.1 We support the CMA's clarification that the relevant description of goods or services will be determined by reference to the specific competition concern under investigation. This more disciplined, concern-led approach should help focus the CMA's analysis and provide merging parties with greater predictability when assessing UK merger control risk. We suggest, however, that the revised guidance adopt a clearer and more robust approach: the CMA should be expected to '**consider only**' the goods or services relevant to the competition concerns arising from **horizontal overlaps**. This would remove ambiguity in the current drafting and make clear that the CMA's application of the test is confined to the overlaps the test was designed to capture.

3.2 We are concerned that the proposed changes in relation to the calculation of the 25% threshold will not meaningfully improve legal certainty. The test remains highly flexible, making it difficult for advisers to predict whether the CMA will assert jurisdiction over a given transaction. While the CMA proposes to 'typically only focus on' the criteria specified in the Act—namely, value, cost, price, quantity, capacity, and number of workers employed—this does not constrain its discretion in practice. The CMA can still rely on any factor it has used in prior cases, preserving the flexibility that has attracted longstanding criticism.

3.3 If the CMA's objective is to increase certainty, it should commit to applying the test by reference to, at most, value, quantity, and capacity—the factors most aligned with industry and international practice. Maintaining criteria such as cost, price, and number of workers employed introduces unnecessary unpredictability and does not reflect the CMA's usual application of the test. Moreover, where the only basis for considering asserting jurisdiction is by reference to tenuous metrics (which are unlikely to be readily available to the parties) and the parties do not reach a 25% share of supply or purchases on any standard metric, it is highly unlikely that competition concerns will arise. A clearer, more consistent approach would benefit both businesses and advisers assessing jurisdictional risk.

4 MATERIAL INFLUENCE

4.1 We welcome the CMA's clarification of its approach to assessing material influence. The revised guidance goes some way to improving transparency and predictability for investors and merging parties. In particular, the indication that shareholdings below 25% will confer material influence only in limited circumstances is helpful. The inclusion of illustrative examples, along with more detailed guidance on the relevance of board rights, commercial agreements, and financial dependencies, should help parties assess jurisdictional risk and engage with the CMA at an earlier stage where appropriate.

4.2 That said, the revised guidance lacks clarity on when the CMA may find material influence in shareholdings below 25% (and even below 15%). The references to the 'status and expertise' of the acquirer, and the non-exhaustive list of financial, commercial, and consultancy agreements—along with any perceived financial or commercial dependencies—leave the CMA's discretion effectively unfettered. This does not enhance legal certainty.

4.3 What would help companies deciding where and how much to invest in a target is a bright-line test setting out a presumption when the CMA will typically find material influence and when it will not. The guidance could preserve necessary flexibility—and the current statutory position—by caveating that there may be exceptional cases beyond the bright line, accompanied by examples. Moreover, the Guidance should recognise that in borderline cases, the risk of substantive concerns is lower and that the CMA would therefore need compelling reasons to open an investigation.

5 INCREASED ENGAGEMENT WITH MERGING PARTIES

5.1 We welcome the CMA's emphasis on early and constructive engagement during pre-notification. The introduction of teach-in sessions and regular update calls is a positive step that has been used successfully already and should help ensure the CMA better understands the commercial and competitive context of a transaction from the outset. It also provides merging parties with valuable visibility into the CMA's emerging thinking. This more interactive approach should enable parties to tailor their submissions to the issues that matter, address potential concerns in a timely way, and engage meaningfully on potential remedies where appropriate. We also support the CMA's continued openness to without prejudice discussions throughout pre-notification, which can play a critical role in resolving concerns efficiently and avoiding unnecessary delay.

6 PRE-NOTIFICATION KPI.

6.1 ***40-working-day KPI.*** We welcome the intention behind the CMA's introduction of a 40-working-day KPI for pre-notification, which aims to provide greater discipline and pace in the early stages of merger review. Pre-notification periods have historically varied considerably, often resulting in unnecessary delays. By setting a clear benchmark, the CMA can encourage both case teams and merging parties to focus their efforts on the issues that matter, ensuring that information gathering is proportionate and targeted. We also support the CMA's decision to allow parties to opt out of the 40-working-day KPI where appropriate. This flexibility is particularly valuable in complex or multi-jurisdictional transactions, where aligning timetables across different authorities, engaging in without prejudice remedy discussions, or preparing more detailed submissions on central issues may require more time. The ability to opt out, combined with early and open dialogue with the CMA, should promote more efficient and coordinated case management in complex or multi-jurisdictional transactions.

6.2 ***Risks of KPI Framework.*** While we support the CMA's overall objective of shortening the pre-notification period, we are concerned that the newly introduced 40-working-day KPI may not achieve this aim and could, in practice, extend the overall time the CMA spends reviewing a merger. Currently, the CMA's pre-notification statistics are compiled from the date the merger parties submit a Case Team Allocation Form. Under the proposed approach, however, the KPI clock would only start once the CMA has received what it considers the necessary information to commence the "initial stages" of pre-notification. This effectively creates a new 'pre-pre-notification' phase, which may be as long as, if not longer than, current pre-notification practice—followed by a separate 40-working-day period. This risks prolonging rather than streamlining the CMA's engagement.

6.3 It would be helpful for the CMA to clarify how it will refer to this earlier phase, and what level of engagement parties can expect with the case team during this time. Moreover, it is unclear how this approach aligns with the CMA's statutory obligations under section 34ZA(3)(a) of the Enterprise Act. Where parties submit a formal Merger Notice, the CMA must start its phase 1 investigation once it is satisfied that the Notice is complete—that is, in the prescribed form and containing the prescribed information. The legislation does not permit the CMA to delay the start of the clock to gather further information from third parties. To enhance legal certainty and comply with its statutory duties, the CMA should confirm in the final guidance that it will not defer starting formal review—*i.e.*, the Phase 1 40 working-day clock—once a complete Merger Notice has been submitted.

7 CHANGES TO THE MERGER NOTICE

7.1 The proposed revisions to the Merger Notice sensibly include requests for information that the CMA would typically request during pre-notification, which should help meet the new KPIs. However, the Guidance Note to question 9 has been revised to lower the threshold for Relevant Markets in relation to which internal documents should always be provided from 15% to 10%. It is unclear why this change is proposed when the equivalent threshold for switching data in question 14 remains at 15%, and when competition concerns are unlikely to occur in markets where merging parties have <15% share. This proposal would increase the administrative burden on merger parties unnecessarily and is inconsistent with the CMA's objective to promote proportionality and pace.

8 CLEARANCE DECISIONS

8.1 We support the introduction of the CMA's 25-working-day KPI for announcing straightforward clearance decisions. This is a welcome step in reducing the overall length of the merger review process. A faster timeline not only benefits businesses by enabling them to progress transactions more quickly, but also aligns the UK regime more closely with international best practice, where accelerated review timetables are increasingly the norm for non-problematic cases.

8.2 We also support the CMA's plan to publish shorter decisions in these cases. This approach should ease the administrative burden on the CMA—allowing it to devote resources to more complex cases—and reduce the risk of disclosing commercially sensitive information unnecessarily. However, it remains important that decisions contain sufficient reasoning on key issues—particularly market definition and competitive assessment—to serve as a meaningful precedent and to ensure the CMA complies with its duty to provide adequate reasons.

9 CONCLUSION

9.1 The CMA's proposed updates to its mergers guidance are important and valuable. They reflect a commendable aim: to make the UK's merger control process faster, more efficient, and better attuned to global transactions. The new KPIs and commitment to earlier engagement are particularly welcome.

9.2 But the outcome of these reforms should be to reduce uncertainty and sharpen the CMA's focus. On that score, the proposals remain incomplete. The 'wait and see'

approach leaves too much to chance. The proposed changes to the share of supply and material influence tests maintain too much discretion. And the pre-notification reforms risk adding steps without saving time.

9.3 What the regime needs are clearer lines and firmer commitments—rules that businesses can navigate with greater certainty. The CMA has an opportunity to deliver a regime that is not only faster but also more predictable, transparent, and legally sound.

Cleary Gottlieb Steen & Hamilton LLP
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