13 August 2025

Response to the CMA's Consultation: '4Ps' Changes to the CMA's Mergers Guidance (CMA2) and Mergers Notice Template

I. Introduction

1. Covington & Burling LLP (**Covington**) welcomes the opportunity to respond to the Competition and Markets Authority's consultation dated 20 June 2025 regarding proposed changes to its Mergers Guidance on Jurisdiction and Procedure (CMA2) (the "**Draft Guidance"**), and its mergers notice template.

2. Covington's views are based on our experience advising clients in relation to merger control in the UK and the EU as well as in various EU Member States, and on feedback received from our clients that have participated in phase 1 and phase 2 CMA investigations.

3. As noted in our response to the CMA's call for evidence on remedies, merger control is the shop window of the CMA. Most businesses experience the CMA through its merger control function rather than through its enforcement function. In 2024, the CMA considered just over 1,000 mergers of which it formally investigated 38. Merger control risk assessment forms a key part of any corporate M&A strategy, and the predictability and pace of merger control (or lack thereof) in a key jurisdiction such as the UK is a critical factor when assessing the feasibility of a corporate transaction. Therefore, the CMA's merger control function is particularly important when it comes to attracting investment to the UK.

4. It is helpful to recognise that UK merger control is currently an area of uncertainty and concern for business. The expansive approach taken by the CMA to jurisdiction, including by reviewing global mergers with only limited nexus to the UK, and interpreting the share of supply test in novel ways, together with the introduction of the new hybrid test, have resulted in real uncertainty as to whether and when the CMA will intervene in deals. Covington has seen clients walk away from pro-competitive deals with a nexus to the UK due to the risk of CMA intervention and uncertainty as to the CMA's likely approach.

5. As regards process, the pre-notification process for UK merger control is somewhat rigid, with merger parties frequently complaining of a lack of control and an inability to tailor the process to the specific needs of their deal. Speed is not always the primary driver for merging parties in prenotification, but where speed is required, it is extremely difficult to achieve it, with the average length of pre-notification having steadily increased over recent years. The process is also seen as inefficient, with limited opportunity for engagement with staff with decision making responsibility, which can result in issues taking longer to resolve than they may if more experienced staff took decisions earlier in the process.

6. Therefore, Covington welcomes the CMA's stated aim to improve the predictability and proportionality of its decision making on jurisdiction and to allow for pace (where deals require it) and greater engagement in its processes. We see this as a genuine attempt to make

the UK more attractive to investors while promoting competition and protecting consumers and are very supportive of the CMA leadership's efforts to make the new approach a reality.

7. As set out further below, however, we have some queries and concerns as to how the CMA can make its aims a reality, in particular given that it is constrained by the current legislation. Ultimately, it is Covington's view that a change in the legislation will be required to address some of the more fundamental issues. We note the Government's plans to consult on proposals to change the legislation in the near future, in particular to give more certainty around jurisdictional thresholds.

8. We hope that our response will assist the CMA in clarifying its approach to jurisdiction and improving the efficiency of its process, and stand ready to assist further in the spirit of constructive engagement.

II. Structure of this Response

9. This response begins by addressing certain overarching issues with respect to jurisdiction, and then goes on to address each of the themes in the CMA's consultation document (dated 20 June 2025), in the order they are addressed in that document.

III. Updates relating to the application of the CMA's jurisdiction tests

a. General Points on Jurisdiction

10. Covington welcomes the CMA's aims to create more certainty around when the CMA will take jurisdiction over mergers. Covington also welcomes the signal that the CMA aims to take a less expansive approach to jurisdiction than it may have done previously.

11. This section of our response covers two overarching points in relation to the jurisdictional thresholds (which are also relevant to the CMA's approach to global mergers), namely the basis for the CMA's proposed change in policy and the role of IEOs.

<u>*Prioritisation*</u>

12. Covington welcomes the improved clarity of the revised guidance, but considers it could be strengthened further with additional detail and guidance on the CMA's approach to prioritisation of cases. Given the extremely wide jurisdictional thresholds, it is clear the CMA must carry out a prioritisation exercise to determine which mergers it will investigate. In Covington's view, clear and unambiguous statements as to how to the CMA will exercise its discretion when deciding which cases to investigate are absolutely critical in the face of the broadly drafted jurisdictional thresholds.

13. It would create greater certainty if the CMA made clear that its change of approach is based upon a change to the way that it will exercise its administrative discretion. The CMA could then set out the criteria upon which it will base its prioritisation decisions, noting that the

thresholds that the CMA will apply when exercising its discretion to investigate can be different to (and higher than) the legal threshold for jurisdiction.

14. Basing its new approach on prioritisation criteria would allow the CMA to begin to make changes that are in line with (or moving towards) the ultimate goals that a change in legislation would be designed to achieve. The prioritisation criteria could cover the material influence, share of supply, and hybrid tests and the approach to global mergers. This would allow the CMA to create a more coherent overall approach to jurisdiction, with a framework that is designed to address the fundamental issues. The CMA could, for example, use a prioritisation framework to set out safe harbours in respect of which the CMA is unlikely to prioritise investigations (e.g. where the target has turnover below a designated figure, or has less than a designated number of customers in the UK).

15. Furthermore, setting out prioritisation criteria by reference to the share of supply and hybrid tests would resolve a number of the issues surrounding global mergers, and reduce the need for the "wait and see" approach (with which we have concerns, as set out further below). The CMA could set out clearly those cases that it intends to dedicate its limited resources to by reference to (1) the scale and seriousness of the impact in the UK; and (2) the relative size of the UK part of the deal vis-à-vis other parts of the transaction in other jurisdictions. It could then confirm when cases do not meet its prioritisation criteria (and thus will not be investigated), removing a suite of mergers from the uncertainty of the "wait and see" approach.

16. However, ultimately, we consider that such changes will be a stop-gap until such time that legislative change is possible. In our view, genuine improvements in predictability and proportionality will require legislative change in respect of the CMA's jurisdiction.

Approach to IEOs

17. The uncertainty around the CMA's jurisdictional thresholds is an issue in itself; however it is exacerbated by the CMA's current approach to IEOs.

18. The key concern is that the IEOs imposed by the CMA can in practice create stricter requirements on the merging parties than the suspensory effect of mandatory regimes (for example by limiting the activities of the acquirer, including outside of the UK). Given the draconian consequences of these IEOs, the impact of an unexpected jurisdictional finding by the CMA can be unnecessarily burdensome and commercially harmful even if a deal is ultimately cleared.

19. In Covington's view the CMA's current practice with regard to IEOs is disproportionate and needs to be remedied. Given that the CMA's jurisdictional tests do not give the same level of certainty as a mandatory regime, IEOs should only be imposed where the jurisdictional finding is clear and predictable from the outset, or they should at least be tailored in line with the certainty of the jurisdictional outcome (i.e. the more speculative the jurisdictional claims, the less draconian any IEO should be). To the extent IEOs are imposed, they should be limited in scope to cover the minimum necessary (and ideally only the target business in the UK).

b. The 'material influence' test

20. As noted above, 'material influence' is by its nature a flexible test which is designed to be a "catch all" (as compared to the jurisdictional test used in many mandatory regimes). However, the CMA's interpretation of the test in the past has arguably stretched the concept beyond what was necessary, such that there is now a considerable amount of uncertainty around even whether very small minority stakes could trigger a burdensome CMA investigation.

21. Covington welcomes the CMA's attempts to amend the guidance and give companies a better steer as to when the material influence test will be met. In particular, Covington welcomes the clarification that shareholdings of less than 25% will be unlikely to confer material influence in the absence of other factors, and that shareholdings of less than 15% would only amount to material influence in certain limited circumstances (paragraph 4.23). Similarly, Covington welcomes the clarification that a single board seat without broader governance control or veto rights will not normally meet the required level for material influence (paragraph 4.28).

22. However, the impact of such changes in terms of increasing business certainty should not be overstated. We consider the CMA could go further in increasing certainty, if, as set out in section a above, it were to set out prioritisation criteria making clear what level of influence would likely trigger the CMA to exercise its discretion to investigate (which could be higher than legal threshold triggering jurisdiction). We would also suggest that it is particularly important that the CMA write clear and detailed decisions setting out its findings on material influence in future cases in order to have more points of reference for parties seeking certainty as to the current approach.

23. As a specific point, the CMA notes the change in paragraph 4.29, clarifying that, when assessing board representation as a source of material influence, the CMA will generally consider the expertise of the acquirer rather than the individual expertise of board members. Covington notes that the relevance of industry expertise or knowledge has in the past taken on an outsized role in determining whether the material influence test is met.[1] In Covington's view, the CMA should be careful not to let this factor take on undue importance, particularly when other factors point away from material influence, and to the extent this change in the Draft Guidance signals a more expansive approach, that should be avoided.

[1] See, for example, *Amazon/Deliveroo* and *RWE/E.On*

c. The share of supply test

24. The share of supply test (as interpreted by the CMA and the CAT), currently affords the CMA an extremely wide discretion to take jurisdiction, including over global mergers with limited impact on UK markets or consumers. The unusually wide tests (and the interpretation of those tests - for example in *Sabre/Farelogix* and *Facebook/Giphy*) have resulted in the CMA making significant interventions in respect of mergers with no appreciable nexus to the UK. This interventionist stance has resulted in many businesses regarding the CMA as a significant barrier to global deal making.

25. Covington welcomes the CMA's attempts to give more certainty to business on its future approach to the share of supply test, particularly insofar as this signals a move towards a less interventionist approach in future. In particular, we welcome the narrowing of the focus of the share of supply test to those areas where competition concerns exist (paragraph 4.64) and the confirmation that the CMA will only focus on the conventional factors specified in s23(5) of the Enterprise Act to determine whether the share of supply test is met (paragraph 4.72).

26. However, as per the points made in section a above, any changes would be better addressed as part of a prioritisation framework. For example, in our view the CMA could use the share of supply test as a proxy to prioritise those mergers with clear horizontal overlaps (on the basis of a traditional market share test).

27. Furthermore, and as noted above, the reality is that for many companies, the introduction of the new hybrid test has rendered concerns about the existing share of supply test largely irrelevant. This is because those companies are likely to meet the turnover and 33% share of supply thresholds and so all that is required is a (weak) nexus to the UK on the part of the target in order for the hybrid test to be met. For many larger companies, the key source of jurisdictional uncertainty, which can dampen incentives to invest, is the hybrid test. In our view any prioritisation framework, and any future legislative reform, should also address this concern. For example, in addition to using the share of supply test as a proxy for prioritising mergers with horizontal concerns, the hybrid test could be used as a proxy to prioritise mergers with vertical and conglomerate concerns. Rather than simply confirming that the acquirer has a 33% market share, and the target is active in the UK, the CMA should (at the very least), establish a link between the two, which should be the same link which is at the heart of the CMA's vertical or conglomerate competition concerns.

d. Enterprises ceasing to be distinct

28. One point in relation to which no material changes are proposed in the Draft Guidance is question of when enterprises cease to be distinct. Covington has concerns that the statement in the guidance (paragraph 4.9) that: *"in some cases the transfer of assets or employees alone may be sufficient to be an enterprise"*, is very wide, risks going further than the existing law

as set out in the *SeaFrance*[2] case, and signals a very expansive approach to jurisdiction, which the CMA seems to be trying to move away from. In Covington's view a more nuanced approach should be taken, and the CMA should at least clarify that this would only happen in exceptional circumstances.

IV. Changes relating to the CMA's approach to global mergers

29. We note that there is little substantive change to the wording of the Draft Guidance on the CMA's approach to global mergers, and the new proposed approach is something that has been available to the CMA previously, but has rarely been used. Our understanding of the proposals and the CMA's public statements[3] is that the CMA intends to make more use of this option in the future.

30. We assume that, in proposing this change of approach, the CMA is aiming to reduce the regulatory burden on businesses and allow the CMA to target its limited resources in those areas where they can add the most value. Whilst we agree with those aims, we have concerns about how this approach will work in practice and whether it will achieve the desired result.

31. Our key concern with the with the *"wait and see"* approach is the inordinate level of uncertainty it could create for merging parties, not least because the CMA may only be able to determine whether remedies imposed by other authorities would be likely to address competition concerns in the UK at the end of their process.

32. In our view, firstly, as already noted, the CMA should create greater certainty in respect of global mergers by setting out an approach to prioritisation based on the criteria set out in sections III a and c above.

33. Where global deals meet the prioritisation criteria, and the CMA intends to take a "wait and see" approach, it would be desirable for the CMA to make its consideration of overseas remedies more transparent (whether this is in accordance with published guidance, or by communication with merger parties in each case).

34. Greater transparency would also be helpful at the outset, in respect of whether the CMA is considering an investigation, as this would enable merger parties to anticipate questions and discuss the potential submission of a merger notice or briefing paper with the CMA. In a similar vein, when the CMA confirms that it has "no further questions" in respect of a global merger, it would be helpful if it could explicitly confirm whether this means it is not investigating or whether it is monitoring the process in other jurisdictions and may still go on to investigate.

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[2] Société Cooperative De Production Seafrance SA (Respondent) v The Competition and Markets Authority and another (Appellants) [2015] UKSC 75

[3] See e.g. Sarah Cardell blog dated 13 February 2025: "New CMA proposals to drive growth, investment and business confidence" and Naomi Burgoyne presentation to the Law Society dated 29 April 2025.

V. Changes relating to process

a. Pre-notification

35. As regards the proposed changes to the pre-notification process, Covington very much welcomes the spirit of the changes, and the desire to provide the opportunity for shorter pre-notification periods and for more engagement with senior CMA leadership. However, whilst we welcome the spirit of the changes, we have concerns that the proposals in the Draft Guidance may not achieve the desired results, and in fact could potentially risk exacerbating the current issues.

36. Our key concern is that pre-notification should be a flexible process that is led by the parties which aims to facilitate the transaction and provide for a good user experience. The process should be flexible enough to accommodate the needs of different deals; for some merging parties, speed will be of the essence and the process should be adaptable enough to accommodate that. However, in other cases, speed may be less important, but there could be more need for informal dialogue and/or good reasons that a transaction should not be made public in the short term. The key point is that pre-notification, which is not a statutory process, should be flexible enough to accommodate any of these scenarios. However, the new proposals appear likely to create more, rather than less, rigidity in the CMA's pre-notification process. Given the need for flexibility, we would also note that imposing fines in respect of failure to comply with information or document requests in pre-notifications in respect of anticipated deals would in general be disproportionate and should only happen in exceptional circumstances.

37. As regards pace, we agree that the option to increase pace should be there for those merging parties that require it. However, that should be one of a flexible suite of options available to the parties, rather than being imposed on all. As far as the proposals made in the consultation aimed at improving pace, we have two key concerns with the new 40 day KPI. Firstly, any indicator tends to stop being useful when turned into a KPI (as the underlying objective inevitably becomes secondary to the incentive to meet the KPI), and secondly, in order to make the KPI achievable, the CMA, understandably, has made the official start of pre-notification subject to strict requirements (as set out paragraph 6.27 of the Draft Guidelines). The consequent risk is that pre-notification becomes a new "phase zero", subject to a further "pre-pre-notification" process of its own (which will not be time constrained), thus potentially having the practical effect of doubling the statutory deadline for Phase I. In reality, the only KPI that matters for the merging parties is how quickly after the deal is signed that it can be closed.

38. As practical matters, contact details and internal documents often follow the initial submission and should not hold up the CMA from commencing its review (although it may stop the KPI from running).

39. As regards the publication of the case webpages and the requirement for the parties to consent to CMA contacting third parties, again, we consider this removes the flexibility of pre-notification and makes it more akin to a further Phase I period. In Covington's view, third party outreach should be done within the statutory confines of the Phase I review.

40. In respect of engagement with senior staff, as noted in Covington's response to the remedies call for evidence, in our experience, it has in the past been difficult for merging parties to engage on substantive issues with senior staff who have the ability, experience and authority to have meaningful discussions. Rather, the CMA staff currently charged with doing much of the day-to-day work on merger cases, particularly at phase 1, are often relatively junior and, as a result, it can be challenging to engage on substantive issues in a meaningful way. Further, the current process gives limited opportunities for merging parties and their advisers to engage directly with senior members of staff and/or the decision maker. Those opportunities that are baked into the process take place too late in the day to allow for any meaningful engagement on complex substantive issues and occur when much of the CMA's thinking has already crystallised.

41. In our response to the remedies consultation, we recommended that the CMA's processes should be amended to better facilitate early and meaningful engagement, from pre-notification onwards, on both substance and remedies. We also recommended that, in order to make the CMA's merger control ambitions a reality, in our view, the staffing of CMA case teams, particularly in complex cases, should be reviewed. The ratio of senior to junior staff should increase, and senior staff with decision making capabilities should take a more active role in running complex cases, with a large portion of their time dedicated to doing so.

42. We therefore very much welcome the fact that merger parties will be invited to provide a teach-in to the case team early in pre-notification and that senior staff (such as a senior director for mergers) will attend that teach in (paragraph 6.36 onwards). However, we note that this is a fairly limited commitment to increasing engagement at a senior level and there do not appear to be any proposals to change the staffing of CMA merger teams. Covington's concern is that, without a change in the seniority of the teams staffed on mergers, the CMA's goals will be very difficult to achieve. Process changes need to go hand in hand with changes to the make-up of case teams, particularly in the most complex cases.

b. Clearance Decisions

43. We welcome the CMA's new target of issuing clearance decisions in straightforward cases in 25 working days. We note the CMA's statement in paragraph 5.26 of the consultation document that one way of achieving this will be to make those decisions substantially shorter, and more akin to the current summaries of decisions. Whilst we agree that there is room to shorten some of the current decisions and there are good reasons to do so in the name of pace and efficiency, this must be carefully balanced with the CMA's duty to provide reasons for its

decisions and the precedential value of the CMA's decisions, which can increase business certainty.

VI. Changes to the Merger Notice Template

44. In respect of the changes to the Draft Merger Notice Template, Covington is of the view that certain of the changes impose disproportionate burden on the parties, and risk making the process slower and more cumbersome, running counter to the CMA's ambitions on pace. In particular, the change in scope of the document request to include all material overlaps is a significant change which will significantly increase the burden on the merging parties. In our view, this change should be reversed, with the additional documents being requested on a case by case basis as necessary. In fact, rather than expand the scope of the document request, in Covington's view, it would be far more efficient for the document request in the Merger Notice to be more limited, covering, for example, those documents created by or for directors or officers, which assess the competitive impact of the transaction. Further documents requests could then be sensibly tailored on a case by case basis, reducing unnecessary burden on the merging parties and the CMA.

45. Similarly, the expansion in the scope of the contact detail request is, in our view, unnecessary and risks creating unnecessary burden. To the extent further contact details are required in an individual case, these can easily be requested at the start of the process.

46. Finally, we welcome the incorporation of what are typically the CMA's first questions on decision making processes, board composition, and details of the negotiation of the deal into the Merger Notice, as this will increase efficiency.