NON-CONFIDENTIAL VERSION

CMA CONSULTATION ON DRAFT REVISED GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE AND DRAFT REVISED MERGER NOTICE

Response from Baker & McKenzie LLP

1 August 2025

1. Introduction

1.1 Baker & McKenzie LLP ("**Baker McKenzie**") welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA's**") consultation on its draft revised guidance on the CMA's jurisdiction and procedure (the "**Draft Revised Guidance**") and draft revised Merger Notice ("**Draft Revised Merger Notice template**"), published 20 June 2025 (the "**Consultation**").

1.2 Specifically, the consultation seeks opinions on four topics:

1. Proposed changes to the CMA's Guidance on Jurisdiction and Procedure ("**CMA2**" or the "**Current Guidance**") relating to the application of the CMA's jurisdiction tests, namely updates relating to:
   (a) the 'Material Influence' test; and
   (b) the 'Share of Supply' test;
2. Proposed changes to CMA2 relating to the CMA's approach to 'Global Mergers'; and
3. Proposed changes to CMA2 relating to process and updates to the CMA's Merger Notice template.

1.3 Baker McKenzie welcomes the CMA's review of CMA2 in line with its overall commitment to update the UK's merger regime.

1.4 We would be happy to discuss any of our comments in more detail and contribute to any further thinking or analysis on these topics.

1.5 Please note that this response represents the views of Baker McKenzie as a firm and does not represent the position of any of our clients, even with reference to any parties of the specific merger investigations cited. This response also does not represent the position of any individual partner or associate of Baker McKenzie. This is a non-confidential version of our response which we are happy for the CMA to publish on its website. Confidential information that has been excised has been marked "[✂]".

2. Topic 1(a): Changes to the CMA's guidance on the application 'Material Influence' test

2.1 We are pleased with the CMA's intention to provide updated guidance on its application of the material influence test (the "**Material Influence Test**" or the "**MI Test**"). We consider this area of the regime to be an important focus in respect of improving both predictability and proportionality under the CMA's new overarching enforcement framework.

2.2 We continue to find it challenging to apply the Material Influence Test, which is unique among global merger control regimes. While we appreciate the improvements offered by the CMA's incremental clarifications as set out in the Draft Revised Guidance, our position is that the MI Test should be disposed of entirely as it is unfit for a pro-growth regime which seeks to prioritise

predictability for businesses. Notwithstanding that the CMA used to rely upon the MI Test only sparingly to establish jurisdiction over certain transactions, we have seen an increase in the CMA testing the limits of the MI Test by reviewing a range of partnership arrangements[1], which has served to undermine general predictability, particularly for transactions where a less than 20% shareholding is acquired. The CMA's increased reliance on the MI Test is even more frustrating given that all but one[2] of such cases led to an eventual finding of no expectation of SLC. This prompts the question as to why jurisdiction was so zealously established in the first place.

2.3 Should the UK government consider amendments to the Enterprise Act 2002 (EA02), we would urge it to discard the MI Test completely. However, as we understand this consultation to be limited to the CMA's guidance on application of the MI Test, we propose sensible changes to the MI Test to alleviate the unnecessary burden placed on businesses which seek to complete unproblematic deals.

2.4 In short, we propose changes to the application of the MI Test that would increase predictability and closer alignment between European and UK jurisdictional standards. We set out our proposals as follows:

(a) The MI Test should be more closely aligned with the approach of the European Commission ("**EC**") to the decisive influence test, as set out in the relevant Consolidated Jurisdictional Notice (2008/C 95/01) (the "**CJN**") (the "**Decisive Influence Test**" or "**DI Test**").

(b) Acquisitions involving acquirer shareholdings of 15% or lower should be presumed to fall within a new 'safe harbour' exemption that creates a bright-line limit on the CMA's jurisdiction, save for a very narrow set of exceptions.

(c) In applying a modified MI Test, the CMA should adopt a more transparent methodology which uses a hierarchy of categorised factors to enhance predictability of outcome.

Alignment of MI Test with the European Commission's DI Test

2.5 We consider that the EC approaches the assessment of decisive influence using a more consistent, transparent and predictable methodology. Accordingly, from our experience we are far more confident advising clients on whether an acquirer will acquire 'control' given the usability of the DI Test than the contrasting uncertainty provided by the CMA's MI Test. Therefore, we and our clients would welcome closer alignment on the application of the MI Test and the DI Test.

2.6 We regard the CJN as much clearer and more user-friendly in its assessment of relevant factors for the DI Test. In general terms, the CJN qualifies relevant factors, rather than solely listing them in no particular order. By way of example, the EC in its CJN clarifies when and under what circumstances, relevant factors may be considered as part of the DI Test, such as:

(a) For contractual rights, the CJN states at paragraph 18 that, in order to be considered as conferring control, the rights must (our emphasis added): "*In addition to transferring **control over the management and the resources**, such contracts must be characterised by a **very long duration** (ordinarily without a possibility of early termination for the*

[1] In 2024, the CMA initiated 4 cases to try to determine if an acquirer had the ability to materially influence the target company.

[2] ME/2811/06 *British Sky Broadcasting Group plc / ITV plc*.

party granting the contractual rights)." We find these qualifications, which amount to specific criteria that must be fulfilled to constitute decisive influence, important in providing clarity to businesses. We would urge the CMA to provide similar qualifications for its MI Test in CMA2.

(b) For purely economic relationships, the CJN states at paragraph 20 that (our emphasis added): "*a situation of economic dependence may lead to control on a de facto basis where, for example,* ***very important long-term supply agreements*** *or* ***credits provided by suppliers or customers****, coupled with* ***structural links*** *confer decisive influence*". Again, we interpret these examples as helpful criteria which allow legal advisers to provide clients with greater certainty when it comes to assessing the economic relationships in question. We would urge the CMA to consider providing examples of combinations of factors which together would be likely to confer material influence.

(c) For investment funds, we also appreciate the reasoning and clarity provided at paragraphs 14 and 15 of the CJN that investment funds typically acquire a form of indirect control and are not to be treated equally to other types of acquirers in respect of the DI Test. We contend that recognition of this distinction should also be covered in the Draft Revised Guidance or, alternatively, examples of how the CMA views relevant factors differently for this category of investor.

2.7 In contrast, based on our experience of advising clients based on the Current Guidance and case precedents, it is challenging to provide clarity as to which factors other than the size of shareholding to be acquired may be determinative in the CMA's assessment. The Draft Revised Guidance lists the "main factors", which "can, in isolation, confer material influence" but will generally only do so in combination with other factors.[3] We appreciate the CMA's effort to create a quasi-hierarchy of factors, but consider that the Draft Revised Guidance currently falls short of providing meaningful guidance and should include a more extensive hierarchy of relevant factors. It would also be helpful to see examples included by the CMA of the circumstances in which the "main factors" would confer material influence in isolation and, equally, when they would not but would in combination. Without further development, the distinction between "main factors" and other factors in the Draft Revised Guidance may have the unintended consequence of further undermining predictability.

2.8 We propose two possible methods of providing a hierarchy from paragraph 2.12 below, which would allow the CMA to depart from its current arbitrary methodology towards a more predictable and transparent model that still preserves sufficient discretion for the CMA for exceptional cases.

'Safe harbour' exemption

2.9 At the outset, we consider that the most appropriate way to ensure transparency, predictability and proportionality in the application of the MI Test to very low shareholdings is for the CMA to adopt an absolute safe harbour for acquisitions of less than 15% shareholdings (the "**Proposed Safe Harbour**"). We note that the Draft Revised Guidance continues to reflect that shareholdings below 25% are "unlikely" to confer material influence and that shareholdings below 15% might only attract scrutiny "in certain limited circumstances" where "significant" other factors exist which indicate ability to influence a target's "commercial" policy. We

[3] Draft Revised Guidance, para. 4.20 and footnote 45.

consider that shareholdings below 15% are so unlikely to confer material influence that they should be benefit from a clear and predictable bright-line exemption.[4]

2.10 We consider that the Proposed Safe Harbour would follow the proportionality element of the CMA's new overarching framework for engaging with businesses by ensuring that the MI Test is applied with the purpose of facilitating a competitive business environment. It would also further the predictability objective as it would provide businesses with more clarity in application of the MI Test.

2.11 If the CMA chooses not to pursue the Proposed Safe Harbour, we would urge the CMA to treat the 15% shareholding threshold as a rebuttable presumption and clearly articulate what "certain limited circumstances" and what "significant" other factors must be present for the CMA to rebut the presumption (see our illustrative suggestions in **Table 2** below). Currently, the Draft Revised Guidance refers to the factors contained in paragraph 4.31 - 4.34 but does not indicate when these factors would be considered "significant" enough. Under this proposal, the CMA would still have the flexibility to find material influence in appropriate cases.

MI Test Factors

2.12 As described above, we consider that one of the key reasons why the DI Test is more consistent, transparent and predictable than the MI Test is because the EC helpfully qualifies (and impliedly applies weighting to) many of the factors identified in the CJN. As explained above, whilst we welcome the amendments set out at paragraph 4.20 and footnote 45 of the Draft Revised Guidance and consider them to be positive improvements to the usability of the MI Test, we nonetheless urge the CMA to introduce a more comprehensive weighting system, clearly categorising factors in order of importance and how those factors will be considered in determining material influence. Although we recognise that any list cannot be exhaustive in order to preserve the CMA's discretion, a more methodical system for application of the MI Test would improve transparency and predictability.

2.13 **Table 1** below sets out an illustrative example of how the CMA might categorise the factors considered in applying the MI Test. **Table 2** sets out how these factors could be applied to the MI Test based on shareholding. Such a methodology would improve predictability by ensuring that certain factors deemed to confer only minimal influence are only considered as part of the MI Test once a pre-defined percentage shareholding exists.

Table 1: Categorisation of factors by importance

Category	Factors	Scope
(A) High influence	*e.g., veto rights over strategic decisions of the target business e.g business plan; budget; appointment / termination of senior management; entry / renewal / termination of key customer or supplier contracts; significant investments.*	*Potentially decisive factors that can confer sufficient influence in isolation.*

[4] Indeed, the only instances we are aware of in which the CMA determined that shareholdings of less than 15% would confer MI were in the context of the assessing the divestment remedies in *BSkyB/ITV* and *Ryanair/Aer Lingus*. In the former, the CMA considered that, based on past voting patterns, a shareholding of between 7.5% and 15% would still allow BSkyB to materially influence ITV policy. In the latter, the CMA considered that Ryanair would have the ability to materially influence Aer Lingus at all levels of shareholding if it also acquired board representation.

(B) Medium influence	*e.g., exercisable right to appoint board member(s) where the acquirer is an industry investor with expertise/knowledge that is used in (or could be used in) the market relevant to the target's activities.*	*May confer sufficient influence in isolation (in extreme cases) or in combination with other factors.*
(C) Low influence	*e.g., exercisable right to appoint board member(s) where the acquirer is a financial investor*	*May only confer sufficient influence in combination with other factors in higher categories.*
(D) Minimal influence	*e.g., purely financial agreements*	*Unlikely to impact the material influence assessment (and will only do so in exceptional circumstances).*

Table 2: Application of factors by shareholding

Acquirer's % shareholding	Factor(s) that must exist in addition to the corresponding Acquirer's % shareholding
0-15%	*(If no Safe Harbour) Category A factor **and** multiple Category B factors*
15-25%	*Category A factor **or** multiple Category B factors **or** multiple Category C factors in combination with a Category A factor or one or more Category B factors.*
25-35%	*Category A or B factor **or** an multiple Category C or D factors*
35-50%	*Category A, B, C or D factor*

2.14 Tables 1 and 2 merely serve as examples of how a matrix might be included within the Guidance to assist businesses in assessing the likelihood that a notification on the basis of material influence is required. We urge the CMA to consider devising its own categorisations and application methodology aligning closely with the EC's approach set out in the CJN.

3. Topic 1(b): Changes to the CMA's guidance on the application of the 'Share of Supply' test

3.1 We are pleased with the CMA's intention to provide additional guidance and clarity on the 25% share of supply test (the "**Share of Supply Test**" or the "**Test**") and regard it as a very positive step forward, particularly within the CMA's renewed focus on predictability and proportionality. We welcome the opportunity to provide comments on another unique aspect of the CMA's merger regime.

3.2 We consider that the £10m safe harbour threshold introduced at the beginning of 2025 has been a positive change. Some of our clients have already benefitted from the increased certainty this has provided, as it has introduced some much needed clarity and predictability for transactions with a limited UK nexus. However, for the multitude of remaining transactions which cannot avail themselves of this safe harbour, the CMA's broad and unpredictable application of jurisdiction based on the Share of Supply Test remains a significant hurdle in deal making and substantially increases transaction risk.

3.3 While we welcome the proposed changes, we consider that this method of asserting jurisdiction, an outlier amongst other global regulators, could benefit from further review beyond the CMA's proposed changes in order to achieve the CMA's broader policy objectives.

Share of Supply as a basis for jurisdiction

3.4 As a preliminary point, we recognise the effectiveness of the CMA compared to other jurisdictions in that the voluntary nature of notification creates a more targeted regime than comparable mandatory jurisdictions. This is evidenced by the number of cases the CMA investigates annually compared to, for example, the German Bundeskartellamt.[5] However, the broad and unpredictable application of the Share of Supply Test does little to reduce the burden on merger parties in deciding whether or not a filing is indeed necessary or proportionate.

3.5 We consider that Share of Supply and market share thresholds are an inherently flawed basis for asserting jurisdiction. We appreciate that the Share of Supply Test is "*not an economic assessment of the type used in the CMA's substantive assessment*"[6] and that relevant markets need not be defined. However, even calculating Share of Supply may require extensive economic exercises, especially where parties have not conducted their own share exercises or shares are not readily available in third-party reports. Even the availability of such reports provides little comfort given the CMA's unfettered discretion to depart from traditional economic market definitions and to identify instead a specific category of goods or services for the purposes of applying the Share of Supply Test. To require merging parties to undertake such an extensive exercise so early in the deal-making process is unjustifiably burdensome given it is merely to determine whether the CMA has jurisdiction to review a transaction.

3.6 Jurisdictional tests should be bright-line and easy to apply, rather than an exercise in crystal ball gazing. We, as advisors, cannot currently confidently advise businesses, but rather provide them with an overview of the risks of the CMA's discretion. In its Phase 1 decision in *Roche/Spark Therapeutics*, the CMA dedicated 11 pages of a 66-page document to assessing its jurisdiction (not to mention a further 15 pages on background and analysis of product lifecycle and IP rights for Hem A treatments used to justify its view). The CMA is currently asking merger parties to predict unknown unknowns, and conduct a similarly limitless analysis guessing where the CMA will land before the process even begins.[7] This is not remotely proportionate. Even then, this analysis can never provide absolute comfort, and predictability remains out of reach regardless of how extensive the analysis is.

3.7 As a result, the commercial reality is that the Share of Supply Test has effectively become meaningless and has transformed a voluntary regulatory regime into a somewhat mandatory one. To effectively advise businesses, the only way to assess the need to file in the UK is not to focus on jurisdiction, but conduct a disproportionately extensive substantive analysis of the impact of the merger on UK markets. The reality for businesses is that there is little point arguing that the CMA does not have jurisdiction as the CMA has unlimited discretion to

[5] In 2024, the CMA formally investigated 38 mergers compared to ~900 for the Bundeskartellamt.

[6] CMA2, para. 4.63(a).

[7] For example, in our experience of pre-merger antitrust filing assessments, it would be difficult to predict the need to count patents and R&D employees and is unlikely to be how the businesses actually view the market. Whilst businesses active in pharma markets may now take this into account when conducting an assessment, they cannot predict future creative applications of the Share of Supply Test.

investigate transactions which could potentially result in an SLC.[8, 9] Parties and their advisors, therefore, must skip straight to the full substantive analysis – which increases the burden on merger parties before a filing has even begun, or is even necessary. This is not conducive to a productive and proportionate merger control regime.

3.8 The Share of Supply Test, therefore, operates like a jurisdictional threshold that captures any transaction which could impact competition in the jurisdiction. This may indeed be what the CMA intends to be the impact of the broad nature of the Share of Supply Test, but it does little to further the current growth industrial strategy and focus on the 4Ps.

3.9 Furthermore, the unpredictability inherent in market share and Share of Supply tests are arguably inconsistent with the ICN Recommended Practices for Merger Notifications, which state that notification thresholds should be *"clear and understandable*" and are "*best served by easily administrable 'bright-line' tests*". Furthermore, the ICN considers that mandatory notification regimes should be *"based on objectively quantifiable criteria"* as:

> "*Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification*". [10]

3.10 While the UK regime is not mandatory, we consider that the above still has application to voluntary regimes, particularly given the CMA's power to impose an initial enforcement order, in order to provide merger parties with the ability to accurately self-assess whether the CMA has jurisdiction, upholding the benefits of the voluntary regime in the first place.

3.11 Indeed, the ICN further advises that, while market share-based tests can be used in voluntary jurisdictions for providing guidance on which transactions may require notification, these market share-based voluntary thresholds are not appropriate to use as a basis for "*determin[ing] whether the competition authority has jurisdiction to review the transaction*." Instead, competition authorities should use *"objective criteria or provide guidance to assist parties in determining which transactions meet the thresholds*".[11]

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[8] We are not aware of any instances where there has been a successful appeal to the CAT on the CMA's establishment of jurisdiction in a merger context.

[9] In *Sabre Corporation v Competition and Markets Authority [2021] CAT 11*, the CAT outlined in relation to Ground 1 of appeal (that the CMA erred in law in that its Relevant Description of Services ("**RDS**")) that, due to the CMA's wide discretion in choosing an RDS and the criteria it based this on, the only appropriate challenges to be referred to the CAT was the *rationality* of the RDS itself and/or the criteria on which it was based. The CAT observed that "*central to the rationality of the CMA's definition of the RDS is consideration of the underlying statutory purpose of the requirement for such a definition, and, in turn the underlying purpose of the share of supply test. The "share of supply test" identifies mergers where the turnover test is not met, but which nevertheless fall within the jurisdiction as being suitable for investigation by the CMA. In a general sense, it might be said that the purpose is to identify those smaller mergers which are "worthy of consideration" i.e. warrant the devotion of time and resources by the CMA and the parties*." In doing so, the CAT essentially creates an unlimited and circular precedent for the CMA to use when Share of Supply is challenged: the purpose of the Test is to capture transactions which warrant review, and by definition, if an SLC is found the basis on which Share of Supply is established becomes immediately rational. This in practice means that merger parties have two possible outcomes when jurisdiction is established on the basis of Share of Supply; (i) no SLC is found; or (ii) the CMA considers that there is a reasonable prospect of an SLC, and the Share of Supply Test becomes self-fulfilled and unchallengeable. *Sabre Corporation v Competition and Markets Authority [2021] CAT 11*, paras. 138 *et seq*.

[10] See, ICN Recommended Practices for Merger Notification and Review Procedures, Section I, here.

[11] See, ICN Recommended Practices for Merger Notification and Review Procedures, Section I(D) and I(E), here.

3.12 Currently, the Share of Supply Test is neither clear and understandable, nor objective. Merger parties can never be fully confident that the CMA would not assert jurisdiction in order to initiate an investigation. While this has limited impact on very large mergers, which would undoubtedly be notified elsewhere and have sufficiently extended timelines and regulatory budgets to accommodate notifying the CMA, it has a more significant impact on smaller transactions and those focused solely on the UK where CMA intervention can jeopardise timelines and deal 'do-ability'. This puts a disproportionate pressure on smaller transactions, often in nascent markets, and is at odds with the CMA's growth agenda.

3.13 **We would therefore ultimately propose that, in the event the CMA decides to consult on legislative reform, it should follow in the footsteps of the Australian Competition and Consumer Commission ("ACCC") in abandoning share-based tests in favour of bright-line turnover and transaction value-based thresholds.** We do not consider this would impose too high a burden on the CMA and businesses and result in an overflow of notifications, as the CMA could maintain its excellent informal Briefing Paper route, allowing parties who meet the thresholds the opportunity to outline why no competition concerns can credibly arise, as well as its own initiative investigation powers and *de minimis* thresholds.

3.14 We recognise that the CMA's current consultation is purely a review of the Current Guidance and we are ultimately advocating for legislative reform and removal of the Share of Supply Test entirely. In the meantime, we consider there are changes to the CMA's application of the current Share of Supply Test which could be made to improve the CMA's application of this test and move more positively in the direction of the 4Ps:

(a) The 'reasonable' description of goods or services should not be a CMA subjective standard, but rather a commercially reasonable view based in part on how the businesses in the industry view the market; and

(b) The Share of Supply Test should be applied to goods and services relevant to the potential SLC.

The reasonable description standard

3.15 It is difficult to conduct a sufficiently robust economic analysis to identify the frame of reference against which to assess shares of supply. In most cases, this amounts to conducting a review of how the business people view the market and the substitutable products within it. While this may suffice for mature markets, it provides little comfort for modern and dynamic markets like tech and pharma when the CMA has substantial discretion to view the market in a completely different way as long as it is defensible as 'reasonable'.

3.16 While we welcome the CMA's clarification in paragraph 4.72 of the Draft Revised Guidance by reiterating the factors outlined in Section 23 of EA02, the clarification has done little to provide merger parties with any comfort, so long as the wording "*... or some other criterion of whatever nature [...] or such combination of criteria, as the decision-making authority considers appropriate*" is retained in EA02. If the CMA ultimately intends to pursue legislative reforms in this area, which we would strongly encourage, we urge the CMA to consult on removal of this endless discretion in favour of a defined list of factors. Until such legislative reform, we propose that the CMA interprets Section 23 narrowly, relying on "some other criterion" only in very rare circumstances.

3.17 In order to increase predictability of the Test's application, and indeed to bring the CMA's jurisdiction closer in line with commercial reality, we consider that the CMA's 'reasonable'

description standard should correspond to a description that the relevant industry would recognise as a sensible categorisation or coherent product or service line based on their existing business analysis/strategy. This will align the CMA's jurisdictional test with the competitive reality that businesses face, and improve the ability of merger parties to accurately self-assess, ultimately increasing predictability, pace and process.

3.18 We recognise that this proposal is somewhat circular and inherently involves a level of reliance on the competitive assessment, i.e., the CMA must begin to conduct its assessment before becoming fully abreast of how the market is viewed by those within it. However, it will improve the ability of companies to self-assess by reviewing Share of Supply estimates for a few possible reasonable market views based on how they view the market and the substitutable products or services in order to determine whether a notification is necessary. If the CMA decides to reach out through its Mergers Intelligence Committee, the merger parties would be able to submit a justified and reasonable view as to why they do not consider the jurisdictional thresholds have been met. Currently, there is no point making submissions that the CMA does not have jurisdiction, as it is essentially limitless as outlined above.

3.19 We note that the CMA has proposed removing the original wording from paragraph 4.64(b) of the Current Guidance stating "*[w]hilst the share of supply used may correspond with a standard recognised by the industry in question, this need not necessarily be the case.*" We strongly urge the CMA to reinstate this wording, however appropriately amended to reflect that the CMA will indeed have regard to the industry's reasonable view in <u>all</u> investigations.

Focus on goods and services related to the potential SLC

3.20 We welcome the CMA's clarification in paragraph 4.64 of the Draft Revised Guidance and agree that the CMA should focus its attention on the relevant goods or services which it considers would be most likely to give rise to an SLC. This would avoid the requirement to conduct extensive analysis, often requiring economists to produce market shares, in irrelevant markets and removes the ability of the CMA to construct interpretation of goods and services not relevant to any potential competition concerns purely to "take" jurisdiction over a particular transaction in an unpredictable and uncertain way. For example, in a hypothetical supermarket merger where the merging parties meet the Share of Supply Test solely on the basis of the number of employees in the UK but the potential competition concerns do not relate to employment issues – in such circumstances, the CMA should not have jurisdiction to review. We therefore welcome the CMA's clarification in this regard.

Share of Supply Test in the context of the CMA's new powers.

3.21 The CMA's flexibility in applying the Share of Supply test has been used creatively to take jurisdiction in cases where there are *prima facie* competition concerns but limited overlap between the merger parties on the relevant economic market. This sometimes arises in situations where there is a potential conglomerate or vertical link, or the CMA may be concerned regarding the acquirer's market position and the acquisition of the 'increment' from the target (in terms of pipeline products, patents, or ability to enter etc).

3.22 We consider that these borderline cases are now effectively dealt with under the CMA's new powers introduced under the Digital Markets, Competition and Consumers Act 2025. Indeed, the purpose of the introduction of this new test, according to the CMA's consultation in 2021, was to provide a 'more reliable' basis for capturing potentially harmful non-horizontal mergers and killer acquisitions.

3.23 The new Hybrid Test[12] has covered a large part of the perceived gap the CMA intended to cover by leaving the Share of Supply Test sufficiently broad. While we are unable to verify this due to confidentiality, it seems likely that the CMA would have jurisdiction to review *Sabre/Farelogix* or *Roche/Spark Therapeutics* under the Hybrid Test if they occurred today.

3.24 Given the introduction of the Hybrid Test, there are minimal, if any, cases which truly pose competition concerns, which the CMA would not have jurisdiction to review if the Share of Supply Test was reined in as suggested. The CMA may be concerned that, in letting go of some of its broad discretion to take jurisdiction whenever it wants, some problematic cases may slip through. This is unlikely to be the case, or would be exceedingly rare. The attempt to create a merger regime where there is zero possibility of any transaction 'slipping through the net' will always result in over-correcting on the other end of the scale, i.e., a hugely increased regulatory burden and unpredictability on the large number of unproblematic mergers. As stated recently by the Chancellor of the Exchequer, the CMA, like the entire regulatory landscape in the UK, currently has a disproportionate attitude to risk and should be willing to accept that the risk will never be zero, rather than maintaining an "*excessive focus […] on stamping out risk entirely*".[13]

3.25 In the interests of moving the CMA to a more proportionate and predictable regime, the broad application of the Share of Supply Test should be restricted in favour of very clear guidance and more predictable rules on its application as proposed above. The benefits of these changes would significantly outweigh any theoretical negative effects of a merger that the CMA is unable to review, an outcome which – particularly with its new powers – is unlikely to materialise.

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3.26 Finally, we are of the view that any additional guidance and clarifications regarding the application of the Share of Supply test must apply equally to the 33% Share of Supply test in the Hybrid threshold. Not reflecting these changes would retain the unpredictability of the Share of Supply Test, allowing the CMA to find jurisdiction by applying its broad discretion to any possible description of either party's business activities in the UK.

4. Topic 2: changes to the CMA's approach to 'Global Mergers'

4.1 Further clarity on the UK's approach to global mergers is a much-welcomed update to the Guidance. In line with the UK's industrial strategy and its more Proportionate approach, we appreciate the CMA's recognition that it should, in certain circumstances, decline to investigate truly global transactions.

4.2 However, we consider that additional guidance is necessary to provide the clarity which would make this change truly proportionate and predictable. We would propose the guidance be updated to include the following:

(a) Clarification on what constitutes a 'global' merger in this context in which the CMA would consider adopting a 'wait and see' approach;

(b) Clarification on the circumstances under which the CMA would intervene;

(c) Clarification on the timing of possible CMA intervention in these circumstances;

[12] CMA2, para. 4.3(b).

[13] See "Rachel Reeves: the pendulum has swung too far on risk", Financial Times 15 July 2025.

(d) Introduction of an informal decision not to investigate; and

(e) Clarification on how the CMA would interact with other reviewing competition authorities and the merger parties.

Clarification on 'global' mergers

4.3 We consider it would be helpful for the CMA to provide further clarity on the types of mergers where it may choose to exercise this discretion. For example, in ✂, the markets were global ✂ markets with no specific impact on the UK and no UK merger parties. This transaction was notified to the ✂. We would welcome clarity on whether the CMA would consider this small transaction, with no UK nexus other than some global customers (as with many other jurisdictions) would satisfy the 'global' merger situation in which the CMA would 'wait and see'. Alternatively, if the CMA envisages this only applying in situations where the transaction value is significant, this should be clarified.

4.4 Additionally, the Consultation and Draft Revised Guidance indicate that the CMA is likely to de-prioritise investigating mergers which concern exclusively global (or broader than national) markets. We request that the CMA provides additional clarification as to how it will identify these cases without initiating an investigation.

Circumstances under which CMA would intervene

4.5 We request additional guidance on the circumstances in which the CMA, having decided to adopt a 'wait and see' approach, would later be minded to intervene.

4.6 For example, we would welcome further guidance on the CMA's approach to remedies in regard to, e.g., how the CMA would decide to approach a remedy which did not meet its 'clear cut' standard at Phase 1 or where another jurisdiction imposed behavioural commitments which did not explicitly refer to obligations in the UK. The CMA has historically taken a divergent and more aggressive view on remedies which have been accepted by other regulators.[14] As mentioned, in line with the responses to the CMA's remedy call for evidence, we consider that the CMA should accept increased risk in this area and be accepting of remedies capable of mitigating the most likely effects of an SLC (without necessarily eradicating all possible SLC effects entirely) at Phase 1. This would go some way to increasing predictability in the CMA's approach to global remedies.

4.7 Another potential outcome is that other global regulators may decide that there are no concerns with the transaction. We trust that, having decided to adopt the light touch approach and not investigate thoroughly, the CMA would be comfortable trusting the outcomes of these authorities. If there are possible circumstances where the CMA may decide that there are issues which have not been identified by other authorities, then it should not adopt this light touch approach in the first place. We would welcome further guidance on how the CMA will assess the outcomes in other jurisdictions in order to decide whether it is satisfactory.

Timing of CMA intervention

4.8 If the CMA initially decides to pursue the 'wait and see' approach outlined in the Draft Revised Guidance, the Parties could be left with considerable uncertainty well into the filing processes in other jurisdictions. Ultimately, the CMA is unlikely to know for certain whether the outcomes

[14] For example, ME/6927/21 *Cargotec/Konecranes*; ME/6983/22 *Microsoft/Activision Blizzard*.

of the investigation in another jurisdiction would be satisfactory until the latter stages of the investigation. At this point, even though the process may be expedited somewhat, the CMA would be significantly behind the timelines of other authorities and jeopardise the viability of the deal. The possibility of CMA involvement late into the process would also create significant uncertainty for parties negotiating deals – the unpredictable involvement of the CMA adds additional difficulty when it comes to negotiating conditions precedents and longstop dates and is likely to have a chilling effect on the parties which would impact growth in the UK.

4.9 Furthermore, the threat of CMA intervention late in the merger control process creates the possibility for the CMA to hold merger parties "hostage" unless they, e.g., amend a remedy offered to another authority. This would arguably put the merger parties in a worse position than under the current process as the CMA would be making remedy requests to address competition concerns which it has not investigated and cannot be confident would materialise in the UK. In this circumstance, merger parties would be forced to file with the CMA regardless of its willingness to take a backseat, in order to avoid being required to offer potentially ill-considered remedy amendments at the end of the process.

4.10 To improve predictability, we propose that the CMA adopt a policy to decide at an early stage whether to review a transaction and waive its right to call in the transaction at a later point. If the CMA is not prepared to do this, then there should be a bright-line cut-off point at which the CMA confirms it will not initiate a review. This cut-off should be at a point sufficiently advanced in the timelines for the CMA to be satisfied with the position of the other reviewing authorities but not so late as to impact on timelines for the reasons outlined above. We consider that the point at which another reviewing competition authority opens a Phase 2 investigation would be the last appropriate point in time in which the CMA could call in the transaction for review, as this would coincide with the merger parties initiating remedies discussions with the other reviewing competition authority. This timing of the CMA's intervention would still allow the CMA to consider and accept undertakings in lieu and, therefore, would not have a considerable impact on the deal timetable.

Informal decisions not to investigate

4.11 On the basis that the CMA does not have the statutory authority to issue a formal and binding decision not to investigate a transaction and in order to improve predictability, we propose that the CMA issue an informal confirmation that it will not open an investigation, akin to a 'No Further Questions' response from the Mergers Intelligence Team following a Briefing Paper. This would provide at least some comfort and allow merger parties to negotiate CMA condition precedents which can be reasonably and definitively satisfied.

Clarification on interactions with other reviewing competition authorities and the merger parties

4.12 We propose that the CMA stay in regular contact with other competition authorities and be willing to consult on potential competition concerns and remedy proposals as early as possible, so that it has sufficient time to initiate an investigation sufficiently early in the process (and before the bright-line 'point of no return' suggested above) if it considers the other reviewing authorities' position on the potential competition concerns and/or any remedy proposals may be insufficient to satisfy the CMA.

4.13 Given the criticality of input from other reviewing authorities in this context, it would be helpful for the CMA to provide guidance on how this would be accomplished. For example, would the CMA request waivers from the merger parties, hold regular update calls with other authorities, etc? It would also be helpful for the CMA to provide guidance on how it envisages updating

merger parties – e.g., regularly updating the merger parties on whether it is still minded to investigate, and if so, on what basis.

4.14 In order to keep the CMA sufficiently informed of the facts of the case we propose that merger parties provide the CMA with a copy of the filings made in other jurisdictions e.g., the Form CO, once the appropriate waivers have been obtained. The CMA (shadow) case team would have sufficient information to meaningfully engage with the facts of the case. This would improve predictability for the merger parties as the CMA would be in a better position to assess remedies offered and to stress-test the outcomes of other jurisdictions.

5. Topic 3: Changes to the CMA's process and updates to the Merger Notice template

5.1 Baker McKenzie appreciates the CMA's continued willingness to improve the effectiveness and proportionality of the CMA process. We are generally supportive of the proposals made by the CMA in the consultation, in particular:

(a) **Pre-notification Teach-Ins** – We welcome the ability to provide upfront sessions with the case team and consider this will significantly increase the pace of the Phase 1 process for all stakeholders by allowing the CMA case team to get to grips with the market and meaningfully engage with the facts of the case much quicker. In order to realise the benefits of this, the case teams should utilise the increased understanding of the market received during these sessions to provide more timely, targeted and streamlined RFIs and increasing the pace of work during pre-notification.

(b) **Increased engagement** – A significant difficulty with the current Phase 1 process has been the timing of the merger parties being made aware of the CMA's thinking. This leaves less time for the correct evidence to be obtained and more targeted assessments to be conducted. This is particularly the case for third party views, which the merger parties often do not get to see until the Issues Letter. We welcome this update and hope this will allow for a more efficient and targeted Phase 1 process, as well as earlier engagement on remedies as necessary.

(c) **Publication of pre-notification webpage** – We are generally supportive of this proposal and understand the CMA's need to start the market testing in pre-notification in order to ensure it meets the Pre-Notification KPI and general increased Phase 1 pace goals. As the CMA has identified, there may be situations where the merger parties do not wish to make the case public at the pre-notification stage. We consider that the CMA should adopt a pragmatic approach to accepting parties' arguments in this regard, rather than imposing an extremely high bar for opting out.

(d) **Shorter summary decisions** – This proposal is sensible in the context of increasing the pace of the CMA process and the proportionate burden on CMA case teams. However, CMA case precedent is a wealth of articulated past approaches to merger investigations and market definition. We hope the CMA adopts a long-term view of increasing pace and predictability, as the CMA's past decisional practice is extremely helpful for businesses and their advisors to assess future transactions. As such, we suggest that summary decisions retain the depth of information which make them most useful, particularly relating to market definitions and redacted market share tables to assist merger parties in future.

5.2 Our response to the CMA's proposals regarding the Pre-Notification KPI and updates to the Merger Notice are detailed below.

Pre-Notification KPI

5.3 Historically, merger parties have experienced varying lengths and speeds during the pre-notification period, often with seemingly no correlation with the complexity of the case at hand. In some instances, there are long delays between RFIs, whilst in others, RFIs come slowly, but are followed by a sudden request to start the clock, even with RFI responses outstanding. As with the other topics in this consultation, the CMA's current discretion causes considerable unpredictability for merger parties and has a significant impact on deal timelines.

5.4 We welcome the CMA's dedication to pace and process in committing to shorten the pre-notification period to 40 working days as often as possible and further appreciate, and agree with, the flexibility afforded to merger parties to opt out in appropriate circumstances, for example when the merger parties are trying to devise a suitable remedy proposal.

5.5 However, in order to effectively track this KPI, there must be a 'trigger point' that starts the KPI clock. While previously this has been the submission of the first draft Merger Notice, the updated guidance provides the CMA with further discretion in that pre-notification is only deemed to start once a Satisfactory Notification has been provided so that the CMA case team can meaningfully engage with the facts of the case. Without further guidance on when exactly the Merger Notice will be deemed "satisfactory", we are concerned that this provides the CMA with another period of flexibility to mould the timelines to meet the case team's timetable, effectively creating a period of pre-pre-notification. A 40-working day KPI becomes meaningless if the clock only starts once the CMA considers it has enough information to hit its KPI target on time. Whilst we recognise the reasoning behind the Satisfactory Notification standard (previous 'drip-feed' cases), in most circumstances this will not be the case, and it is in the merger parties' mutual interest to provide as much information in as timely a manner as is possible. Gathering some of the information now required by the Merger Notice before it will be considered satisfactory (internal documents, market share estimates, bidding and switching data) can take considerable time even where merger parties are working diligently. This has historically been a normal part of the pre-notification process. Simply moving this information gathering to ‘pre-pre-notification’ will do little to change the pace of the investigation for most merger investigations.

5.6 The CMA has outlined the ability to exclude cases from the KPI where the merger parties are not providing information and acting in accordance with their obligations under the Mergers Charter. This tool should be used to tackle these outlying cases of feet dragging, but delaying starting pre-notification should not be used to punish the majority of merger parties working expeditiously. There will undoubtedly be cases where the merger parties are working hard to gather the correct information (internal documents, market share, switching or bidding data) and these would materialise shortly into pre-notification in any event.

5.7 We therefore urge the CMA to act pragmatically in deciding whether Satisfactory Notification has been achieved, by taking into account whether this information will be forthcoming in pre-notification in a timely manner, and appropriate explanations by merger parties of efforts being undertaken to provide this information as soon as possible.

5.8 In parallel with timing commitments, the CMA must commit to working at pace. If the Satisfactory Notice threshold means the Merger Notice is almost entirely complete before pre-notification can begin, the CMA case teams will remain at liberty to work slowly, delay outreach

and sporadically engage with the merger parties to suit their own timelines, e.g., due to staffing levels at certain times of year, all the while hitting the pre-notification KPI. Alongside this commitment, the CMA must commit to an increased pace of engagement with investigations to increase the predictability of timelines from the very start until the decision date.

Updates to the Merger Notice

5.9 As noted above, the updated Merger Notice has expanded the information needed to be gathered by the merger parties. This in isolation will increase the total length of pre-notification. Simultaneously, the CMA is seeking to reduce the length of pre-notification by introducing a shorter KPI. Our concern is that the real length of pre-notification (i.e., submission of the first draft Merger Notice (which may be rejected) to the Final Merger Notice) will increase. The CMA will be able to claim its KPIs are being met even though the actual length of pre-notification has been increased. The KPI (as outlined above) then becomes meaningless and the interesting statistic will in fact be the time between allocation of the Case Team and Satisfactory Notification. This is in direct contradiction of the CMA's aim to improve pace.

5.10 **Updates to Document Requests** – Based on prior experience, the information now requested at Question 8(a) and Question 9 is generally requested in any early RFI from the CMA. We understand that the CMA has front-loaded this information request in order to ensure the first draft Merger Notice provides a more fulsome account of the merger approval process. However, the expansion of this request will add significant burden to the merger parties in preparing a Satisfactory Notification to the CMA's standard.

5.11 As highlighted above, our concern with the updated Merger Notice and requirement for Satisfactory Notification is that the CMA may employ its discretion with regards to internal documents to delay the start of pre-notification. This is particularly the case now that the Merger Notice questions have been amended to refer to 'all Internal Documents'. If the CMA considers that insufficient documents have been provided alongside the Merger Notice (particularly with regards to the new requests), then the CMA should use its statutory powers under section 109 of EA02 to make targeted requests for these documents. This issue is exacerbated as the CMA now requests documents in relation to all Relevant Markets including vertical and conglomerate overlaps.

5.12 Additionally, the CMA has clarified that it expects merger parties to have regard to the individuals and processes identified in Questions 8 and 9 when providing documents. This, coupled with the clear request for 'all' internal documents, seems to be structured in a way similar to the CMA's section 109 powers with the previously identified individuals as custodians. We consider it would be unhelpful and disproportionate to use Internal Document requests in the Merger Notice to hold parties hostage, and to make the merger parties comply with a quasi-section 109 request whilst no formal investigation has begun.

5.13 The CMA should clarify the circumstances in which it will consider these questions complete. In the event the CMA considers insufficient data has been provided, it should issue targeted requests in pre-notification under its section 109 powers, rather than use the Merger Notice to mass request documents.

5.14 We further note the CMA has also reduced the combined market share threshold for horizontally overlapping markets to be considered relevant for the document request questions, from 15% to 10%. We request that the CMA explains this decision. Given that the Merger Notice is now more burdensome for merger parties and the CMA has the ability to delay pre-notification indefinitely, we would urge the CMA not to expand the relevant markets covered by the

questions without good reason. We note that the 15% threshold has not been reduced for providing switching data, and do not consider that internal document requests should be held to a more burdensome standard than the rest of the Merger Notice.

5.15 **Bidding and switching data** – This information is generally provided during the merger process where available. We welcome the CMA's amendment to Question 15 seeking to understand the extent to which bidding data is relevant to the market, and to what extent this information is held by the merger parties, rather than request bidding data outright. This will reduce the upfront burden on the parties and result in a more targeted process.

5.16 **Contact Details** – Collection of contact details is a significant exercise. The CMA should recognise that in many cases, merger parties do not maintain databases of individual contact details for their competitors. Furthermore, it is increasingly difficult to identify personal and individual contact details as opposed to generic email addresses and phone numbers, simply by virtue of how modern communication with businesses occurs, in particular with the use of online forms, automated chatbots and CRM tools. We propose that the CMA should relax its requirement by accepting the submission of generic business email addresses and not delay the investigation or Satisfactory Notification until receipt of total individual contact details have been received. Businesses and their advisors do not have the ability to gather appropriate contact details by reaching out to competitors and customers prior to the publication of the case page (and indeed, often even afterwards). The CMA, however, does have the ability to reach out to these stakeholders and request appropriate contact details at their generic inboxes, with the added weight and credibility of an @gov.uk email address.

5.17 We welcome the ability to discuss overlapping markets with the CMA and exclude the requirement to provide contact details where the merger parties have only a limited overlap.

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Baker McKenzie remains at the CMA's disposal to discuss any of the points raised in this response.

Baker & McKenzie LLP

August 2025