July 2025

RESPONSE TO:

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

BY ARNOLD & PORTER

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1 INTRODUCTION

1.1 Arnold & Porter Kaye Scholer (UK) LLP (**Arnold & Porter** or **the Firm**) welcomes the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on draft revised guidance on the CMA's jurisdiction and procedure (**Draft Guidance**) and draft revised merger notice (**Draft Merger Notice**).

1.2 This response is based on the Firm's strong and wide-ranging experience and expertise in advising clients on matters relating to UK competition law and the CMA's enforcement action in the merger control space.

1.3 We have confined our comments to those areas of the Draft Guidance and the Draft Merger Notice which we consider are most significant. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2 GENERAL OBSERVATIONS

2.1 The Firm welcomes the Draft Guidance and agree with the CMA's proposal to update the previous guidance to embed the CMA's new '4Ps' framework into its mergers processes.

3 THE FIRM'S RESPONSE TO THE DRAFT GUIDANCE

Question 7.3: What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

Jurisdiction and relevant merger situations (Chapter 4)

3.1 ***The concept of "enterprise" (paragraphs 4.5-4.15):*** We welcome the inclusion of, in footnote 34 of the Draft Guidance, reference to the *Microsoft/Inflection* decision. However, it would be helpful to take this chance to provide more guidance for businesses to assess where acquisitions of employees or "acqui-hires" may amount to a "merger situation". This could be done, for example, by listing (and explaining) the main factors the CMA would typically consider when making its assessment – e.g. in terms of (i) number/proportion of employees who move over versus those who remain with the seller, (ii) whether the employees who move over need necessarily to carry out business activities that largely mirror the activities of the transferring entity, (iii) whether, post-transaction, the expectation is that the seller will have discontinued entirely/almost entirely the relevant business activity (or at least materially re-focussed its commercial strategy), (iii) whether the granting of licensing over the seller's core technologies will generally be necessary to qualify as a "business transfer", (iv) whether the value of the transaction plays a key role (and whether a "soft" safe harbour can be established for transactions whose value are below a certain minimum threshold), and (v) what weight would the CMA give to the fact that employees have resigned individually rather than being transferred automatically under the Transfer of Undertakings (Protection of Employment) regulations.

3.2 While, at paragraph 4.11(a) of the Draft Guidance, the CMA has now clarified that "*intangible assets such as intellectual property rights (including know-how) are*

unlikely, on their own, to constitute an enterprise," it would be helpful to clarify in what circumstances licensing agreements may constitute a "merger situation" – including in the event the licensed assets do not yet generate any turnover. For example, based on the limited available case law (see for example the European Commission's decision in M.7872 *Novartis/GlaxoSmithKline* and the CMA decision in ME/6893/20 *Behring LLC/uniQure biopharma BV),* as well as the general principles of merger control, we would welcome some clarifications in respect of the circumstances under which the CMA may consider the licensing of IP as falling within UK merger control. For example, would an exclusive, long-term, worldwide licence over a clinical compound in late stage of clinical trial be likely to be considered as falling within UK merger control rules (if all other relevant criteria have been met)?

3.3 ***Material influence (paragraphs 4.17-4.20):*** The Draft Guidance states, at paragraph 4.20, that "*Material influence is unlikely to arise in situations where a minority shareholder has no more than the rights normally accorded to minority shareholders in order to protect their financial interests*." However, we would expect in this situation "material influence" will virtually never arise, and we would encourage the CMA to re-consider this wording and/or clarify where material influence could potentially arise in these cases. For the sake of legal certainty, it would also be helpful if the CMA could provide a safe harbour (e.g. the acquisition of shareholdings of less than 10%) below which material influence could not be deemed to arise.

3.4 ***The share of supply test (paragraphs 4.59-4.72):*** It is helpful that the Draft Guidance states, at paragraph 4.72, that the CMA "*will typically only focus on the factors specified in the Act to determine whether the 25% threshold is met, for example value, cost, price, quantity, capacity and number of workers employed*." However, in addition to citing some of its precedents in footnote, it would help predictability if the CMA could clarify in what circumstances it would typically consider (also) each of the factors other than value and volume – given that traditionally most businesses have primarily, and in most circumstances, relied on value and volume data to assess whether the 25% share of supply test could be met. For example, we expect that the share of supply test may be calculated (also) based on the number of other bidders only where the overlaps between the merging parties are in relation to services which are typically subject to tender processes. Similarly, we would expect the share of supply test may be calculated (also) based on the number of patents procured by the merging parties in the pharmaceutical and other R&D-heavy sectors, but it would be helpful if the CMA could provide examples of industries where it would expect to apply this factor. Additionally, it would be helpful if the CMA could clarify and/or provide examples of what are the "*other criterion, or combination of criteria"* referred to at paragraph 4.72, and provide a list of these other criteria which is as exhaustive as possible.

The phase 1 process: overview (Chapter 5) and Initiating merger investigations (Chapter 6)

3.5 Given the length of pre-notification in recent years, the commitment to limit pre-notification to no longer than 40 working days is very much welcome. However, we make the following observations:

a) It would be helpful to give an indication of the expected duration/maximum duration of the "initial discussions" referred to as "Stage 1A" in *Table 1: The key stages of a typical phase 1 investigation* – the concern being that, if these

discussions can potentially extend for a significant period of time, the benefit of introducing a 40-day KPI might be materially reduced.

b) Given the increasing number of transactions being notified via submission of a briefing memorandum to the CMA's Merger Intelligence Unit, in addition to providing criteria that the CMA will follow to decide whether to open an investigation on its own initiative (paragraph 8.3 of the Draft Guidance), we would welcome some clarity or a set of criteria/factors that make in general a case as a good candidate to be proactively notified via submission of a briefing memorandum rather than a formal filing (e.g. in terms of parties' revenue, market share increment, combined market shares, case being notified in other jurisdictions etc.). We point out that nothing is provided in this regard at paragraphs 6.11-6.12 of the Draft Guidance; the *2020 Guidance on the CMA's intelligence function* also lacks any specific guidance in this regard.

c) It is our understanding that 40 working days is broadly in line with the current pre-notification period in cases which do not raise material concerns. As such, it would be helpful if, in addition to providing for an overall maximum period of 40 working days, the CMA could provide a range or at least distinguish between cases that do and cases that do not raise material concerns – the concern here being that an overall 40-day KPI applicable to all cases would not be an improvement in instances which do not raise material concerns.

d) The CMA has introduced new and extensive requirements for merger parties to adhere to before the 40 working day pre-notification period commences, meaning that in practice the pre-notification period will only start running as of submission of a "very advanced draft" rather than a "first draft" filing (as it is currently the case). In particular, under paragraph 6.27 of the Draft Guidance, the pre-notification period will only start once the parties have responded to all applicable questions in the Merger Notice (including identifying all horizontal overlaps and vertical links – and not just the main ones), and once they have provided all supporting documents and all relevant contact details. In practice, this means that, by the time pre-notification discussions start, the parties will be required to be already at a very advanced stage of the analysis, having identified all/almost all possible overlaps and all/almost all potential concerns, as well as having gathered all internal documents and contact details (process which is usually quite time-consuming); we are concerned that therefore the overall gain in terms of timing may be potentially very limited, given the parties will likely need to spend a much more extended period of time at a stage prior to pre-notification.

e) While we appreciate that the CMA will review the initial draft "promptly" after submission (see paragraph 6.28 of the Draft Guidance), it would be helpful to set some KPIs or at least an indicative timing within which the CMA endeavours to review the draft Merger Notice and begin the pre-notification process.

f) While we appreciate that publishing a case webpage announcing the start of pre-notification (paragraph 6.29 of the Draft Guidance) increases transparency about the CMA's work, this seems at odd with most merger control regimes, where cases are not usually made public until later in the process. We are concerned that merger parties may, in most cases, want to keep the fact that a

merger is being contemplated as confidential – particularly where there may be matters to be discussed in pre-notification that might affect a decision regarding deal feasibility. We also point out that, given third parties will be contacted at this stage in any event, that provision seems unnecessary. We would therefore ask the CMA to re-consider its position.

Changes relating to the CMA's approach to global mergers

3.6 We welcome the CMA taking a pragmatic approach to global mergers. However, it would be helpful for the revised guidance to provide additional detail on what a "*UK-specific impact"* is. For example, markets for pharmaceutical products are typically considered national in scope. Would a merger involving a pharmaceutical product marketed globally (including in the UK) necessarily involve a UK-specific impact? Similarly, we would welcome guidance on the circumstances under which the CMA would consider remedies imposed or agreed in other jurisdictions to be likely to address any competition concerns that could arise in the UK and, thus, the circumstances under which the CMA would, for example, consider not imposing a separate remedy/carry out an in-depth review and/or would be satisfied to be notified the deal through submission of a briefing memorandum to the CMA's Merger Intelligence Unit.

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