

RESPONSE OF CLIFFORD CHANCE LLP TO THE DRAFT UPDATED GUIDANCE ON THE CMA'S MERGERS JURISDICTION AND PROCEDURE

Clifford Chance welcomes the opportunity to respond to the consultation of the Competition and Markets Authority (CMA) on the proposed changes to: (i) Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2); and (ii) the Merger notice template

Our observations and comments provided below are based on the substantial experience of our lawyers in our antitrust practice of advising on the UK merger control regime. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Draft Revised Guidance

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

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.

Are the changes Draft Revised Guidance consistent with the CMA's '4Ps framework' and likely to promote the pace, predictability, proportionality and engagement in the CMA's merger investigation process? Are there any additional changes that may further contribute to these priorities?

Material influence

1. We welcome the enhancements made to the material influence section in the CMA2 consultation version (**CMA2 Consultation Version**). While we appreciate that this area is inherently case-specific, we note that the CMA promises that the clarification in the Draft Revised Guidance will bring *greater predictability* for businesses and will provide *greater certainty* over which transaction could meet the CMA's jurisdictional thresholds.¹ However, the Draft Revised Guidance is hedged with qualifications and lacks specificity, such that neither predictability nor certainty will be materially enhanced by the proposed changes, in our view. For example, 4.23 of the CMA2 Consultation Version conceives the possibility that a less than 15% shareholdings (a interventionist threshold than most other merger control jurisdictions) could give rise to material influence in certain circumstances, but – contrary to the aims of predictability and certainty – those circumstances are not specified. We appreciate that, pending legislation, the CMA cannot change the rules, but in the guidance could be

¹ Par. 3.4 of draft revised guidance on the CMA's jurisdiction and procedure and draft revised merger notice (20 June 2025).

more specific on how it will apply them in practice so as to give greater predictability and certainty.

2. With this in mind, we have the following comments:

- (a) **Footnote 46 and 61 of the CMA2 Consultation Version should be clarified.** Footnote 46 of the CMA2 Consultation Version states that "*...the existence of economic dependence, exclusivity, or close relations between the acquirer and the target entity will not be (whether in themselves or collectively) sufficient per se to establish a material influence over policy if those factors do not confer on the acquirer f [sic] ability materially to influence strategic commercial decisions of the target entity*". Footnote 61 has similar wording. These footnotes are somewhat circular and do little to provide practical guidance. By stating that economic dependence, exclusivity, or close relations are not sufficient to establish material influence unless they actually confer material influence, the footnotes simply restate the test rather than clarifying how these factors should be assessed in practice. This approach does not assist parties in understanding the circumstances in which such factors may, individually or collectively, amount to material influence, nor does it provide any meaningful criteria or examples to guide assessment.
- (b) **The CMA should provide a non-exhaustive list of minority protections that do not confer material influence.** The current drafting in the CMA2 Consultation Version, which states 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*,"² provides only limited practical guidance. The only example given at Footnote 47 - rights in the context of a liquidation - does not sufficiently illustrate the range of rights that may be considered "normal" or where the boundary between investment protection and material influence lies. This is an important area, given the potential for overlap between investment rights and elements of control and the fact that, under the EU Merger Regulation, the European Commission treats as minority investor protections a number of rights that are treated by the CMA as conferring material influence (e.g. the ability to block special resolutions). It would therefore be helpful for the guidance to include a broader set of examples or clearer criteria to assist parties in assessing when minority rights might cross the threshold into material influence.
- (c) **The CMA should elaborate on the role of observers in its material influence assessment.** At paragraph 4.20(b), the CMA2 Consultation Version states that "*to the extent that they provide a mechanism via which influence over*

² Par. 4.20 of the CMA2 Consultation Version.

commercial strategy can be exerted, the main factors which are likely, individually or collectively, to confer material influence are the following... Rights to appoint members of the board of the target entity (including board observers) (see paragraphs 4.28 to 4.30 below)” (own emphasis). However, the referenced paragraphs do not provide any further detail on how the CMA will assess how the appointment of board observers may give rise to material influence. Indeed, this is even more important given the CMA's clarification in the CMA2 Consultation Version that “... *the ability to appoint a single board member is unlikely to confer material influence*”³. Further clarification or illustrative examples in this area would be helpful to provide greater certainty to parties, given that (i) the role of board observer is a legitimate means for investors to protect their interests, (ii) observers have no board voting rights, and (iii) the receipt of information does not, in itself, confer any ability to influence decision making of the board.

- (d) **The CMA should explain its position on convertible notes and non-voting shareholdings.** In both *Alphabet / Anthropic* and *Amazon / Anthropic*⁴, Alphabet and Amazon acquired convertible notes which could be converted into non-voting shares. In *Alphabet / Anthropic* the CMA stated that in the “*absence of any voting rights or board representation, the CMA considered whether other rights attaching to Google's investments in Anthropic might allow it to exercise substantially greater influence than might be expected to result from its non-voting minority shareholding*”⁵. In *Amazon / Anthropic*, the CMA did not make a finding in respect of material influence. It would be helpful for the CMA to set out in the revised CMA2 guidance how convertible notes and non-voting shareholdings might give rise to, or contribute to, a finding of material influence.
- (e) **The CMA should give weight to the strategic transaction documents of the merging parties.** In our view, transaction rationale documents set out the intention of the merging parties and reveal not only the mechanisms of the transaction, but also the intention of the parties. The CMA2 could be revised to elaborate on how much weight the CMA will give to the parties' internal documents, to consider whether material influence can and will be exercised.
- (f) **The CMA should consider the identity, size and expertise of other shareholders that appointed board members of the target entity in its assessment.** The CMA2 Consultation Version states that “*Whether as a free-standing basis for material influence or as a supporting factor in the context of*

³ Par. 4.28 of the CMA2 Consultation Version.

⁴ *Amazon / Anthropic* (ME 7100/24).

⁵ Par. 26 of *Alphabet / Anthropic* (ME/7108/24)

*a shareholding, the CMA will review a range of factors in relation to such board representation, including, for example, the corporate/industry expertise, other relevant experience or incentives of the acquirer"*⁶. We would suggest that this be further amended to include that the CMA will consider the identity, size and expertise of other shareholders that appointed board members of the target entity in its assessment, including the board member(s) to be appointed by the acquiring entity.

- (g) **The CMA2 consultation should focus on *strategic commercial policy***⁷. The CMA2 Consultation Version has amended wording throughout the material influence section to read "commercial policy". However, commercial policy is extremely broad, and the CMA2 Consultation Version should instead focus on *strategic commercial policy*, as it is only in this context that material influence would arise.
- (h) **The CMA should bolster the section "*Other sources of material influence*".** As noted above, the CMA has undertaken significant work undertaken in this area in the past year⁸, particularly assessing other sources of material influence, including at least (i) supply arrangements, (ii) distribution arrangements, (iii) licensing arrangements; and (iv) future collaboration and development opportunities. Whilst the CMA has bolstered the CMA2 Consultation Version with additional guidance in this area, including Footnote 59, it would be helpful for the CMA to draw out more specifically the various factors it considered in these cases and how it came to its conclusions, for example, its position on non-exclusive agreements and how these could confer material influence.

- 3. Clear and comprehensive guidance on the material influence test is crucial to provide as much certainty as possible, while recognising that a one-size-fits-all approach is not appropriate. Applying the material influence test too rigidly can, and arguably already has, deterred normal minority investments – particularly those that are vital sources of capital for smaller start-ups seeking to grow and succeed⁹.

Share of supply

- 4. Similar to the material influence section above, we note that the CMA promises, in paragraph 3.14 of the consultation, that the clarification in the Draft Revised Guidance will bring greater predictability for businesses and will provide greater certainty over

⁶ Par. 4.29 of the CMA2 Consultation Version.

⁷ See for example, par. 4.28 and 4.31 of the CMA2 Consultation Version.

⁸ See for example, *Amazon / Anthropic* (ME/7100/24), *Alphabet / Anthropic* (ME/7108/24), *Microsoft / Mistal* (ME/7102/24), *Microsoft / OpenAI* (ME/7084/23).

⁹ We note that Footnote 60 may have a cross-referencing error when it refers to Footnote 52.

which transaction could meet the CMA's jurisdictional thresholds. However, the changes in the Draft Revised Guidance are minimal, such that neither predictability nor certainty will be materially enhanced by the proposed changes, in our view.

5. It is helpful for the CMA to insert the point that, in determining the relevant description of goods or services, the CMA "will consider those which are relevant to any potential competition concerns arising from the merger"(introductory words of paragraph 4.64 of the draft amended guidance) but this should be repeated in subparagraph (b) and ideally expanded on with details. We also welcome the indication that the CMA will "typically only focus on" the factors expressly listed in s23(5) of the Enterprise Act 2002 (EA02), notwithstanding its ability to also consider any "other criterion, of whatever nature".
6. However, given the new "hybrid" jurisdictional threshold, we consider that the CMA could provide clearer and more definitive guidance on its application of the share of supply test in this respect. As the CMA is aware, the new hybrid jurisdictional threshold was introduced to fill a "*gap in the jurisdictional thresholds*"¹⁰. This was because the previous jurisdictional thresholds could not squarely capture acquisitions of nascent or potential competitors (*i.e.*, killer acquisitions), and acquisitions which gave rise to purely vertical and/or conglomerate concerns, unless they met the target turnover test. Indeed, in relation to these types of acquisitions, the "Reforms to Merger Control" impact assessment noted that¹¹ -

"The CMA may be able to investigate some cases of this nature through its existing jurisdictional tests however these will not always be suitable and their application in this context may create uncertainty amongst businesses".

7. Prior to the introduction of the hybrid test, the CMA previously had to use its existing tools, particularly the share of supply test, to fill these gaps. In doing so, the CMA was, in our view, driven to interpret the share of supply test excessively broadly in some cases – and in ways that were inconsistent with the ordinary meaning of the statutory wording – to address transactions that potentially raised competition concerns but did not fit neatly within the jurisdictional thresholds.
8. This approach can be seen in several merger decisions, for example:
 - (a) In *Roche Holdings, Inc / Spark Therapeutics, Inc*¹², the CMA asserted jurisdiction over a target with no revenue in the UK. In doing so, the CMA

¹⁰ Par 25 of "Reforms to Merger Control", <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/ImpactAssessmentAnnex3.pdf>

¹¹ Par 26 of "Reforms to Merger Control", <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/ImpactAssessmentAnnex3.pdf>.

¹² *Roche Holdings, Inc. / Spark Therapeutics, Inc* (ME/6831/19).

stated that "*competitive interactions between firms should not be reduced to overlaps in directly-marketed products*" and found that the activities of Roche – a firm with a currently marketed product – and Spark – a firm with products still in clinical development – overlapped for the purposes of the share of supply test, despite Spark having never supplied any products to customers anywhere in the world. In our view, this was a distortion of the statutory test in s.23(3) EA02, which requires that a quarter of the relevant goods in the UK "are supplied" (present tense) by the merging parties;

- (b) In *BlackRock / Preqin*¹³, the CMA calculated the merging parties share of supply by reference to the number of full-time equivalent employees of the parties in the UK, despite finding that the parties operated in a global market (*i.e.*, it excluded major competitors that were headquartered outside the UK from its share of supply calculation to find jurisdiction). This approach leads to the counter-intuitive result that a UK company operating in a global market may be penalised for its decision to invest in the UK;
 - (c) In *Mastercard / Nets*¹⁴, the CMA made a referral to the European Commission under Article 22 of the European Union Merger Regulation. Despite the CMA noting that the target had no assets in the UK, no current business activities and no plans for future business activities in the UK, the CMA found that the share of supply test had been met on the basis that the target was participating in one tender in the UK (as a future supplier to a prime bidder), and that the acquiring entity was participating in the same tender, fulfilling the share of supply test on the basis that the parties constituted approx. 20 to 30% of the total suppliers of a particular product to prime bidders. This was despite the fact that the tender was ongoing and Nets had therefore made no supplies to the prime bidder (or to any other customer in the UK) at the time of the CMA's decision.
9. None of the above decisions were appealed and we consider it likely that, if they had, some or all of them would have been overturned by the CAT on jurisdictional grounds.
10. The CMA2 guidance (including the CMA2 Consultation Version) has been drafted to support and maintain this expansive interpretation of the horizontal share of supply test. However, this approach has created significant uncertainty for businesses in the UK, as it makes it difficult to assess whether the CMA will assert jurisdiction, and the resulting compliance costs and regulatory risk, at the outset of a transaction. As noted above the

¹³ *BlackRock, Inc. / Preqin Holding Limited* (ME/7121/24).

¹⁴ *Mastercard Incorporated / Parts of the Corporate Services Business of Nets A/S* (ME/50824-19).

UK Government itself plans to launch a consultation with proposals to address the uncertainty with the existing share of supply and material influence tests¹⁵.

11. The new hybrid test is specifically designed to address many of the policy concerns that previously informed the CMA's expansive interpretation of the horizontal share of supply test. Indeed, the passage quoted from the "Reforms to Merger Control" impact assessment recognises this as the very purpose of the hybrid test. The new regime, therefore, provides a more direct and robust mechanism for asserting jurisdiction over these types of transactions. We therefore submit that the CMA's guidance should state that the CMA will, in the future, adopt a clearer and more objective approach to interpreting the horizontal share of supply test and, in particular, that:
 - (a) parties will not be treated as having supplied a product or service within the UK unless, at the time of the CMA's decision, they have actually supplied products or services to one or more UK customers. Being "active" in "the development stage" of the "supply cycle" (as per *Roche/Spark*) should no longer be considered to meet this test. In addition, for the purposes of s.128(3) EA02, "the provision of services by making them available to potential users" should be interpreted as meaning that those services are made available for users to receive at the time of the CMA's decision (which was not the case in *Mastercard/Nets*); and
 - (b) where it is clear that the geographic markets in question are wider than the UK, it will not be appropriate to assess shares of supply solely on the basis of assets or employees that are located in the UK, unless all other major competitors have their productive assets and employees located in the UK too.
12. Enhanced guidance on the application of the share of supply test in the CMA2 would directly advance the CMA's 4P strategy - ensuring that merger control is predictable, proportionate, practical, and proactive. Clearer jurisdictional boundaries would reduce the scope for protracted and resource-intensive pre-notification discussions regarding jurisdiction, streamline the CMA's processes and deliver more proportionate and practical enforcement, while also supporting the UK Government's ambition to drive economic growth, investment, and innovation by fostering a more attractive and certain environment for business.

Global mergers

13. The additions made to the CMA2 Consultation Version in respect of multi-jurisdictional mergers is helpful. However, the guidance stops short of providing clear

¹⁵ <https://www.gov.uk/government/publications/a-new-approach-to-ensure-regulators-and-regulation-support-growth/new-approach-to-ensure-regulators-and-regulation-support-growth-html>.

and predictable criteria for when the CMA will defer to other regulators or refrain from intervening.

14. To provide greater certainty for businesses, and to ensure predictability, the CMA should go further. In cases involving global markets, the CMA should actively consider whether other competent regulators are better placed to address any competition concerns, particularly where remedies imposed elsewhere would adequately resolve any potential UK issues.
15. We recognise that, where remedies in respect of global markets may have a direct impact on the UK, the CMA should have an interest in the outcome. However, where there is a better placed regulator to consider remedies, the CMA² should set out an informal process allowing parties to approach and update the CMA. The CMA can also work with other regulators, to understand the concerns being raised and their potential impact on the UK. This approach would promote international cooperation, reduce unnecessary duplication, and provide much-needed clarity and predictability for merging parties.

Process

16. We welcome the additional guidance provided by the CMA to expedite the pre-notification and formal investigation periods, which gives practical effect to the pace element of the CMA's 4Ps. We do, however, have the following comments:
 - (a) **Supporting documentation and third-party contacts should not be a pre-requisite for commencing pre-notification**¹⁶. Whilst we recognise that the CMA requires all the requisite documentation and third-party contact information for its investigation, pre-notification allows the parties to identify the information to be submitted with the final merger notice. The parties should be encouraged to provide draft contacts and a draft list of internal documentation that has been identified as relevant to the CMA's investigation, of which the CMA can request copies.
 - (b) **The CMA should provide for a second teach-in during pre-notification**¹⁷. The CMA² Consultation Version states that "*[e]arly in pre-notification the merger parties will be invited to provide a teach-in for the case team and senior staff. A teach-in is an opportunity for the CMA to better understand the merger parties' businesses and the relevant industry or industries*". While we believe it is helpful that the CMA has offered calls in the middle and towards the end of

¹⁶ See par. 6.27 and 9.14 of CMA² Consultation Version.

¹⁷ See par. 6.37 of CMA² Consultation Version.

pre-notification¹⁸, we think the potential for a subsequent teach-in would be helpful, to discuss any potential issues identified. If the CMA agrees, it should circulate a proposed agenda before the teach-in so that the relevant business personnel of the merging parties can make themselves available.

- (c) **It would be helpful to know in which circumstances UIL discussions will include the decision maker**¹⁹. The CMA2 Consultation Version states that "*[i]n some circumstances, these discussions can include the decision maker*", and it would be helpful for the CMA to elaborate on when a decision maker is more likely to be part of these types of discussions, and whether it can be formally requested by the parties.

Draft Revised Merger Notice template

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

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

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

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

17. We support the CMA's emphasis on "pace" in merger investigations, and we recognise the necessity to provide relevant extensive information upfront to allow the CMA to work at pace. However, it is important that this is balanced with proportionality. The proposed amendments to the Merger Notice template (**Merger Notice Consultation Version**), however, introduce more substantial reporting requirements overall.
18. We acknowledge that striking this balance is not straightforward. To ensure that the CMA is able obtain relevant extensive information, while reducing the administrative burden on the merging parties, we suggest that the CMA considers including additional share of supply thresholds in its requests, as it has done so in certain instances in the current Merger Notice template²⁰. We have made suggestions below. Not only do we

¹⁸ See par. 6.39 of CMA2 Consultation Version.

¹⁹ Par. 9.78 of CMA2 Consultation Version.

²⁰ See for example Guidance Note 19 of the current Merger Notice template.

suggest that additional thresholds are included in the Merger Notice template, but that the combined share of supply threshold is increased.

Increased combined share of supply threshold

19. The principal combined share of supply threshold currently applied in the Merger Notice template, and largely retained in the Merger Notice Consultation Version, is 15%. For example, Guidance Note to Question 14 states that "*Where the merger parties' combined share in a Relevant Market does not exceed 15%, notifying parties will not typically have to provide switching data...*". This in our view should be increased. The Specialisation Agreements Block Exemption Order sets a combined share of supply threshold at 20%, while the Research and Development Block Exemption Order uses a combined threshold of 25%. Furthermore, the share of supply test itself applies a 25% threshold. The thresholds are used as, typically, only higher shares of supply are likely to raise competition concerns or have a significant impact on market dynamics. These higher thresholds are more appropriate benchmarks for determining when documentation and information should be required from merging parties in respect of overlapping markets. The CMA may, of course, reserve the right to ask for further information about overlaps where the parties have shares of supply below this threshold.

(Re)Inclusion and increase of thresholds

20. We have the following specific comments on where these thresholds could be (re)included or increased:
- (a) **A threshold should be included in Guidance Note to Question 8 in respect of the document request in Question 8(b)(ii) of the Merger Notice Consultation Version.** This would align with the threshold included for the document request contained in Question 9 of the Merger Notice Consultation Version. By including a threshold, this would reduce the documents that are potentially responsive to the request to only those markets which the transaction is most likely to have an impact.
 - (b) **The threshold contained in Guidance Note to Question 9 should be increased, not decreased.** The Merger Notice Consultation Version proposes the following changes in respect of internal documents which set out the competitive conditions, market conditions, market shares, competitors, or the merging parties' business plans in relation to the product(s) or service(s) where the merger parties have a horizontal overlap:

The CMA will typically not require documents responsive to this question to be provided for ~~product(s) or service(s), as identified in response to question 13,~~ Relevant Markets in which the merger parties' combined share of supply (or either merger party's share of supply in

the case of non-horizontally related Relevant Markets) does not exceed ~~15~~10%.

In our view, the 15% threshold should be increased, not decreased, for the reasons we have set out above. In any event, 10% is too low – indeed, this threshold mimics the *de minimis* threshold that the contained in the European Commission's "Notice on agreements of minor importance which do not appreciably restrict competition", which the CMA horizontal guidelines follow²¹.

- (c) **The threshold contained in Guidance Note to Question 14 should be increased.** In respect of switching data, the CMA has stated that "*Where the merger parties' combined share in a Relevant Market does not exceed 15%, notifying parties will not typically have to provide switching data...*". For the reasons provided above, this should be increased > 20%.
- (d) **A threshold should be introduced in Guidance Note to Question 15.** The information being requested in Question 15 (regarding tenders / customer quotations) is significant and is, in our view, as a first step only necessary in respect of those markets where the parties have a high combined share of supply. The CMA should therefore introduce a threshold into the Guidance Note to Question 15.
- (e) **The threshold contained in Guidance Note to Questions 25 to 27 should be reintroduced.** In the current Merger Notice template, the Guidance Note to Questions 25 to 27 states that "*Where the merger parties do not have common customers in related Relevant Market(s) or where their individual shares of supply do not exceed 30% in any of the related Relevant Market(s), notifying parties will not typically have to provide contact details of their customers and competitors in each upstream or downstream Relevant Market where they have a vertical relationship*". It is unclear why this has been removed, but we would suggest that it be re-included. Likewise, we suggest that a combined share of supply threshold is included to reduce the contact details required from the merging parties in respect of the areas in which they overlap to only those areas where there may be a potential impact on the market, *i.e.* a 20% combined share of supply threshold.

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²¹ See par. 3.57 of the CMA's Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements.