Euclid Law Response to CMA Consultation on Draft Revised Guidance on the CMA's Jurisdiction and Procedure and Draft Revised Merger Notice

31 July 2025

A. Introduction and summary

Euclid Law welcomes this opportunity to comment on the CMA's consultation and to engage further once the CMA's thinking develops.

Euclid Law is a specialist competition law firm, with offices in London and Brussels. We advise on all aspects of UK and EU competition law, including many high-profile merger control mandates. Our partners and consultants are senior practitioners with many decades of experience of this field, gained at some of the world's largest law firms. The views stated in this response are our own and do not necessarily represent the views of any client of our firm.

There is no confidential information in this response. We adopt the defined terms of the CMA's consultation document.

B. Draft Revised Guidance

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

We generally welcome the proposed changes, which we believe will facilitate and accelerate merger reviews. We particularly support the following approaches, which we understand the CMA is already implementing pending the consultation outcome.

First, we support greater use of teach-ins between merging parties and the CMA case team early in the pre-notification process. As well as saving time, this should help to reduce the volume of information requests, by clarifying points upfront. Having not only case teams but also senior CMA staff attend these will also be beneficial when decisions are subsequently escalated up the CMA hierarchy.

Second, we support the new approach to pre-notification. In our experience, clients have often found pre-notification to be unduly burdensome and unpredictable, given the lack of a clear timeframe. They will therefore be pleased at being required to produce a reduced volume of internal documents and to respond to fewer questions in pre-notification, resulting in a pre-notification period typically no longer than 40 working days. Clients will also welcome the CMA's target of announcing straightforward phase 1 clearances by working day 25 (compared to working day 35). The CMA's commitment to tracking and publishing its performance against these KPIs is also to be welcomed. We do note, however, that the latter KPI is partly softened by the fact that it only commences when the CMA has received an initial Draft Merger Notice,[1] noting that the CMA has added to the Draft Merger Notice certain requests which it used to make post-notification. If the overall pre-notification burden on the notifying parties is, however, reduced, then this ought not to be a concern. We would, however, caution against the CMA putting an unreasonable burden on merging parties to complete all requested information before the CMA is prepared to start its pre-notification timetable, for KPI

[1] Consultation document, paras 5.6-7

purposes. We note, in particular, the requirement that the draft Merger Notice provide all "requested details" for "all relevant categories" of third-party contacts before pre-notification commences.[2] While this terminology is presumably deliberately flexible, we would be concerned if the CMA were to apply this requirement too onerously (for example, by requiring telephone numbers and email addresses for all listed customers) to avoid formally initiating the pre-notification KPI timetable, given the difficulty of collating third party contact details.

Third, the CMA's approach to gathering information from third parties during the early pre-notification stage, together with a pre-notification case page, is helpful, as it will likely flush out concerns at the outset, and reduce the risk of third-party complainants holding back information until a later stage, in order to slow down proceedings. Similarly, the CMA's promised update calls on the case team's current thinking and initial third-party feedback will better enable issues to be flushed out and addressed by the notifying parties much sooner in the process. Properly implemented, this should materially improve the predictability, proportionality and pace of the phase 1 process.

In response to question 2 below, we nonetheless have some targeted proposals for improving the Draft Revised Guidance.

2. **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.**

"Material influence"

The wide scope of "material influence" can cause discomfort for clients, particularly as it is a concept not commonplace in other merger control regimes. It is therefore welcome, particularly for financial investors, that the CMA is clarifying its informal shareholding safe harbours, namely that shareholdings below 25% "will be unlikely to confer material influence in the absence of other factors" (wording in the consultation document[3] and the Draft Revised Guidance[4]); and that "it will **only** be in certain limited circumstances that a shareholding of less than 15% could provide material influence where there are significant other factors to indicate the ability to influence commercial policy" (wording in the consultation document[5]). Regarding the 15% threshold, we note, however, that the Draft Revised Guidance puts the point using expansionary ("even") rather than limiting ("only") language: "**Even** shareholdings of less than 15% might in certain limited circumstances attract scrutiny where significant other factors indicating the ability to exercise material influence over commercial policy are present"[6]. We suggest the Draft Revised Guidance ought to reflect the limiting, and not expansionary, language of the consultation document.

We welcome the fact that the "Draft Revised Guidance clarifies the main factors which can, individually or collectively, confer material influence"[7]. Notwithstanding this statement in the consultation document, the Draft Revised Guidance still contains the potentially wide statement, tucked away in a footnote, that "[t]he list of factors is not exhaustive which means that the CMA can exceptionally consider additional factors." It would be helpful if the CMA

[2] Para 6.27
[3] Para 3.6
[4] Para 4.23
[5] Para 3.6, emphasis added
[6] Para 4.23, emphasis added
[7] Para 3.7

could give actual or theoretical examples of when it would exceptionally consider additional factors. This would give businesses a better grasp of what "exceptionally" means in practice.

Building on cases in the AI technology sector, the Draft Revised Guidance provides a gloss on where financial dependency could result in material influence, namely where the investee "is so financially dependent on the investor that this dependency may confer on the investor the ability to influence materially the recipient's commercial policy through, eg, regular engagement with senior management"[8]. However, this statement does not resolve uncertainty over the boundaries of this principle. Many significant investors in various sectors regularly engage with senior management, as this is important for monitoring the health of their investments. It would be helpful for the CMA to spell out in greater detail where the boundary of material influence lies in this context, as referring to where the financial dependency may lead to materially influencing commercial policy is somewhat circular.

The "share of supply" test

The hitherto wide scope of the "share of supply" test has also caused concerns for clients in terms of legal certainty for transactions. We therefore welcome the CMA's proposal that it "will typically only focus on the factors specified in the [Enterprise] Act to determine whether the 25% threshold is met, **for example** value, cost, price, quantity, capacity and number of workers employed"[9]. However, in the interests of clarity, it would be appropriate to amend the words "for example" to "namely" to reflect that these are the *only* factors specified in the Enterprise Act, s.23(5) which are distinct from the catch-all "or some other criterion, of whatever nature". Moreover, greater legal certainty would result from the CMA stating that it will "only" – and not merely "typically only" – focus on these metrics. However, we recognise that are limits to the extent to which the CMA is able to fetter its discretion within the limits set by statute. We therefore look forward to the Government's forthcoming consultation on legislative change on this point.

We also welcome the CMA's other clarification that the description of goods or services applied in the "share of supply" test will be those relevant to competition concerns. However, whereas the consultation document refers to "those [goods or services] which are relevant to **the** potential competition concern **which is being investigated**",[10] the Draft Revised Guidance refers more loosely to "those which are relevant to **any** potential competition concerns arising from the merger".[11] We suggest the Draft Revised Guidance should be tightened up accordingly. We propose it should refer to "only those which are relevant to the potential competition concerns which are being investigated". We would also encourage the CMA to avoid extremely broad approaches towards determining "relevance" for these purposes.

Global mergers

We welcome the CMA's indication that it will not prioritise global mergers which "concern exclusively global (or broader than national) markets"[12]. This will ensure CMA resources are better allocated and that global mergers with a limited UK nexus are not obstructed by UK regulatory overreach. However, we suggest that "exclusively" is amended to "predominantly", when, in accordance with the CMA's plans, it updates its *CMA56: Guidance on the CMA's mergers intelligence function*. This is because global mergers may have limited

[8] Para 4.32(b)
[9] Para 4.72, emphasis added
[10] Para 3.15, emphasis added
[11] Para 4.64, emphasis added
[12] Consultation document, para 4.2

impact on national, or even sub-national, markets in the UK, without them being worthy of CMA intervention, for example because they will also be reviewed by other competition authorities. This would be consistent with the CMA only applying the share of supply test to goods and services relevant to potential competition concerns.

3. **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?**

We believe the CMA's proposed changes are very much consistent with the CMA's "4Ps framework". We would, however, propose the following suggestion. As regards all four of the "4Ps", the CMA could enshrine in its Draft Revised Guidance steps to reduce the number of burdensome pre-notification/phase 1 proceedings which ultimately result in a "found not to qualify" (FNTQ) decision, particularly based on lengthy investigations into whether the share of supply test applies. While we recognise the numbers of such FNTQ decisions have declined over the years, these could be eliminated or made much less burdensome by making a swifter decision on the applicability of the share of supply test. This could either be at the mergers intelligence committee stage or, if the case has reached a phase 1 review, by way of an expedited phase 1. This would be consistent with the other changes being proposed above to the application of the share of supply test.

C. **Draft Revised Merger Notice template**

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

We generally support the (relatively modest) proposed amendments to the current Merger Notice template. In particular, it is helpful the CMA has now made express and upfront in the Draft Revised Merger Notice a number of questions and approaches it has been following in practice for some time: for example, requesting a description and timeline of how the merger came about;[13] and requesting information on the extent of bidding processes in the relevant markets[14]. We would encourage, however, the CMA to waive questions when appropriate, to avoid the increased scope of the Merger Notice form delaying the start of pre-notification where such questions are not relevant.

5. **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?**

We note that question 9 has been widened to include the provision of internal documents for all overlap markets, including vertical and conglomerate ones, with a reduced materiality threshold of a 10% (previously 15%) market share. This could potentially capture a large volume of documents in markets that are unlikely to be relevant for any SLC assessment. This would not be proportionate. The CMA helpfully notes that it will encourage notifying parties to discuss the process with the CMA if this may result in a large number of responsive documents. Whether this works well in practice will depend on the extent to which the CMA takes a pragmatic approach to cutting down this burden, which could otherwise become overwhelming and result in considerable delay. The CMA could also expressly indicate its

[13] Question 8(a)
[14] Question 15

support for the notifying parties relying on the use of appropriate artificial intelligence tools in the case of potentially large volumes of reviewable documents.

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

   We expect the proposed amendments are in line with the "4Ps" framework, subject to the CMA applying these proposed amendments pragmatically in practice, as noted in response to question 5.

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

   We have no other suggestions at this stage.