Response to CMA consultation on proposed changes to its mergers guidance on jurisdiction and procedure (CMA2) and mergers notice template

1 Mills & Reeve LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) consultation on proposed changes to its mergers guidance on jurisdiction and procedure (CMA2) and mergers notice template (the **Consultation**).

2 Mills & Reeve is a national UK law firm with 185 partners and over 750 lawyers operating from seven offices in Birmingham, Cambridge, Leeds, London, Manchester, Norwich, and Oxford.

3 Mills & Reeve's competition practice is made up of experts specialising in this field, with the practice lead having over 25 years of experience advising domestic and international clients across a wide range of UK and EU competition law matters. We act for a range of clients who have varying experience of Phase 1 and Phase 2 mergers. Our comments below are based on the experience of our competition team in advising on Phase 1 and Phase 2 mergers, both at Mills & Reeve and previous firms.

4 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. We would be happy to discuss our responses more generally, at the CMA's convenience.

5 We confirm that this response does not contain any confidential information, and we are happy for it to be published on the CMA website.

Draft Revised Guidance questions

Q1. Overall, are the changes introduced by the Draft Revised Guidance sufficiently clear and useful?

6 We consider that, overall, the changes introduced by the Draft Revised Guidance are sufficiently clear and useful, subject to the comments made in response to Questions 2 and 3 below. We particularly welcome the proposed introduction of enhanced opportunities for engagement with merger parties and the proposed introduction of KPIs for pre-notification and clearance decisions, as a means of injecting pace and providing merger parties with greater commercial certainty. However, we consider that there is scope for further change in this respect, as discussed below.

Q2. 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.

7 We have confined our response to this question to those areas which we consider require further clarification.

The "material influence" test

8 The proposed clarifications relating to the "material influence" test (at paragraphs 3.5 – 3.7, 3.9 and 3.11 of the Consultation document) are welcome. We consider that the following additional changes should also be made:

(a) At paragraph 4.23 of the Draft Revised Guidance, it would be helpful to include the following statement from footnote 51 in the paragraph itself: "*In its past decisional practice, the CMA has only rarely found shareholdings of less than 15% to confer material influence on the acquirer*." Including an express statement of the CMA's past decisional practice in the main body of the guidance, which states that shareholdings of below 25% will be unlikely to confer material influence in the absence of other factors, would provide greater clarity on this point.

(b) At paragraph 4.25 of the Draft Revised Guidance, it would be helpful to further explain or provide examples of what types of "commercial policy or strategic matters" are relevant to the assessment of whether the acquirer's special voting or veto rights may be sufficient to confer material influence.

The "share of supply" test

9 We agree with the CMA (at paragraph 3.15 of the Consultation document) that the statutory parameters afforded to the CMA to establish that the "share of supply" test is met are broad. This can cause unpredictability and uncertainty for the merger parties and their advisors. We therefore welcome the CMA's proposed clarification in the Draft Revised Guidance (at paragraph 4.72) that the CMA will "typically" confine itself to the criteria set out in the Enterprise Act 2002 (i.e., value, cost, price, quantity, capacity, and number of workers employed). We consider, however, that the CMA could go further and clarify that it will confine itself to the criteria set out in the Enterprise Act 2002 "except in exceptional circumstances". We believe that this would provide merger parties and their advisors with greater predictability and certainty regarding how the CMA will apply the test.

10 In the event that the CMA decides to amend the Draft Revised Guidance to state that it will confine itself to the criteria set out in the Enterprise Act 2002 "except in exceptional circumstances", it would be helpful if the CMA could provide some examples of when such exceptional circumstances may arise. The examples would clearly need to be stated as such and it would be prudent to specify in the Draft Revised Guidance that, for the avoidance of doubt, transactions are reviewed on a case-by-case basis and depend on the individual circumstances of the case. Nevertheless, some examples of exceptional circumstances would be useful guidance and help to further the aims of providing businesses with greater predictability and certainty (whilst retaining some discretion for the CMA).

Q3. Are the changes to the 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?

Pace and process

11 As indicated in response to Question 1 above, we welcome the CMA's aim to streamline the pre-notification process with the proposed introduction (at paragraph 6.30 of the Draft Revised Guidance) of the 'pre-notification KPI' of "*no more than 40 working days in most cases*". We note that the Draft Revised Guidance also refers (at paragraph 6.35) to the CMA's general duty of expedition, and given this general duty, we consider that the pre-notification KPI should not be a limiting factor. On this basis, we consider that the Revised Guidance should expressly state that, if the pre-notification process can be completed within a shorter period of time, then the CMA will aim to achieve this.

12 We welcome the CMA's proposal (at paragraph 5.26 of the Consultation document; paragraph 9.56 of the Draft Revised Guidance) to "target" announcing straightforward clearance decisions within a shorter period of time (i.e., "typically" by working day 25, instead of working day 35) and to publish "substantially shorter" clearance decisions. In principle, publishing substantially shorter clearance decisions will help to promote pace (and proportionality).

13 Paragraph 6.28 of the Draft Revised Guidance states that the case team will "promptly" review the initial draft Merger Notice or enquiry letter response, and will advise the merger parties once satisfied that the necessary information has been provided to commence pre-notification. The lack of clarity as to what constitutes "promptly" and how long the process is likely to take is a source of uncertainty for merger parties. It may also undermine the CMA's ambition to inject pace into its processes. Similar to the Investment Security Unit's commitment to confirm its receipt of a

complete application submitted under the National Security and Investment Act, we consider that the CMA should commit to reviewing Merger Notices and confirming if sufficient information has been provided to commence the pre-notification KPI within five working days where possible.

Predictability

14 Please see our comments on the "material influence" test and the "share of supply" test in our response to Question 2 above.

Proportionality

15 With respect to the CMA's proposal (at paragraph 2.8 of the Draft Revised Guidance) to adopt a "wait and see" approach in relation to deals under investigation by other international authorities, we consider it is likely to be proportionate for the CMA to adopt such an approach in most cases. We consider though that the CMA's "wait and see" approach should be expressly limited to cases where, *following appropriate stakeholder engagement*, the CMA determines that the transaction is subject to review by an authority outside the UK and any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK. A short period of stakeholder engagement would mitigate the risk that the CMA has not adequately taken account of differences between the UK and foreign markets that could specifically impact competition and consumers in the UK. We consider that when the CMA has reached such a decision to "wait and see", it should formally notify the merger parties, to increase certainty and predictability and increase investor confidence.

Engagement

16 With respect to the proposed "general practice" of publishing case webpages pre-notification (at paragraph 2.5 of the Consultation document; paragraphs 6.27 and 6.29 of the Draft Revised Guidance), this would be a significant (potentially adverse) change which we do not support. There may be many reasons why the general publication of details about a proposed transaction would not be appropriate at such an early stage. The proposed general practice of publishing case webpages pre-notification, combined with the proposal (at paragraphs 5.7(d) and 5.8 of the Consultation document) that the pre-notification KPI will not begin unless "typically" consent is given for publication of a case page, risks unnecessarily disincentivising merger parties from pre-notification engagement with the CMA. This could also impact on pace.

17 We consider that it would be more appropriate to re-balance this into a neutral proposal so that, in each case, the CMA may propose the publication of a case webpage pre-notification and the parties should then be able to decide whether to withhold consent. Paragraph 6.27(iv) of the Draft

Revised Guidance should be amended so that the non-publication of a case webpage pre-notification is not presented as "exceptional" i.e., lines 3 – 5 of paragraph 6.27(iv) should be amended to state: "The CMA may publish a case webpage pre-notification unless the parties (for whatever reason) withhold their consent". We do not consider that non-publication of a case webpage would hinder engagement with relevant third parties as the CMA can approach relevant third parties confidentially without publishing a case webpage.

18 Similarly, the CMA's receipt of all third-party contact details (at paragraphs 5.7(c) and 5.9 of the Consultation document; paragraph 6.27(iii) of the Draft Revised Guidance) should not be treated as essential in order to commence pre-notification. In our experience, merger parties do not typically hold full contact details for specific named individuals at their competitors and obtaining such information can be time consuming and difficult. Requiring this information to be complete at the pre-notification stage is impractical. In addition, given our comments in paragraphs 16 and 17 above (i.e., the transaction may not necessarily be public in the pre-notification stage), we do not consider that the CMA should presume that full third-party engagement will commence before formal notification.

19 We consider it to be disproportionate (and likely to have an impact on pace) to delay commencing pre-notification on the basis that some third party contact details may have to follow. It should be sufficient for the merger parties to submit the "majority" of third-party details for the commencement of pre-notification.

20 As indicated in response to Question 1 above, we welcome the proposed introduction of opportunities for enhanced engagement with the merger parties, including "as general practice" an invitation for merger parties to provide a teach-in session for the CMA case team and senior staff, and two informal update calls between the CMA and the merger parties (at paragraphs 2.5 and 2.9 of the Consultation document; paragraphs 6.36 – 6.39 of the Draft Revised Guidance). Given the importance of pre-notification engagement both to merger parties and the CMA (including in terms of delivering on the '4Ps' framework), we consider that the Revised Guidance should clarify that it will be standard practice for merger parties to be invited to provide a teach-in and that there will be a *minimum* of two update calls. In addition, we encourage the CMA to commit to a further call, prior to the 'state of play' call so that parties are familiar with the CMA's direction of travel in advance of the 'state of play' call and can better prepare to address any concerns.

Draft Revised Merger Notice template questions

Q4. Are the proposed amendments to the current Merger Notice template sufficiently clear and useful?

21 Overall, we consider the proposed amendments to the current Merger Notice template to be sufficiently clear and useful, subject to the comments made in response to Questions 5 to 7 below.

Q5. 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?

22 We welcome the removal from the current Merger Notice template of the requirement to provide bidding data (at paragraph 6.3(c)(ii) of the Consultation document). We also appreciate the CMA's attempt to focus the information requested in the Draft Revised Merger Notice template on the information that is necessary for it to identify any potential competition concerns. However, we consider that some of the proposed changes go beyond providing the CMA with the information that will be necessary for it to conduct an efficient pre-notification process in all cases:

(a) The requests for switching data in Questions 14 and 15 of the Draft Revised Merger Notice template should be expressly limited to "if it is produced in the ordinary course of business".

(b) The requirement in Question 25 of the Draft Revised Merger Notice template to provide contact details for *overseas* competitors may be difficult to satisfy at such an early stage in the process. We therefore consider that the customer list should be expressly made the priority.

Q6. Are the proposed amendments in the current Merger Notice template in line with the '4Ps' framework?

<u>Pace, process and proportionality</u>

23 We refer to our comments set out in response to Question 5 above. We consider that these aspects could be disproportionate (particularly for merger parties to "less significant" transactions) and adversely impact on pace.

24 In relation to Question 9, the scope of the document request has been amended so that the parties do not have to provide documents for Relevant Markets where their combined share of supply does not exceed 10%. Previously, this threshold was set at 15% and we do not consider that the lower threshold is justified or aligned with the approach of conducting an efficient or timely review.

Q7. Do you have any other suggestions for additional or revised content of the current Merger Notice template?

25 Not applicable.

Mills & Reeve

31 July 2025