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

RESPONSE BY FRESHFIELDS LLP

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Consultation on draft revised Guidance on the CMA's Jurisdiction and Procedure and draft revised Merger Notice

1. Introduction

1.1 Freshfields LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on draft revised Guidance on the CMA's Jurisdiction and Procedure (***Draft Guidance***) and draft revised Merger Notice (***Revised Merger Notice***), as summarised in the CMA's consultation document dated 20 June 2025 (the ***Consultation Document***) (together, the ***Consultation***). This response is based on our significant experience in advising clients on CMA merger investigations, at both Phase 1 and Phase 2, as well as our experience of advising clients in cases before other major competition authorities globally.

1.2 This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2. General remarks

2.1 The CMA's consultation on embedding the new "4Ps" framework into its merger guidance on jurisdiction and procedure (CMA 2), as outlined in the revised Draft Guidance, the Revised Merger Notice and the Consultation Document, represents a commendable commitment to enhancing the efficiency and effectiveness of the UK's merger review process.

2.2 We welcome the articulation of these principles and the CMA's stated ambition to accelerate pace, improve predictability, increase proportionality and enhance engagement with both merging and third parties throughout the merger investigation process. The Consultation offers a number of positive developments. The CMA's stated desire for greater upfront engagement and a more iterative process during pre-notification, could, if effectively implemented, improve predictability and pace in practice. This is welcome.

2.3 However, while certain proposals genuinely advance the "4Ps", other proposals require further clarification or raise concern. In their current form, a number of the proposals appear likely to fall short of delivering tangible benefits in practice, or are dependent on consistently disciplined execution by the CMA in order to deliver the desired benefits. In a number of instances we have identified, the proposals are more likely to result in unintended consequences or introduce new complexities, uncertainty and increased cost for merging parties. We have also in this response noted a number of proposed changes to the guidelines which simply formalise

existing practices, and miss an opportunity to provide further improvements in line with the stated "4Ps" ambition.

2.4 The key examples of these concerns are:

(a) As regards the CMA's jurisdictional tests, increased clarity and a possible narrowing of the CMA's currently very broad jurisdictional thresholds is welcome for those engaging in M&A in the UK. However, the Draft Guidance misses an opportunity to provide real clarity to users of the UK merger regime. The Draft Guidance could go further, while still respecting the bounds of the existing legislative framework, including by introducing presumptions or providing a clearer commitment from the CMA not to prioritise certain cases for investigation;

(b) The new 'pragmatic' approach to global mergers set out in the Draft Guidance, while welcome, is a policy that will require discipline and a high level of consistency on the part of the CMA to deliver the efficiencies and proportionate approach of the "4Ps". The Draft Guidance does not provide a clear indication as to how CMA intervention might interact with the "*wait and see" approach*. This proposal will only be viewed by merging parties as an approach worth taking up if there is a high level of confidence that the CMA will not decide to open an investigation at a late stage in proceedings in other jurisdictions, leading to a delayed start to a lengthy UK review process. To ensure predictability and avoid unexpected extended timelines and additional burdens late in the Phase 1 process, the CMA will need to provide guidance to merging parties on whether a "*wait and see*" position is likely to be reversed at any point due to new issues or remedy limitations, for example;

(c) There is a risk that new proposals also (inadvertently) introduce added uncertainty around the start of the CMA's formal investigation period. There is scope for the introduction of a new "pre-pre-notification" regime (where there is now an additional "completeness" review of the first draft before the 40 working day KPI clock) coupled with a new Draft Merger Notice with more extensive information/data requirements, to increase, rather than decrease, the burden on businesses and additional timing uncertainty. We recognise that this is not the CMA's stated intention, and our experience so far with starting the 40 working day KPI is that the CMA has been transparent and not required unreasonable levels of information. This approach is welcomed. It will be critical that this approach continues and does not evolve in due course into a more onerous threshold.

(d) The Consultation Paper and Draft Guidance make no reference to any changes to the Issues Letter and Issues Meeting process currently employed by the CMA. The Issues Meeting can be an effective tool for testing the strength of concerns being considered by the CMA in a dynamic manner that allows merging parties the opportunity to give their views on the CMA's reasoning and evidence prior to a decision being made. However, the Issues Letter itself comes too late in the Phase 1 process, postponing the ability of the merging parties to put forward arguments and evidence on the CMA's key substantive concerns, which runs counter to the CMA's pace

ambition. Moreover, in some cases, particularly unlikely concerns have been included "for completeness" in an Issues Letter. Such deficiencies act against effective resolution of any concerns at an early stage. It is to be hoped that the other aspects of the proposed changes will lead to a situation where the Issues Letter is no longer a late-stage revelation of a range of – new and/or particularly speculative – concerns which arrive at a stage in the process where there is very limited time for additional engagement on the issues. It should instead become a more focused review of concerns which still remain consistent with the direction of travel that has been discussed at the previous update and state of play calls. We would welcome changes to the Draft Guidance to implement this approach.

2.5 The true test of many of the proposed changes lies in their execution. The effectiveness of the proposals hinges on whether these changes translate into benefits in practice, in terms of clearer prioritisation and focus on areas where substantive concerns are more likely to arise, reduced burdens on merging parties (particularly in areas where substantive concerns are unlikely to arise), clearer communication and genuinely faster outcomes, or merely add further layers of documentation and procedural steps.

2.6 Our response seeks to highlight areas in the Draft Guidance where we consider it offers genuine improvements, where it could benefit from further refinement to ensure it meets its stated objectives, and where there are opportunities for the CMA to go further to ensure the reforms enhance Pace, Predictability, Process, and Proportionality for all market participants.

3. Updates relating to the application of the CMA's jurisdiction tests

The "material influence" test

3.1 We welcome the CMA's intention to provide greater predictability for businesses through its proposed amendments to its guidance to clarify its interpretation of the material influence test. Nevertheless, we note that the Draft Guidance does so essentially by summarising the approach the CMA has taken in previous cases (which the CMA appears to acknowledge at paragraph 3.4 of the Consultation Document). The proposed changes therefore provide limited further insight beyond what has already been set out in published decisions and do not provide additional predictability or certainty for businesses.

3.2 We recognise that, in the absence of legislative change, there is less scope for the CMA to provide the clarity that is needed with respect to the material influence test. That said, we think the CMA could do more to prioritise situations or fact patterns under the material influence test and provide additional (or clearer) guidance within the confines of the existing statutory framework.

3.3 First, the CMA should consider providing **clearer presumptions with respect to shareholding thresholds**:

(a) We welcome the confirmation in the Draft Guidance that shareholdings of less than 15% will only confer material influence in limited circumstances. However, given that such findings have been rare, we believe the CMA should go further and consider a more affirmative approach using the 15%

shareholding threshold as a "safe harbour", below which there would be a *presumption* that there is no material influence. Such a presumption would merely be reflective of CMA practice and would considerably enhance predictability for merging parties.

(b) The Draft Guidance should elaborate on those circumstances in which minority shareholdings – particularly below the 15% threshold – would be considered by the CMA to confer material influence (i.e., when the CMA will consider other factors to be "significant"), again, particularly since the circumstances in which material influence have been found below 15% are very few.

(c) In particular, while it is helpful for the CMA to summarise outcomes in previous cases, these are heavily fact-specific and it would be more useful for the CMA to articulate (reflecting a deeper assessment of common commercial practices in specific sectors) the factors that it intends to take into account when assessing (for example) whether commercial relationships will result in one firm being considered to exert a level of influence over the commercial policy of another to give to a finding of material influence.

(d) The same point applies to the "grey area" between voting rights of 15% and 25%. The CMA could provide additional clarity and predictability to merging parties by applying workable presumptions in this "grey zone". For example, it would also be useful for the CMA to articulate (reflecting a deeper assessment of common commercial practices in specific sectors) the factors that it intends to take into account when assessing (for example) the weight to be placed on *knowledge and expertise* in a particular industry (where the previous case law is, again, very fact-specific).

(e) Again, it would be useful for the CMA to consider introducing presumptions in this regard – e.g., that an acquirer of a 15-25% shareholding is unlikely to acquire material influence where it does not have a strong track record and/or specific expertise in the same industry as the target entity.

(f) Additionally, the CMA could clarify the circumstances in which it will consider that the target entity's "*appetite for pursuing certain strategies would be reduced because of a perception that these strategies would be likely to cause conflict with the acquirer*".[1] For example, the CMA could provide further predictability to businesses by confirming whether this factor will be considered only in combination with the acquirer's industry knowledge and expertise, and more broadly by clarifying the factors it will consider when assessing the target entity's "*appetite for pursuing certain strategies*".

3.4 Second, while the Consultation Document notes that the examples introduced by the CMA into the Draft Guidance of situations or factors that are unlikely to confer

[1] Draft Guidance, para. 4.27.

material influence "*will provide greater certainty over which transactions could meet the CMA's jurisdictional thresholds*", **considerable ambiguity persists:**[2]

(a) Although the CMA has clarified that shareholdings of below 25% are unlikely to confer material influence "*in the absence of other factors*", the Draft Guidance provides limited insight into the *weight* the CMA will give to such other factors in its assessment. The other situations or factors that are unlikely to confer material influence, as identified by the CMA in the Draft Guidance, are limited to: (i) the ability to appoint a single board member (in the absence of a material shareholding or financial / commercial arrangements that may confer material influence); and (ii) situations in which a minority shareholder "*has no more rights than the rights normally accorded to minority shareholders in order to protect their financial interests*" (for example, rights in the context of a liquidation). The Draft Guidance could go further and provide additional clarity on:

(i) What constitutes a "material shareholding". For example, the right to appoint a single board member (as opposed to two or more) presumably means that a "material shareholding" would need to be appreciably greater than 15% (if shareholdings of 15% or below are *de facto* presumed not to be material influence except in limited circumstances);

(ii) Whether arrangements between the parties would create a dependency of the target entity on the acquirer to the extent that the acquirer would be able to influence materially the commercial policy of the target (noting the limited additional guidance on the CMA's approach to financial and commercial arrangements at paragraphs 4.32 to 4.33 of the Revised Guidance); and

(iii) Precisely which rights the CMA will consider "normal" for minority shareholders.

3.5 We would also ask the CMA to consider offering merging parties the opportunity to approach it for informal "fireside chats" to discuss their proposed transaction structure on a non-binding, no-names basis so that they can have greater certainty as to whether the CMA would consider the material influence test to have been met. While we recognise that this proposal would re-introduce the possibility of informal advice for material influence cases, this would represent a major step forward in terms of enhancing predictability, pace and proportionality in the CMA process. Moreover, this would avoid long discussions involving the parallel assessment of jurisdiction and substance, thereby significantly reducing the costs incurred by merging parties and the CMA.

3.6 Finally, at the very least, if the CMA wishes to provide an additional commitment towards proportionate enforcement, it could put on the record (in guidance) that it intends to interpret the statutory provisions in relation to material influence "narrowly". While this would have no clear statutory basis, this has not prevented the CMA from taking the same approach in, for example, its guidance on the digital

[2] See Consultation Document, para 3.8.

markets regime, which states that the CMA will interpret the provisions of certain sections of the Digital Markets Competition and Consumers Act "broadly".[3]

The "share of supply" test

3.7 While we welcome the CMA's efforts to clarify the scope of the share of supply test, and recognise the challenges of doing so within the confines of the existing statutory framework, we consider there is an appreciable risk that the CMA's Draft Guidance does not provide meaningful change in practice.

3.8 In light of the new "hybrid" threshold introduced by the Digital Markets, Competition and Consumers Act 2024 (the ***DMCC Act***), the CMA no longer needs to rely on broad interpretations of the share of supply test to assert jurisdiction when considering acquisitions of targets with no UK revenues and/or supplies to UK customers. The CMA has already indicated that that such contortions were likely to be a thing of the past, and that it would clarify and delineate its remit with respect to the share of supply test.[4] Indicating that the CMA will "typically" focus on the criteria listed in the Act with respect to the share of supply test merely restates the law and does not meaningfully clarify or delineate the CMA's remit by way of insightful guidance.

3.9 It would also be open to the CMA to take the approach that it will generally treat value (and, if necessary, quantity) as the most appropriate criterion by which to determine share of supply, and that it will only in exceptional and defined circumstances consider it necessary to use the other criteria listed in the Act – including in situations where the share of supply test is *not* met on the basis of value (or quantity). Section 23(5) of the Act affords the CMA discretion to determine which criteria it considers appropriate, and this can be defined in the Draft Guidance. We consider that a willingness to give guidance of this sort could materially improve predictability.

3.10 Finally, as noted above, this is also an area in which the CMA could, if it wishes to provide an additional commitment towards proportionate enforcement, put on the record (in guidance) that it intends to interpret the statutory provisions "narrowly".

4. Changes relating to the CMA's approach to global mergers

4.1 The CMA's proposed "*wait and see*" approach to global mergers, as outlined in section 8 of the Draft Guidance, represents a significant shift in policy. In principle, the "*wait and see*" position offers a welcome degree of pragmatism by acknowledging that interventions by other competition authorities may be sufficient to address potential competition concerns arising from global transactions, which could give rise to a number of benefits for both the CMA and the merging parties, including:

(a) **The avoidance of potentially parallel, duplicative investigations in multiple jurisdictions**. By stepping back in those cases where another competition authority is already undertaking a robust review and whose review (including approach to remedies, if required) is likely to address the

[3] See Digital Markets Competition Regime Guidance (CMA194), paras. 2.13-2.14.

[4] New CMA proposals to drive growth, investment and business confidence – Competition and Markets Authority.

scope for any UK concerns, the CMA can significantly reduce the burden, cost, and time commitment for merging parties.

(b) **Faster clearances in some cases.** Where the CMA ultimately decides not to open an investigation, having delayed its review in order to see how a parallel review plays out, this could lead to quicker overall transaction closure, as parties would not need to navigate a full-blown UK review (which can often be longer than merger review processes in other jurisdictions).

(c) **Greater proportionality.** By focusing the CMA's interventions on mergers with a direct, material and discrete impact on UK markets.

(d) **Promotion of international cooperation.** The "*wait and see*" approach encourages and relies upon greater co-operation and information-sharing between competition authorities globally, potentially fostering a more coherent and efficient international merger control landscape.

4.2 However, in practice, the proposed approach set out in the Draft Guidance raises a significant number of questions which, unless addressed, will lead to material uncertainties and challenges for merging parties. In our view, these questions are sufficiently material that – unless the CMA provides further guidance – they will likely impede or prevent some of the CMA's intended benefits from materialising, namely:

(a) **Uncertainty regarding UK nexus.** A key challenge for merging parties lies in the inherent subjectivity of the CMA's assessment in such circumstances. What constitutes a "UK-specific impact" versus a "global market" effect?

(b) **What constitutes sufficient intervention by other authorities.** How will the CMA define and assess "sufficient" action by other international competition authorities? In order to provide merging parties with any meaningful comfort, it must be expected that a merger *clearance* by another authority will be accepted by the CMA as sufficient review of the issues that gave rise to the potential for concerns in the UK.

(c) **Coordination complexity.** Even with a "*wait and see*" approach, merging parties still need to monitor global developments and engage with authorities in parallel. Does the CMA foresee merging parties having to proactively present arguments to the CMA as to why another jurisdiction's review is sufficient? How much updating on the progress of proceedings in other jurisdictions will merging parties be expected to provide?

(d) **Impact on transaction timelines.** While on the one hand this could lead to faster clearances, the ambiguity of when the CMA will or won't intervene could also introduce *new uncertainties* into overall transaction timelines, making it more difficult for merging parties to plan and execute deals, thereby *reducing* predictability. This could in turn undermine the CMA's proposed approach by incentivising "defensive" filings by parties, made simply to manage the transaction risks and uncertainties introduced by the Draft Guidance.

(e) **Risk of late intervention.** A significant concern with the proposed approach is the potential for the CMA to "*wait and see*" for a period, only to intervene

late in the day if it determines that decisions in other jurisdictions are insufficient, or if new UK-specific concerns emerge. Such late intervention will be highly disruptive, costly, and could even threaten a transaction that has already progressed significantly in other jurisdictions and is at risk of breaching its long-stop date, particularly if the CMA then requires an additional, prolonged review period. Moreover, the CMA would want to avoid merging parties factoring-in or provisioning for a specific UK remedy as 'standard' if it is not strictly required, as this would undermine both the proportionality of its review and the "*wait and see*" approach.

(f) **Managing third-party engagement.** Critically, a "*wait and see*" approach also hands a significant degree of influence to third parties who may (strategically) wait until late in a transaction timetable before raising concerns, potentially prompting an intervention from the CMA. Again, this has the potential - irrespective of the legitimacy of any concerns expressed – to derail a transaction to the extent the CMA feels compelled to at least investigate such late-breaking claims. It will be important that the CMA's process is robust to the strategically late communication of concerns by third parties.

4.3 The subjective nature of assessing "sufficient" intervention by another authority, or the "UK-specific impact" of a global transaction, could lead to inconsistent application and potentially create a regulatory vacuum or unexpected interventions down the line. Moreover, while reducing the immediate burden of a full-blown UK review is a positive step, parties still require certainty regarding potential future investigations or the imposition of interim measures if the CMA decides to intervene later. Any residual uncertainty undermines the predictability that the "*wait and see*" approach aims to provide and could, if not underpinned by transparent and well-defined parameters, introduce a new layer of strategic complexity for merging parties attempting to manage global merger control filings efficiently.

4.4 Accordingly, at the very least, the Draft Guidance needs to be precise about the criteria the CMA will use to determine when it will genuinely "step back" and rely on other enforcers. In particular, there is a variety of ways in which the CMA could improve the Draft Guidance to address some of the issues identified above. For example:

(a) **Define "UK-specific impact"**. For example, the CMA could consider whether additional guidance can be provided in relation to:

(i) *Quantitative thresholds*: the Draft Guidance should provide illustrative examples of quantitative thresholds that would strongly suggest a limited UK impact, such as very low UK turnover, very small number of UK customers/users, minimal UK market share for non-overlapping activities; and/or

(ii) *Qualitative factors*: the Draft Guidance should provide clear examples of qualitative factors that would lead to a conclusion of limited UK impact, such as where the UK presence is purely ancillary or where UK-based activities are entirely dependent on non-UK operations. The Draft Guidance could identify key risk indicators by

providing a list of factors that increase, or decrease, the likelihood of CMA interest (e.g., significant UK user base, pipeline products, digital platform presence).

(b) **Elaborate on the sufficiency of action by other international authorities**, by providing further guidance on what the CMA is likely to consider as sufficient to address any UK concerns. For example:

(i) *Jurisdictions:* Which jurisdictions' reviews are generally considered robust enough for the CMA to contemplate a "*wait and see*" approach? Acknowledging that this may be case-specific, the CMA could consider discussing this with merging parties on a confidential case-by-case basis.

(ii) *Confirmation that merger clearances can also benefit:* a "*wait and see*" approach will not deliver material efficiencies to the global regulatory process for a transaction unless the CMA is prepared to accept a merger clearance by another authority in a case which requires careful analysis of potential concerns. Absent this level of clarity, merging parties will only consider the CMA's "*wait and see*" approach to deliver 4P benefits to cases where they have already determined to offer remedies (that also relate to the UK) to a different authority.

(iii) *Nature of remedies*: detail the types of remedies (structural versus behavioural, scope, enforceability) that the CMA would typically consider "sufficient" to address *potential* UK concerns arising from a global transaction. And similarly, detail the circumstances in which a global remedy might be found to be insufficient in the UK.

(iv) *Engagement with other authorities*: additional explanation around the envisaged process for the CMA's engagement with other authorities in such "*wait and see*" cases, including information sharing and coordination.

(c) **Provide clear procedural steps for "*wait and see*" cases.** Specifically:

(i) *Pre-notification dialogue*: outline how merging parties can proactively engage with the CMA during pre-notification to present their case for a "*wait and see*" approach, including the specific information that they should provide.

(ii) *Increased use of Advisory Opinions/Informal Guidance:* the CMA could offer more structured informal guidance or non-binding advisory opinions early in the pre-notification phase for global deals with uncertain UK impact, indicating its likely approach to intervention based on a preliminary assessment of UK nexus and other ongoing reviews.

(iii) *Timeline for CMA "wait and see" cases:* provide an indicative timeframe within which the CMA aims to make a preliminary determination on whether it will "*wait and see*" or launch its own investigation.

(iv) *Clear parameters for third party engagement:* for example provide clearly defined (and early) time windows within which the CMA will be prepared to entertain concerns or complaints. It will be important that the CMA approaches these issues in a procedurally fair manner, which gives third parties the opportunity to express concerns, but does not permit them to delay engagement with the CMA in an attempt to delay or derail a transaction by procedural means rather than through raising legitimate substantive concerns. Given the prevailing judicial interpretation of the CMA's duty to refer, it would seem high risk for the CMA's approach to issuing comfort in "*wait and see*" cases to involve purely internal CMA decision-making, without giving third parties the opportunity to make representations.

(v) *Commitment to non-intervention:* consider what certainty can be offered in relation to non-intervention, for example by outlining the specific conditions under which the CMA would be likely to open a formal investigation.

4.5 The CMA's existing guidance already contemplates the possibility that the CMA may defer to other authorities where it considers that a review by that authority may sufficiently address UK concerns. To date, this has not in practice delivered material levels of confidence to the market that a formal filing to the CMA could be avoided. By addressing the points discussed above, the CMA can transform the "*wait and see*" approach from a source of potential uncertainty into a valuable tool for streamlining global merger control, benefiting both the CMA's efficiency and merging parties' ability to navigate complex international transactions.

5. Changes relating to process

Length of pre-notification

5.1 We welcome the CMA's commitment to adopt a KPI that pre-notification will typically be no longer than 40 working days, which promotes more efficient and timely discussions between the merging parties and the CMA during the pre-notification stage.

5.2 However, the new process should not create additional burdens for merging parties:

(a) **Ensuring that the bar to start the pre-notification "clock" is not excessively high.** In order to start the pre-notification "clock", parties are now required to provide a complete Merger Notice covering all overlaps and non-horizontal links, accompanied by all supporting materials (including the extensive set of internal documents required to be provided with a Merger Notice) and all contact details the CMA will need to conduct its investigation.

This represents a much greater volume of material than was previously required to initiate meaningful pre-notification discussions with the CMA. As currently envisaged, the pre-notification KPI framework does not provide for any materiality threshold on the overlaps required to be covered in the initial draft Merger Notice in order to begin the pre-notification "clock" (parties must provide "*an initial response to each applicable question in the Merger*

Notice template"). In effect, it creates a new "pre-pre-notification" review process during which merging parties could be preoccupied for a considerable amount of time gathering extensive information on markets that may be of little relevance to any competitive assessment of the transaction.

In particular, identifying all overlaps and non-horizontal links may not be an "exact science". For example, if the CMA/European Commission had previously considered a possible market sub-segment (particularly in a historical case and/or where market definition was ultimately left open), would a merger notice only be considered to be complete where full information was provided for that sub-segment?

It will therefore be incumbent on the CMA to ensure that this does not become an unduly burdensome process. We encourage the CMA to adopt a flexible and pragmatic approach and to be reasonable about the amount of information required to start the KPI clock and acknowledge that not all parts of the draft Merger Notice need equivalent levels of response in order to start the 40 working day period.

(b) **The new Merger Notice template has expanded the scope of information and documents required from merging parties**. This approach runs counter to the CMA's 4Ps policy intention and imposes a substantially expanded burden on merging parties by (i) requiring merging parties to provide Question 8 and Question 9 documents for markets in which the merging parties' combined share of supply (or either merger party's share of supply for non-horizontally relevant markets) equals or exceeds 10%, and (ii) requiring the merging parties to provide all such documents upfront to begin pre-notification. This has a twin effect – increasing the burden on all notifying parties regardless of whether this is a necessary or proportionate step, and further raising the bar to beginning pre-notification and engaging in a sensible and open discussion with the case team as to what is useful and insightful for an investigation.

(c) Our view is that **the threshold for further information requirements should remain at 15% for horizontal overlaps**; and should the CMA consider that any further documentation is needed, this can be considered through practical discussions with the parties during pre-notification.

(d) **The CMA should be flexible with regard to the requirement to provide contact details upfront to commence pre-notification.** We acknowledge that in order to meet the CMA's pace objective, the CMA intends to reach out to third parties at a much earlier stage of the investigation. However, we think this objective would be best-served if the CMA retains a discretion to determine with the merging parties if and when contact details may not be needed in order to start the 40 working days. This is particularly the case where, as described above, the scope of all overlaps and non-horizontal links may not be clear-cut (and it would be particularly onerous for merging parties to have to provide contact details up-front for hypothetical market segments that are of limited relevance to competitive assessment).

As regards confidential transactions, we assume that merging parties would still be able to pre-notify confidentially, albeit the 40 working day KPI would not start to run until the CMA is able to reach out to third parties. This should be clarified in the Draft Guidance. The presumption is that the CMA will announce publicly that it is undertaking pre-notification discussion with parties. This is a very strong disincentive for parties to approach the CMA at an early stage, and work with the CMA to accelerate transaction timelines.

Engagement with merging parties

5.3 We welcome the CMA's proposal to introduce, as standard, meetings with the CMA at earlier stages in merger proceedings, including a teach-in with senior staff and two update calls during pre-notification. Early-stage engagement directly between the parties and senior CMA personnel and the CMA case team, in principle should enhance the CMA's ambition to improve "Process" and transparency, while also reducing the burden on merging parties by clarifying the CMA's focus areas at an early stage. We also welcome the more open approach to additional meetings (as needed) between the parties and the CMA.

5.4 Ultimately, whether transparency and process are improved in practice will ultimately depend on the *quality* of the engagement offered at each meeting, not just the fact of additional meetings during the pre-notification period or a pre-prepared script to outline the purpose of these meetings. Regarding the teach-in, our recent experience of this new process is that the CMA's new standard process letter suggests that it expects a teach-in within five working days of it confirming pre-notification has started. Depending on the circumstances of a case, other approaches (e.g., holding the teach-in before the first draft merger notice or slightly later following submission) may be better suited to achieving the overall goal of the shortest possible end-to-end process. We have experienced that the CMA is prepared to be flexible in the scheduling of the teach in, and we encourage this approach to continue, rather than adopting a "tick box" approach.

5.5 With regard to the two new update calls, the Draft Guidance explains that the purpose of these additional meetings is to "*provide the case team's current thinking and typically an overview of the initial feedback received from third parties*". In our experience so far, the format of these calls has been similar to the existing external "state of play" meeting during Phase 1. While initial experience with the update calls has been positive, experience with external state of play meetings (which the update calls are intended to mirror) has, however, been mixed. While some work well, some case teams are less inclined to provide any meaningful "gist" to the merging parties or their advisers, or tend to defer to the Issues Letter instead. Therefore, in order for these additional update calls (and indeed, the external state of play meeting during Phase 1) to be "full and frank" and improve the process materially**, it will be important to ensure the case team's evolving thinking on theories of harm and key focus areas are articulated clearly at each stage**. This would help deliver a key benefit of the proposals, which is to allow the CMA and the merging parties to focus in quickly on issues which the CMA considers need further review, and to close down other areas of inquiry which are not considered to be required.

Publication of case webpages in pre-notification

5.6 In order to help with internal business planning, the Draft Guidance should expressly specify that – as has been our experience in practice – the CMA will provide merging parties with advance notice of the date and timing of the publication of the case webpage in pre-notification.

Engagement with third parties

5.7 The CMA's proposal that it will only typically begin pre-notification once the merging parties have provided appropriate third-party contact details and have given their consent to make public on a case page that it is investigating the merger may be appropriate for cases which have been made public, but is **incompatible with scenarios in which parties seek to engage in confidential early-stage pre-notification discussions with the CMA**.

5.8 The Draft Guidance notes that merging parties can provide reasoned submissions as to why the CMA should exceptionally not make its pre-notification public. The guidance should further make clear, however, that where a transaction is confidential, parties can still begin pre-notification without such contact details and consents being provided (i.e., maintaining the status quo position for the small number of transactions for which a higher degree of secrecy is required for an initial period).

Confidentiality complaints

5.9 Paragraph 5.29 of the Consultation Document explains that the Draft Guidance includes changes to the way the CMA's Procedural Officer will handle confidentiality complaints in phase 1 merger inquiries, and that, as a result of these changes, the Procedural Officer will advise the decision-maker, who considers this advice before making a final decision.

5.10 We welcome the CMA's initiative to clarify the procedural steps involved in the confidentiality complaints process, including how (and by whom) such complaints are assessed and resolved. In practice, **it remains essential for the Procedural Officer to continue to uphold the principles of due process** at all stages of the complaints process.

5.11 **The CMA's guidance should make clear that the confidentiality complaints process is underpinned by fundamental principles of due process**. The CMA should also continue to consider broader changes to the role of the Procedural Officer and the process through which her decisions are reached.

6. Additional comments on the Phase 1 process

6.1 Although not included in the Consultation Document, a key part of the CMA's Phase 1 process is the Phase 1 Issues Letter which, in its current form and application, often runs counter to the CMA's stated ambitions for a more agile and efficient merger control regime. The CMA's ongoing consultation on the Phase 1 process should therefore also consider the Issues Letter process, which has some scope for improvement. In particular:

(a) **New issues being raised (in writing) for the first time**. One concern of the issues meeting process is that it can raise entirely novel concerns for the first time. Given the timing of the Issues Letter process, there can be limited

scope for constructive dialogue with the CMA at that point. In principle, this concern should be addressed by the update calls in pre-notification but the CMA should also be willing to raise any emerging concerns (including in writing and by reference to underlying evidence) with merging parties on an ongoing basis, rather than being limited to set piece events.

(b) **Unfocused and overly expansive**. A Phase 1 Issues Letter is, by its very nature, a preliminary articulation of the strongest case against the merger based on the evidence collected to that point during the CMA's investigation. It is therefore inherently a statement which may contain "hypothetical" concerns that have already largely been discounted by the CMA (and included on a largely precautionary basis). In addition, in some circumstances, the CMA's potential concerns are presented with limited disclosure of the underlying evidence or third-party submissions that have informed its views. This broad-brush approach, even at Phase 1, risks consuming significant resources from merging parties on issues that might ultimately be quickly dismissed.

6.2 A number of significant improvements could be made to the Draft Guidance and practice around the Issues Letter. Specifically:

(a) *Clearer Prioritisation*: The CMA should place particular onus on prioritisation (including the involvement of senior staff) at the internal state of play stage to ensure that only genuine concerns are considered through the Issues Letter process. The Draft Guidance should explicitly state that the Phase 1 Issues Letter will *only* outline the *primary, most plausible* theories of harm that, based on current evidence, are considered to have a "*realistic prospect of an SLC*". It should avoid speculative concerns or concerns that have already largely been discounted by the CMA.

(b) *Transparency on evidence basis*: the Draft Guidance should commit the CMA to providing a concise summary of the key evidence (e.g., anonymised third-party quotes, preliminary quantitative analysis) supporting each concern in the Issues Letter. This allows parties to understand the basis of the concern and address it directly. Where confidentiality concerns arise, the CMA should be willing to consider the more extensive use of confidentiality rings to allow the merging parties' advisers to have more access to underlying evidence.

(c) *Consideration of new evidence:* The CMA should ensure that it is able to properly consider and place due weight on any new evidence provided in the issues letter response. While the proposed reforms should, in principle, help concerns to be aired at an early stage, it is critical that the CMA is willing and able to assess "new" evidence (e.g., quantitative evidence) submitted in response to the issues letter to a fuller extent than is sometimes the case at present. This might involve (for example) the CMA being open to economist-to-economist discussions after the issues meeting, targeted third-party engagement, or further engagement with the merging parties. This should be made clear in the guidance (and the CMA should allocate resources accordingly).

7. Changes to the Merger Notice template

7.1 The CMA has indicated that its proposed refinements to the Merger Notice template are part of the CMA's programme to embed the "4Ps" framework into its merger investigations, and are intended to allow the CMA to conduct its pre-notification activities promptly and efficiently, and within 40 working days.

7.2 As we outline in further detail below, the practical effect of these changes will be to significantly and disproportionately increase the preparatory burden on the merging parties. The refinements will introduce expanded document and information requirements during pre-notification, as merging parties will be asked to produce a broader set of documents and information:

(a) **Bidding data and switching data:** while we consider that the removal of the requirement to provide bidding data upfront is a positive development, we are concerned that this could be counteracted by the proposed changes to Questions 14(a) and 14(b) of the Revised Merger Notice to include switching data, where previously switching data was a key topic of pre-notification discussion between the merging parties and the case team. While an upfront request for switching data might mean more information is available to the case team at the outset, we question whether this approach will promote the "4Ps" objectives, and practically whether this would have any effect other than imposing an additional preparatory burden on the merging parties to commence the 40 working day KPI "clock".

Where the type and extent of information available to the merging parties would have otherwise been discussed and considered by the case team, the changes to the merger notice would now, in theory, require the provision of switching data. While this approach would mean that the case team receives more information relating to opportunities at an earlier stage during pre-notification, this information may prove less useful to the case team than if the merging parties were able to discuss the scope of information available to the merging parties. This is particularly so as switching data is requested for each of the Relevant Markets (rather than only markets which are credibly at issue).

(b) **Broader scope of information requested by Questions 8 and 9:** the CMA's proposed changes to Question 8 and Question 9 of the Revised Merger Notice expand the type of information requested by the CMA, and the custodians from whom the information is requested. This is compounded by, as discussed above at paragraph 5.2(a), the fact that the Revised Merger Notice would require parties to provide Question 8 and Question 9 documents for markets in which the merging parties' combined share of supply (or either merger party's share of supply for non-horizontally relevant markets) equals or exceeds 10%, a reduction from the previous threshold of 15%.

The expanded document and information requirements further request information relating to the description and timeline for the agreement of the merger, and a description of the internal processes for approval of the merger. As the CMA notes, this information was historically requested by the

CMA at an early stage during pre-notification. Requiring the merging parties to supply this information as a matter of course early in pre-notification further increases preparatory burden on the merging parties.

(c) The CMA's proposed changes to the Revised Merger Notice also **expand the scope of the relevant 'senior management' custodians** to include individuals identified in response to Questions 8(a)(ii) and 9(a)(i), i.e., members of the deal team and individuals responsible for making strategic commercial decisions in relation to the Relevant Markets. In our view, the expanded scope of 'senior management' is contrary to the principles of pace, predictability, process and proportionality. Including deal team members as relevant custodians, without allowing the merging parties to consider whether these individuals are truly 'senior management' is unlikely to result in a material increase to information relevant to the CMA's assessment of the merger. We consider that the concept of 'senior management' is already sufficiently broad to capture relevant documents and information responsive to Questions 8 and 9, and we query whether a 'one-size-fits-all' approach to producing internal documents at an early stage during pre-notification is consistent with the aim of the "4Ps". To the extent that the CMA considers that additional information or documents are required from the merging parties, it is more likely that open discussions regarding the scope of any further information required from the merging parties during pre-notification are likely to be more in line with the "4Ps".

In our view, the approach that would be most in line with "4Ps" would be to align Question 8 and 9 of the Revised Merger Notice with the equivalent document request in Section 5(4) of the European Commission's Form CO template (i.e., from the board of directors, the board of management and/or the supervisory board, for all affected markets[5] only) – particularly as such documents are now required to be provided, as standard, with the first Draft Merger Notice in order to start the 40 working day KPI "clock". The materially broader scope of the CMA's request is to ensure that it gathers information which is relevant to an assessment of the real issues in an investigation, without significantly expanding the burden on the merging parties to conduct a thorough due diligence at an earlier stage in the investigation.

(d) **Expanded request for contact details:** the CMA's proposed amendments to Questions 25 to 27 of the Revised Merger Notice propose to significantly expand the scope of contact details requested by any first Draft Merger Notice. These changes remove the 30% thresholds for vertical and conglomerate markets, and require as a matter of course the production of customer and competitor contact details for Relevant Markets that overlap either vertically or are adjacent, and top 10 (rather than top 5) competitor details. In line with our comments on the expanded requirements of Questions 8 and 9 of the Revised Merger Notice, we question whether

[5] Section 6.3 of the Form CO defines affected markets as all relevant product and geographic markets, as well as plausible alternative relevant product and geographic markets, on the basis of which in the EEA territory in respect of which the concentration will lead to, *inter alia*, a combined market share of 20% or more.

requiring more information from the merging parties upfront will meet the objectives of the "4Ps", which are likely to be better achieved through open discussions with the merging parties during pre-notification.

Increased preparatory burden on the merging parties

7.3 As outlined above, rather than simplifying or expediting the case team's investigation, we are concerned that the proposed changes to the Merger Notice template request additional information at a much earlier stage during an investigation without considering the specific circumstances of the case, including what type of information and data is available to the merging parties, which could hinder the case team's assessment of the real issues in a merger investigation.

7.4 Unless the proposed changes to the Merger Notice template are accompanied by a material culture shift among CMA case teams, whereby case teams are prepared to critically assess the information that is crucial to their assessment of the merger, the proposed changes to the Merger Notice template are likely to place a heavier preparatory burden prior on the merging parties, for potentially limited gains to the CMA's understanding of the real issues in an investigation. This outcome would clearly be contrary to the CMA's intention to embed the "4Ps" into the CMA's merger process.

8. Conclusion

8.1 The intention behind the reforms is encouraging for businesses, and some of the CMA's proposals are likely to bring about positive change in the merger review process. However, in their current form, there is considerable potential for the changes to be significantly less impactful than intended, noting that ultimately, whether the proposed amendments successfully embed the "4Ps" into the CMA's merger process and deliver a truly improved experience for merging parties, depends to a large extent on their interpretation and implementation in practice.

Freshfields

15 August 2025