Competition and Markets Authority Consultation

'4Ps' changes to the CMA's mergers guidance (CMA2) and mergers notice template

Response of Herbert Smith Freehills Kramer LLP

INTRODUCTION

Herbert Smith Freehills Kramer LLP welcomes the opportunity to respond to the CMA's consultation of 20 June 2025 on changes to the CMA's merger guidance on jurisdiction and procedure (CMA2) and to the mergers notice template, in order to implement the new '4Ps' framework into the CMA's merger processes (**Draft Revised Guidance**).

The proposed changes can be grouped into the following three main categories: jurisdiction, process and global mergers, and we have structured our response in line with those three categories.

The comments set out below are those of Herbert Smith Freehills Kramer LLP and do not represent the views of any of our individual clients.

1. JURISDICTION

1.1 As confirmed in the Government's June 2025 Industrial Strategy, the Government intends to bring forward a consultation on legislative changes to the UK merger control regime, with particular focus on improving the clarity around the jurisdictional thresholds of material influence and share of supply.

1.2 Prior to and absent legislative changes, we note that the CMA is considerably restricted in its ability to introduce changes to its guidance on jurisdictional matters. The changes in the Draft Revised Guidance on jurisdictional points are therefore not extensive but rather of a clarificatory nature. They reflect the CMA's current practice and maintain its high degree of flexibility in determining whether jurisdictional thresholds are met.

1.3 We look forward to seeing the Government consultation in due course which we would hope will seek to introduce further predictability for merger parties.

Material influence

1.4 We welcome the CMA's confirmation of the "main factors" that it considers are likely to confer material influence on an acquirer. The Draft Revised Guidance will also be helpful for merger parties in clarifying that material influence is unlikely to be found where: (a) there is the ability to appoint a single board member but not a material shareholding or without the existence of one or more other key factors; and (b) an acquirer has a shareholding of less than 15%, unless there are "significant" other factors.

1.5 In the interests of introducing further clarity, we would invite the CMA at this stage to:

- Provide further guidance as to when it considers a 'dependency' on an acquirer will arise, which is a concept referred to a number of times in the Draft Revised Guidance (e.g. at paragraph 4.20(c)).
- Clarify what is meant by the ability of an acquirer to block special resolutions 'as a practical matter' (paragraph 4.20(a)).
- Expand the non-exhaustive list of circumstances where the ability to pass or block a special resolution would be likely to be seen as conferring material influence (paragraph 4.22).

Share of supply

1.6 We welcome the express addition in the Draft Revised Guidance that, for the purposes of determining the description of goods as part of the share of supply test, the CMA will consider "*those which are relevant to any potential competition concerns arising from the merger*", crystallising in guidance the position from the CAT's judgment in *Sabre Corporation v Competition and Markets Authority* [2021] CAT 11.

1.7 The Draft Revised Guidance also notes that the CMA will "*typically only focus on […] value, cost, price, quantity, capacity and number of workers employed*" for the purposes of determining whether the 25% share of supply threshold is met.

1.8 While these are somewhat helpful clarifications, the CMA's discretion in terms of jurisdiction is still very wide and merger parties' predictability remains limited. We would welcome further proposals aimed towards increased predictability in these areas as part of the Government's upcoming consultation.

2. PROCESS

We welcome the CMA's proposed changes around process and expect that they will go a considerable way to achieving the CMA's policy goals of pace, predictability, proportionality and process.

2.1 We support the CMA's commitment to complete prenotification in 40 working days (at paragraph 6.30). It is important, in practice, that the CMA meets that commitment and does not exceed it regularly, particularly in straightforward cases.

2.2 In order for the clock to start running the CMA requires a complete Merger Notice identifying all horizontal overlaps and vertical links, with supporting documents and third-party contacts (paragraph 6.27). In our view and as flagged below, the CMA should consider a wider review of the Merger Notice, removing all superfluous information, in line with its principles of pace and proportionality, which will reduce the burden on the parties also at this stage.

2.3 We welcome the CMA's commitment to conduct targeted, efficient and proportionate information gathering and focus its RFIs only on potential areas of concern (paragraph 6.30).

2.4 We welcome the CMA's proposal to publish data on the length of prenotification in its annual merger investigation outcome data (paragraph 6.31). It would be helpful if the CMA would also publish the key themes explaining why in one or more cases the 40-working day KPI was not met.

2.5 The proposal to increase the use of teach-ins and early engagement with the CMA at phase 1 (paragraphs 6.36 to 6.37) is a welcome development. In our experience, merger parties have found teach-ins useful in phase 2 cases. However, it is not entirely clear from paragraph 6.38 why it is proposed that a Senior Director (or staff at a similar level of seniority) will attend the meeting. If this is the case because the same individual will be the decision-maker if the case goes through the case review meeting process, this should be made clearer.

2.6 We welcome the CMA's commitment to engage early with third parties (paragraph 9.14). In our experience this reflects the CMA's recent practice.

2.7 We support the CMA's approach of inviting merger parties for calls during phase 1 in order to facilitate relevant submissions and assist the merger parties in preparing remedy proposals (paragraph 9.46). It is however important that such dialogue with the parties is very much a two-way process (i.e. that the CMA does not merely read from a script but rather is actively engaged in the discussion).

2.8 We welcome the introduction of a feedback session at the end of phase 1 or phase 2 focused on the process (paragraph 9.48). It is important that both the merger parties and the CMA reflect on the feedback given to ensure continual improvement to the merger control process.

We would recommend the following further changes:

2.9 For anticipated mergers the CMA will provide the merger parties with the option to notify the transaction, in which case it will typically expect the parties to commit to submitting a draft Merger Notice within 10 working days (footnote 150). Given the volume of information needed to complete a Merger Notice, allowing only 10 working days for submission is insufficient. We do not consider that there is a need for the CMA to request a draft Merger Notice on such a short timeline for anticipated transactions, where the CMA is not at risk of losing jurisdiction. We would recommend that the CMA does not prescribe a time period in its guidance but makes it clear that it will discuss with the parties what timeline is appropriate having regard to the specific case.

2.10 The process for formally notifying a transaction starts with the submission of a Case Team Allocation Form (CTAF). We would welcome additional clarity on the process following submission of a CTAF (paragraph 6.14). In particular, it would be useful:

(i) for the CMA to set a timeline for allocating a case team following the merger parties submitting a CTAF (e.g., within one week), and

(ii) for the CMA to set out its expectations on when merger parties should submit their first draft Merger Notice following allocation of a case team (e.g., within two weeks).

2.11 We are concerned that the Draft Revised Guidance will discourage early engagement from merger parties on remedies, as the proposed revisions indicate greater involvement from the decision-maker in remedies discussions (paragraphs 6.26 and 9.76). We would recommend revising the Draft Revised Guidance so that the CMA will follow the wishes of the merger parties, unless there are exceptional reasons to involve the decision maker against the parties' wishes.

2.12 We would welcome the CMA setting a KPI for the issuing of its first RFI following submission of the Merger Notice (e.g., one week), at paragraph 6.28.

2.13 The Draft Revised Guidance does not propose any changes to the issues meeting process set out in paragraphs 9.58 – 9.65 which is unfortunate. In our experience the timetable for this process is notoriously difficult and the two working-day period to make representations to the issues letter at the issues meeting, followed by a further one-to-two-day period in which to make written submissions, is not proportionate and does not allow sufficient time to make informed representations. The CMA considers that the description of the competition concerns provided at the state of play discussions means that the merger parties already understand the theories of harm at an earlier stage and can prepare their representations on those points before they receive the issues letter. However, in our experience the state of play call, while helpful, often only provides merger parties with a partial understanding of the CMA's views on a merger, and it is not until the issues letter that all the CMA's views are sufficiently understood. In addition, the level of detail which the CMA provides on state of play calls varies from case to case. The CMA should therefore consider extending the period for responding to the issues letter, or to the extent that new issues arise after the state of play, share any new areas of concern with the parties as early as possible. We would recommend a minimum of five working days between receiving an issues letter and the merger parties attending an issues meeting. Shortening certain time periods in the CMA's phase 1 process may facilitate extending this time period.

2.14 In the event of disagreement around what qualifies as confidential information and should be excised from the public version of the CMA's report, paragraph 17.2 of the current guidance empowers the Procedural Officer (PO) to make a decision in phase 1, which is helpful as they are not involved in the day-to-day running of the case. It is unclear why the CMA has changed this in the Draft Revised Guidance so that the PO only advises the phase 1 decision-maker. This risks making the PO process less robust and independent than it is currently. We would recommend that this change is reversed.

2.15 On the draft revised Merger Notice template, we suggest that the CMA consider a review of the Merger Notice template in the round and, in line with the principles of pace and proportionality, consider reducing the amount of information required from the merger parties. The current process for the provision of a draft Merger Notice is a significant exercise and we believe that the merger notification process would be further streamlined if the CMA were to pare back the volume of

information required, in appropriate cases, such as a reduction in information requested regarding ancillary markets where it is clear from the outset that there are no conceivable competition issues.

3. INTERNATIONAL MERGERS

3.1 As foreshadowed in Sarah Cardell's announcement on 13 February 2025, launching the CMA's new 4P's framework, the CMA is committed to taking a more proportionate approach to its assessment of global mergers and prioritise transactions with a material nexus with the UK that impact UK consumers and businesses.

3.2 We welcome the proposed changes to the current guidance which reflect this approach. The Draft Revised Guidance distinguishes between mergers that have a UK-specific impact and tend to involve local or national markets, which the CMA is more likely to prioritise for investigation. It is less likely to prioritise mergers relating to exclusively global or broader than national markets and where the remedies agreed or imposed in other jurisdictions would be likely to address any competition concerns that could arise in the UK.

3.3 The CMA's 'wait-and-see' approach for the latter category does however raise questions as to how the CMA will approach global mergers in cases where remedies in other jurisdictions do not address its concerns for the UK. This can raise uncertainty for businesses who run the risk that the CMA could start a formal investigation at a later stage, up to the expiry of the four-month statutory period and potentially cause the deal to collapse. There is also an additional risk that certain third parties could try to use this to their advantage and exploit this uncertainty for the merger parties by making complaints to the CMA and encourage it to launch an investigation.

3.4 The aim of the proposed changes in the CMA's approach to global mergers is to reduce the burden of duplicate investigations and increase business confidence to invest in the UK. In order to achieve these outcomes, the CMA will need to consider how it can reduce this risk of uncertainty and expand its guidance setting out how it intends to address these concerns in practice.

We would be happy to discuss our comments with the CMA if this would be helpful.

Herbert Smith Freehills Kramer LLP

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