

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

1 Introduction and executive summary

- (1) Linklaters welcomes the opportunity to respond to the CMA's consultation on its draft revised guidance on the CMA's jurisdiction and procedure ("**Draft Revised Guidance**") and proposed changes to the current Merger Notice template ("**Draft Revised Merger Notice template**"). We recognise the CMA's continuing efforts to refine and improve its merger review processes to ensure the UK maintains a robust, transparent and proportionate merger control regime. In particular, we welcome the focus on more transparent timetables and codification of the CMA's revised approach to multi-jurisdictional mergers.
- (2) We recognise that this is not a consultation on legislative reform, but on how the CMA can enhance pace, predictability, proportionality and process *within the existing legislative framework*. The existing legislative framework – especially following its enhancement in the Digital Markets, Competition and Consumers Act 2024 – offers the CMA incredibly broad jurisdictional reach, arguably the broadest in the world. This follows CMA decisions in recent years taking an expansive approach to this discretion, upheld in some cases by the courts.
- (3) This creates an environment in which, for any merger with even a very slim UK nexus, it is very difficult to conclusively "rule out" CMA jurisdiction. This leads to a high stakes and binary situation when deciding whether to approach the CMA in scenarios where jurisdiction is not clear cut. We have experienced the uncertainty over timing, especially in the context of the risk of an interim enforcement order, leading to our clients walking away from potentially pro-competitive, efficiency and innovation-enhancing deals.
- (4) While the CMA should not seek to artificially curtail the discretion afforded to it by Parliament, in the context of such broad discretion, guidance such as the Draft Revised Guidance takes on paramount importance. Given the CMA has indicated it intends to shift its approach and provide greater predictability, in the context of its recent decisional practice, this requires the guidance to contain not only a summary of past practice, but clear statements of intent about how discretion will be exercised going forwards. Many of our comments in response to this consultation request the CMA to refine such statements so that they can be relied upon by businesses. We believe such further clarification will ensure the Draft Revised Guidance and Draft Revised Merger Notice template more fully delivers on the CMA's objectives. This is especially important at a time when regulatory stability, predictability and clear process are key to fostering continued investment and innovation in UK markets.
- (5) Our response provides feedback on a section-by-section basis (reflecting the order of the changes as described in the CMA's consultation document).

2 Updates relating to the application of the CMA's jurisdiction tests

2.1 The "material influence" test

- (6) The proposed changes to the CMA's approach to assessing material influence represent a positive step towards improved clarity; however, further detail would be highly beneficial for businesses and advisers. Under the voluntary UK merger control regime, merger parties must self-assess whether to proactively engage with the CMA, but the absence of explicit "bright line" thresholds for different levels of control (particularly material influence) has generated significant uncertainty about the scope of the CMA's jurisdiction.

- (1) The Draft Revised Guidance helpfully clarifies that shareholdings of <25% are “unlikely” on their own to confer material influence and that shareholdings of <15% will only give rise to material influence where there are “significant other factors”. While this represents an improvement on the current wording, we think it would give significantly more comfort to businesses if the revised guidance were reframed in the negative, so that rather than indicating shareholdings below 15% “might attract scrutiny”, the guidance indicates explicitly – and in our view consistently with CMA decisional practice – that it is “very unlikely” they will attract scrutiny absent exceptional factors.
- (2) Further clarification about shareholdings significantly below 15% would also be welcome, given that the CMA has, on occasion, investigated shareholdings well below these thresholds, including those of less than 1%¹ and that, in its remedy practice, the CMA has at times required divestment down to a level of 5% to resolve competition concerns. Such clarification could take the form of a “safe harbour” for certain investment structures (for instance, shareholdings / voting rights lower than 5%) where competition concerns are very unlikely to arise in practice.
- (3) In addition, greater clarity from the CMA would be particularly valuable regarding the types of “significant other factors” that may support a finding of material influence at shareholding levels below 15%. The current Draft Revised Guidance merely refers back to the general factors that can give rise to material influence and cites *Microsoft / OpenAI*.² This provides little practical guidance or comfort for businesses looking to self-assess jurisdiction and the challenge is exacerbated by the paucity of decisional practice in relation to such shareholdings. We suggest that the CMA provide more clarity on whether any individual factor listed in 4.31-4.33 would be sufficient, regardless of the level of shareholding (i.e., as a “free-standing” basis for material influence), or whether and how these will be weighed with other factors such as the size of the shareholding. It would also be helpful for the CMA to indicate whether these, or other, exceptional factors are more likely to arise in specific sectors or if there are sector-specific patterns influencing the likelihood of material influence being established.

2.2 The “share of supply” test

- (4) The Draft Revised Guidance helpfully consolidates past case law and CMA practice with respect to the application of the share of supply test and confirms that the CMA will “typically” only focus on statutory criteria when determining whether the 25% threshold is met (for example, value, cost, price, quantity, capacity and number of workers employed).
- (5) We welcome the removal of whether the merger parties may have a material presence in the UK market by virtue of pipeline products or services (at paragraph 4.63(c) in the current CMA2 guidance) as a relevant consideration: the current guidance in our view expansively

¹ For instance, in the CMA’s recent review of Microsoft’s partnership with Mistral, the CMA examined whether Microsoft’s debt investment, which (if converted at a later date) could theoretically only have resulted in a potential shareholding in Mistral of less than 1%, together with other relevant factors, might give rise to material influence, although it ultimately determined that no jurisdiction arose in that case.

² The Draft Revised Guidance cites the CMA’s recent decision in Microsoft’s partnership with OpenAI – however, this decision related to whether Microsoft had increased its level of control from material influence to *de facto* control. Paragraph 46 of the decision, which describes a submission made by OpenAI and appears to set out their view on whether Microsoft had material influence over OpenAI, is almost entirely redacted for confidentiality. Subsequent considerations by the CMA on whether Microsoft increased its control to *de facto* control primarily look at factors specific to AI foundation models, being the supply of compute infrastructure and IP and commercialisation rights.

applies the share of supply test in a manner which extends beyond the statutory threshold under section 23 of EA02.³

- (6) The CMA states that, when considering which goods or services are relevant for applying the share of supply test, it will “*consider those which are relevant to any potential competition concerns arising out of the merger*”. We note that there are a number of cases (e.g., *Vanilla Group / Washstation*; *Facebook / GIPHY*) where the CMA has assumed jurisdiction on the basis of a much narrower lens than that ultimately used in its competitive assessment. Explicit confirmation the CMA will not follow this approach in future, or at least will only do so in limited circumstances, would be welcome.
- (7) In addition, the Draft Revised Guidance is, in our view, a missed opportunity to provide further guidance on what increment in share of supply the CMA would consider sufficiently material to justify asserting jurisdiction. The current guidance, consistent with the statutory framework, merely states that *any* increment is sufficient and the CMA’s previous decisional practice has seen it assert jurisdiction where the increment from the transaction is marginal (or theoretical) but the overall share crosses the 25% threshold, as was the case in *Sabre / Farelogix*, where the CMA found a relevant “increment” existed despite the target having no UK turnover. Additional comfort for businesses that the CMA will include some measure of materiality in the context of assessing an increment to a share of supply would be welcome and consistent with the principles of the 4Ps framework.
- (8) In addition, the Draft Revised Guidance does not materially update the guidance on the hybrid thresholds, as introduced by the Digital Markets, Competition and Consumers Act. Again, we consider this a missed opportunity to provide a level of predictability to businesses which meet the turnover condition, for whom every single deal with a UK nexus is potentially within scope. It would be helpful for the CMA to clarify how it intends to apply the principle of proportionality in its review of transactions that only satisfy the hybrid threshold, especially in cases involving targets with limited UK activity.
- (9) In particular, it would be beneficial for the Draft Revised Guidance to include further detail on how the CMA will apply these thresholds to align with its 4Ps framework, including by taking a targeted approach to prioritise review of mergers with a UK-specific impact. For instance:
 - the CMA would use this test only if the acquisition of the target would have a specific and distinct impact on UK-based customers;
 - a clear and objective materiality threshold would be applied to the UK nexus limb, such as by requiring that the target has generated at least some turnover in the UK in the previous financial year (rather than, for example, maintaining a UK-based subsidiary only); and/or
 - considerations highlighted above around determining an increment to the 25% share of supply test should equally apply to inform the CMA’s application of the 33% share of supply test under the hybrid threshold.

3 Changes relating to the CMA’s approach to global mergers

- (10) We welcome the Draft Revised Guidance’s clear commitment to a more proportionate approach to global mergers and in particular the confirmation the CMA will focus on mergers

³ See Section 23(3) EA02, which refers to good which “are supplied” in the United Kingdom, or in a substantial part of the United Kingdom.

with a “UK-specific impact”. Prioritising mergers with distinct UK impact enables more proportionate and targeted regulatory action, rather than duplicating scrutiny of global transactions already reviewed by other authorities.

- (11) While welcome, we recognise there are practical challenges with this approach both for the CMA and merger parties. A situation where the CMA does not commence a review initially but chooses to open one many months later, having concluded it is dissatisfied with action taken elsewhere, would be the worst of all worlds for merger parties. Indeed, many parties may prefer to proactively submit themselves to the CMA by voluntarily submitting a Merger Notice.
- (12) While taking advantage of the CMA’s “wait and see” approach necessarily entails some uncertainty and therefore risk for merger parties, this could be mitigated by further clarity as to the CMA’s envisaged approach and the factors that it will consider in relation to global mergers, as well as for more transparency about the status during the “waiting period”. This would help merger parties anticipate when the CMA may seek to intervene or ask further questions during parallel global review processes, and in turn to make an informed decision about whether to submit a voluntary Merger Notice.
- (13) Ensuring a reasonable degree of predictability in the face of this inherent uncertainty will demand a more open and transparent approach by the CMA than has been standard in interactions with the Mergers Intelligence Committee (“MIC”) historically. First, to the extent that the CMA is able to offer insight into the criteria that it may factor into its analysis (e.g., any *de minimis* thresholds), this would support greater predictability for merger parties coordinating international filings before even engaging with MIC.
- (14) Second, MIC should make clear to parties where its “no further questions” response on a Briefing Paper is its (albeit informal and unbinding) “concluded” view, or whether MIC has “no further questions pending reviews in other jurisdictions”. This will enable parties to make an informed decision about whether to voluntarily submit a Merger Notice.
- (15) Third, in situations where parties have proactively engaged with the CMA and provided the information and waivers requested, they should be able to expect the duration of any waiting period to be clear and communicated by the case team. In addition, this would ideally involve the CMA setting out its thinking early in the process on the circumstances in which they would “call in” a given transaction, and providing regular updates during any period of deliberation. CMA officials have made recent public comments to the effect that where parties proactively keep the CMA informed and engage in early discussions about UK-specific competition issues, there should be a reasonable expectation that the CMA will not launch a late-stage investigation except in truly exceptional circumstances. Confirming this position in the revised guidance, ideally with examples of what such exceptional circumstances could be, would give significant comfort to businesses.
- (16) Finally, it would also be helpful for the Draft Revised Guidance to clarify the type and extent of engagement the CMA may require with respect to merger reviews by overseas regulators and what parties will be expected to do (in addition to granting waivers) to support this.

4 Changes relating to process

4.1 KPIs for pre-notification and issuing clearance decisions

- (17) We support the CMA’s commitment to speed up its review processes, including through implementing KPIs for pre-notification (40 working days) and faster decisions in

straightforward cases (25 working days). These measures have the potential to support merger parties to plan transaction timetables with increased confidence. We also welcome the option for merger parties to opt out of the pre-notification KPI where appropriate, for instance to align UK and international merger review timelines or provide merger parties with additional time to make submissions on more complex issues.

- (18) However, we are concerned that the Draft Revised Guidance not only raises the threshold for commencing pre-notification compared to current practice, but also sets it at an unnecessarily high level. Under the Draft Revised Guidance, pre-notification begins only when the merger parties provide all of the information specified as necessary for the CMA's initial assessment. This means that the CMA expects the initial Draft Merger Notice ("**DMN**") to include at a minimum:
- information relating to how bidding works and what bidding data the merger parties (noting that this is a new requirement which was not previously included in the current Merger Notice template);
 - an initial response to each applicable question in the Merger Notice template;
 - all supporting documents requested in the Merger Notice template as annexes to the initial draft;
 - all relevant third-party contact details requested in the Merger Notice template; and
 - typically, consent for the CMA to publish a case webpage announcing that it is starting pre-notification, and to contact relevant third parties.
- (19) These proposed requirements for initiating pre-notification are, in our view, unduly rigid. Rather than accelerating the review process, this approach risks introducing an informal "pre-pre-notification" stage with no clear parameters, increasing complexity and potentially lengthening timelines. This concern is heightened by the proposed expansion in the Draft Revised Merger Notice template, which would significantly increase the burden on merger parties seeking to satisfy the pre-notification criteria.
- (20) Based on our experience, merger parties acting in good faith and full cooperation often submit a DMN that may contain some placeholders for less critical information or data that requires additional resources or time to obtain. For example, internal documents or third-party contact details are frequently submitted after the initial DMN. During this period, it is common and efficient for the case team to begin reviewing the merger parties' submission and begin familiarising themselves with the relevant market(s). Pre-notification has always been an iterative process, but the guidance proposed appears to suggest formal pre-notification will now not start until the CMA has what is in essence, a complete Merger Notice and supporting materials.
- (21) In our view, pre-notification should commence as soon as the case team is able to begin meaningful investigation of the merger – for example, when they have sufficient information to understand the transaction, relevant industry dynamics, linkages between the parties' activities, and potential areas where competition concerns may arise. If the CMA is unable to progress the investigation due to material information gaps (e.g., if during pre-notification, the merger parties fail to respond to information or document requests within reasonable timeframes), we suggest that the CMA should then have the discretion to determine that its 40-working day KPI will not apply for that investigation.

4.2 Review timeframe for briefing papers

- (22) We welcome recent CMA engagement with businesses, which has suggested that the CMA plans to work towards a two-week turnaround for reviewing briefing papers under the “4Ps” framework. Embedding this as a formal internal target in the CMA’s guidance (whether into this document or guidance on the MIC) would provide helpful certainty and predictability for merger parties at the early stages of review. Such a commitment would complement the existing KPIs for pre-notification and initial decisions, further supporting parties as they seek to coordinate transaction timetables and respond to UK merger control in a timely and efficient manner.

4.3 Engagement with merger parties

4.3.1 Early involvement of the decision-maker

- (23) Linklaters’ recent experience has been variable in the degree of upfront engagement by case teams, with limited decision-maker involvement sometimes resulting in reluctance to narrow the focus of investigations or clarify key areas of concern early in pre-notification (or in some cases, during pre-notification at all). To address this, we recommend that the decision-maker be involved from as early as is practicable and at the latest when the formal pre-notification clock begins. Our experience where there has been early and active participation (for example, in teach-in sessions and pre-notification update calls) at a sufficiently senior level has been vastly more positive, as it enables the case team to set aside non-material issues, reducing the administrative burden for merger parties (for instance, on internal document submission) and allowing merger parties to focus their submissions on key concerns and, where appropriate, potential remedies.
- (24) Earlier decision-maker involvement, particularly at key meetings and milestones before and after formal notification, is particularly important in the context of balancing the need for pace and proportionality. Given the cautious Phase 1 legal standard for reference, failure to quickly triage issues can lead to a more significant list of potential SLCs in Issues Letters and ultimately more SLC findings at Phase 1, which in turn makes reaching a Phase 1 outcome – whether through unconditional clearance or with remedies – significantly more challenging. This challenge becomes only more acute with the CMA’s (welcome) commitment to speeding up its reviews, making early and active engagement at a senior level even more critical.

4.3.2 Update calls during pre-notification

- (25) The Draft Revised Guidance recognises the value of proactive engagement between the CMA case team and merger parties during pre-notification. By codifying its practice of inviting merger parties to provide a teach-in session, the CMA places additional emphasis on early, open communication. In line with our comments above, for these meetings to be effective, we recommend that the CMA schedules them to allow for the participation of the assigned decision-maker and other senior staff involved in the process.
- (26) For enhanced engagement to deliver on its potential, the teach-in should not be a one-off but the start of a constructive dialogue. We, therefore, welcome the codification of the practice of regular update calls, including one before the formal investigation begins. These update calls should be more than scripted, one-way briefings from the CMA. They should provide a forum for two-way exchange, allowing the CMA to share its views and the substance of any complaints and parties to respond. For example, where the case team’s preliminary view (or evidence the CMA is receiving, even if no view has yet formed) contrasts

with the parties' submissions, such as over product differentiation or horizontal effects, these points should be discussed openly with merger parties as early as possible, as is common in other jurisdictions. This enables parties to engage more directly with relevant concerns and, if necessary, prepare for remedies discussions.

4.3.3 Reporting on pre-notification timelines

- (27) We welcome the CMA's proposal to publish data on pre-notification timelines in its annual merger investigation outcomes. To further support predictability, it would be helpful for the CMA to also publish key themes explaining when and why the 40-working day KPI was not met.

5 Changes to the Merger Notice template

- (28) The Draft Revised Merger Notice template represents a significant expansion that effectively frontloads the information and document collection process, creating a considerable potential burden for the parties. While some of the additional and expanded questions in the Draft Revised Merger Notice template reflect the CMA's current practice when requesting information as part of pre-notification (for example, regarding how the merger was agreed and approved, details on internal decision-making), other additions are likely to be disproportionate in many cases.
- (29) First, in many cases it may be disproportionately burdensome and inefficient for merger parties to provide internal documents for all material overlaps, especially for large, complex organisations. The burden of providing a complete set of documents is significant and expands with the scope of the demand. The proposed expansion of the requirements will be disproportionate in many cases, for example where early engagement enables the CMA to satisfy itself that a specific overlap would not raise material concerns. We also consider the revised 10% threshold is unnecessarily conservative and recommend retaining the current 15% threshold in the template.
- (30) Second, the expanded scope for third-party contact details risks increasing the administrative burden on merger parties while generating limited additional benefits. We consider that requesting five competitor contact details should serve as the standard approach, providing the CMA with a representative overview of the competitive landscape, while allowing the CMA to request additional contacts should further information be required. Relatedly, the proposal to request details for all "relevant markets" does not account for situations where material concerns are highly unlikely to arise (for example, where the parties have vertical links but no common customers or their individual shares of supply do not exceed 30%). Accordingly, we similarly propose that the current approach to third-party contact details in the merger notice template be maintained, to ensure the CMA may efficiently reach merger review decisions.
- (31) In summary, we consider it appropriate for the CMA to assess, on a case-by-case basis, what information and documents are actually necessary, rather than imposing a more rigid approach through the DMN, especially given the emphasis on providing responses to all questions in the DMN under the proposed new approach to pre-notification.

6 Conclusion

- (32) We welcome the Draft Revised Guidance and believe the further refinements in this submission would benefit all stakeholders and increase business confidence. We look forward to working further with the CMA as its merger control regime evolves.